

PUBLIC

JUL 18 1997

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Ref. No. 97-355-CC
American International
Group, Inc.
File No. 132-3

By letter dated July 18, 1997, you seek assurance that the staff will not recommend enforcement action to the Commission under Section 9(a)(2) or (3) of the Investment Company Act of 1940 (the "Investment Company Act") if any affiliated person of AIG Trading Corporation ("Trading") provides investment advisory or distribution services to registered investment companies after the entry of a stipulation and order by the United States District Court for the Southern District of New York, as more fully described in your letter.

Facts

You state that American International Group, Inc. ("AIG") is among the nation's largest underwriters of commercial and industrial insurance coverages. AIG Trading Group Inc. ("Trading Group") is 80% owned by AIG, and 20% owned by certain employees of Trading Group. Trading is a wholly owned subsidiary of Trading Group. Trading is not registered (or required to be registered) in any capacity with the Commission or the Commodity Futures Trading Commission (the "CFTC"). The AIG group of companies also includes registered investment advisers and a registered broker-dealer that serves as an investment company distributor.¹

On July 18, 1997, the U.S. Department of Justice (the "DOJ") filed with the United States District Court for the Southern District of New York a stipulation and proposed order (collectively, the "Order") that would settle a civil antitrust action brought by the DOJ against a number of companies, including Trading.² You state that the Order concludes the

¹ AIG Capital Management Corp. is an indirect wholly owned subsidiary of AIG that serves as an investment adviser to registered investment companies. AIG Global Investment Corp. is an indirect wholly owned subsidiary of AIG that serves as subadviser to registered investment companies. AIG International Asset Management Inc. is an indirect subsidiary of AIG and is a registered investment adviser. AIG Equity Sales Corp. is a wholly owned subsidiary of AIG that serves as distributor, placement agent, and principal underwriter of registered investment companies and separate accounts. These four entities and Trading are all under the control of AIG, and thus are "affiliated persons" within the meaning of Section 2(a)(3)(C) of the Investment Company Act.

² Trading is the only AIG affiliate that is a party to the Order. A copy of the Order is attached to your letter. The Order requires the defendants to: (i) comply with Section 1 of the Sherman Act; (ii) maintain antitrust compliance programs; (iii) file annual statements with the DOJ for five years concerning the manner of their compliance with law; and (iv) permit the DOJ periodic access to their personnel and records regarding compliance with the

(continued...)

DOJ's investigation of allegations that between July 1992 and May 1993, employees of Trading and its U.K. subsidiary, AIG Trading Ltd., violated the U.S. antitrust laws by entering into an agreement with other trading firms to reduce the price of commissions paid to brokers for transactions in specified Brent (North Sea) oil spread contracts³ and contracts for differences relating to Brent oil prices ("CFDs").⁴ The proposed Order provides that the parties have "agreed to the entry of this stipulation and order without trial or adjudication of any issue of fact or law herein and without this stipulation and order constituting any evidence against or an admission by any party with respect to any such issue."

You represent that in its complaint, the DOJ did not allege that any employee of AIG or any AIG affiliate providing services to registered investment companies was involved in the activities under investigation. You further represent that no such employee or AIG affiliate was involved in those alleged activities.

Analysis

Section 9(a)(2) of the Investment Company Act bars entities subject to certain court injunctions from serving in certain specified capacities with respect to registered investment companies, including serving as an investment adviser of any registered investment company

²(...continued)
Order.

You state that under 15 U.S.C. § 16 (Supp. 1996), which specifies the procedure for the entry of consent judgments in actions brought by the DOJ under the U.S. antitrust laws, the district court may not enter the proposed Order until at least 60 days following its publication in the Federal Register. During this 60-day waiting period, the court may consider comments submitted by the public and any responses by the DOJ. Before entering the Order, the court must determine that entry of the Order is in the "public interest," as defined in 15 U.S.C. § 16(e).

³ You state that cargoes of Brent crude oil are bought and sold in the Brent market in privately negotiated transactions. Brent spread contracts involve transactions in which there is a simultaneous purchase of a Brent contract for a given month forward, and sale of a Brent contract for a different month forward. You represent that these transactions are not effected on an exchange and occur principally outside of the United States.

⁴ A "CFD" is defined in the Order as a commercial transaction involving the purchase of an instrument the price of which is determined by the difference between: (i) the published price of a cargo of Brent blend crude oil already loaded or available to be loaded on a specified day; and (ii) the published price of a cargo of Brent blend crude oil available to be loaded on an unspecified day of the first month forward. You represent that these transactions are not effected on an exchange and occur principally outside of the United States.

or as principal underwriter for certain registered investment companies.⁵ Section 9(a)(3), in relevant part, provides that a company is prohibited from acting in any of the capacities specified in Section 9(a) if an affiliated person of the company is covered by Section 9(a)(2).⁶

You maintain that Section 9(a)(2) does not apply to the Order, and that, therefore, Section 9(a)(3) does not apply to any of Trading's affiliates that provide investment advisory

⁵ Section 9(a)(2) of the Investment Company Act provides that:

(a) It shall be unlawful for any of the following persons to serve or act in the capacity of employee, officer, director, member of an advisory board, investment adviser, or depositor of any registered investment company, or principal underwriter for any registered open-end company, registered unit investment trust, or registered face amount certificate company.

.....

(2) any person who, by reason of any misconduct, is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an underwriter, broker, dealer, investment adviser, municipal securities dealer, government securities broker, government securities dealer, transfer agent, or entity or person required to be registered under the Commodity Exchange Act, or as an affiliated person, salesman, or employee of any investment company, bank, insurance company, or entity or person required to be registered under the Commodity Exchange Act, or from engaging in or continuing any conduct or practice in connection with any such activity or in connection with the purchase or sale of any security.

⁶ Section 9(a)(3) of the Investment Company Act provides that:

(a) It shall be unlawful for any of the following persons to serve or act in the capacity of employee, officer, director, member of an advisory board, investment adviser, or depositor of any registered investment company, or principal underwriter for any registered open-end company, registered unit investment trust, or registered face amount certificate company.

.....

(3) a company any affiliated person of which is ineligible, by reason of paragraph (1) or (2), to serve or act in the foregoing capacities.

or distribution services to registered investment companies.⁷ You argue that the text and legislative history of Section 9(a)(2) support the view that the provision applies only to conduct relating to the purchase or sale of securities and financial fraud subject to the securities or commodities laws, as opposed to alleged misconduct under the antitrust laws.⁸

You assert that the applicability of Section 9(a)(2) depends on whether the Order enjoins Trading: (i) from "acting as" any of the first group of entities specified in Section 9(a)(2) (the "First Group"); (ii) from "acting as" an affiliated person, salesman, or employee of any of the second group of entities specified in Section 9(a)(2) (the "Second Group"); (iii) from engaging in or continuing any conduct "in connection with any such activity"; or (iv) from engaging in or continuing any conduct in connection with the purchase or sale of a "security."

You maintain that the Order does not enjoin Trading from engaging in conduct in any of the four possible circumstances specified in Section 9(a)(2). You state that the Order does not enjoin Trading from "acting as" any entity in the First Group, or as an affiliated person, salesman, or employee of any entity in the Second Group. You also maintain that the Order does not enjoin Trading from engaging in conduct "in connection with any such activity." You assert that, by its terms, the phrase "in connection with" requires a linkage between the conduct affected by the Order and the activities of an entity in the First Group or an affiliated person, salesman, or employee of an entity in the Second Group. Although Trading is an affiliated person of an entity in the Second Group (i.e., an insurance company), you state that the necessary linkage required between the Order and Trading's activities as such an affiliated person is not present. The Order does not apply to all of Trading's activities, but only to activities in connection with transactions in Brent spread contracts and related CFDs. In addition, the Order expressly permits Trading to engage in any lawful activity relating to Brent oil spread contracts and related CFDs.⁹ You further note that entities in the First Group or affiliated persons, salesmen, or employees of entities

⁷ You assume, for purposes of your request, but do not concede, that the Order operates to "enjoin" Trading, as that term is used in Section 9(a)(2), from engaging in certain activities.

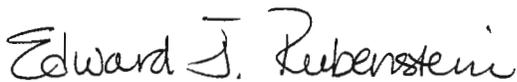
⁸ You state that Section 9(a)(2) was intended to disqualify persons "enjoined by a court in connection with a security or financial fraud." H.R. Rep. No. 2639, 76th Cong., 3d Sess. at 14 (1940); S. Rep. 1775, 76th Cong., 3d Sess. at 14 (1940).

⁹ Specifically, the Order permits Trading to: (i) negotiate with other counterparties the terms of such contracts; (ii) negotiate commissions with brokers; (iii) pay brokerage commissions required or authorized by any U.S. government agency or self-regulatory organization; and (iv) pay brokerage commissions to foreign brokers and, unless the DOJ objects after notice, to U.S. brokers required or authorized by any foreign government agency or self-regulatory organization.

in the Second Group do not customarily purchase and sell 15-day Brent oil spread contracts or related CFDs.¹⁰

Finally, you maintain that the Order does not enjoin Trading from engaging in conduct in connection with the purchase or sale of any security. It is your opinion that the Brent oil spread contracts and related CFDs covered by the Order are not "securities" under the federal securities laws.

Based on the facts and representations in your letter and the proposed Order, and on your opinion that the Brent oil spread contracts and related CFDs covered by the Order are not "securities" under the federal securities laws, we would not recommend that the Commission commence enforcement action under Section 9(a)(2) or (3) of the Investment Company Act if any affiliated person of Trading provides investment advisory or distribution services to registered investment companies after the entry of the Order.¹¹ Because this response is based on the facts and representations in your letter and the proposed Order, and on your opinion, you should note that different facts or representations may require a different conclusion.¹²



Edward J. Rubenstein
Senior Counsel

KM

¹⁰ You represent that Trading is not required to be registered under the Commodity Exchange Act ("CEA") in order to engage outside the United States in the trading of 15-day Brent oil spread contracts or related CFDs, because such transactions are excluded from the jurisdiction of the CEA.

¹¹ We assume for purposes of this response, but express no conclusion, that the Brent oil spread contracts and related CFDs are not securities.

¹² You also assert that the Order is not issued "by reason of any misconduct." Because we conclude, for the reasons discussed above, that Sections 9(a)(2) and (3) are inapplicable to the Order, it is not necessary to reach this issue.

SULLIVAN & CROMWELL

1940 Act/9(a)

NEW YORK TELEPHONE: (212) 558-4000
TELEX: 62694 (INTERNATIONAL) 127816 (DOMESTIC)
CABLE ADDRESS: LADYCOURT, NEW YORK
FACSIMILE: (212) 558-3588 (125 BROAD STREET)
(212) 558-3792 (250 PARK AVENUE)

125 Broad Street, New York 10004-2498

250 PARK AVENUE, NEW YORK 10177-0021
1701 PENNSYLVANIA AVE., N.W., WASHINGTON, D.C. 20006-5805
444 SOUTH FLOWER STREET, LOS ANGELES 90071-2901
8, PLACE VENDÔME 75001 PARIS
ST. OLAVE'S HOUSE, 91 IRONMONGER LANE, LONDON EC2V 8EY
101 COLLINS STREET, MELBOURNE 3000
2-1, MARUNOUCHI 1-CHOME, CHIYODA-KU, TOKYO 100
NINE QUEEN'S ROAD, CENTRAL, HONG KONG

ACT 101
SECTION 9(a)
RULE _____
PUBLIC 7-18-97
AVAILABILITY _____

July 18, 1997

By Hand

Douglas J. Scheidt, Esq.,
Associate Director and Chief Counsel,
Division of Investment Management,
Securities and Exchange Commission,
450 Fifth Street, N.W.,
Washington, D.C. 20549.

Re: American International Group, Inc.

Dear Mr. Scheidt:

We write on behalf of American International Group, Inc. ("AIG") regarding the inapplicability of Sections 9(a)(2) and (3) of the Investment Company Act of 1940, as amended (the "1940 Act"), to a stipulation and order (the "Order"), filed today with the United States District Court for the Southern District of New York, settling a civil antitrust action brought by the U.S. Department of Justice (the "DOJ") against a number of companies, including AIG's indirect subsidiary, AIG Trading Corporation ("Trading"). We have concluded that the Order should not be a disqualifying event under Sections 9(a)(2) or (3) for any affiliated person of Trading that now or in the future provides investment advisory or distribution services to registered investment companies. Nevertheless, in view of the serious consequences that could result if Sections 9(a)(2) or (3) were deemed to apply, we seek the SEC staff's concurrence in our conclusion.

Specifically, we request the SEC staff's interpretative advice that, based on the facts outlined below, the Order is not a disqualifying event under Sections 9(a)(2) or (3) for affiliated persons of Trading that now or in the future provide investment advisory or distribution services to registered investment companies. In the alternative, we respectfully request that the SEC staff take

the position that it would not recommend that the SEC take any enforcement action if any affiliated person of Trading, now or in the future, provides investment advisory or distribution services to registered investment companies after the Order becomes effective without obtaining exemptive relief under Section 9(c) of the 1940 Act.

Summary

With the filing of the Order, the DOJ has concluded an investigation of allegations that Trading violated the federal antitrust laws in connection with brokerage commissions for certain transactions in Brent (North Sea) oil spread contracts and contracts for differences relating to Brent oil prices. These allegations concern activities related to the trading of Brent oil principally in the United Kingdom and do not involve transactions in securities. Trading is not registered (or required to be registered) with the SEC or the Commodity Futures Trading Commission (the "CFTC").

For the reasons stated below, we believe that the Order should not be a disqualifying event for purposes of Sections 9(a)(2) or (3). Among other things, we believe that the Order, which does not contain any findings of fact, should not be considered an injunction "entered by reason of any misconduct." The Order also does not relate to any subject matter specifically enumerated within Section 9(a)(2). No officer or employee of AIG, or of any AIG subsidiary or other affiliate, involved in investment company activities was involved in the activities subject to the Order or any other activities of Trading (except to the extent that members of AIG's legal department and other officers of AIG have been involved in matters pertaining to the DOJ investigation). Further, we have not identified any instance in which a party has sought a Section 9(c) exemption in circumstances not involving alleged violations of the U.S. securities or commodities laws or an entity registered in some capacity with the SEC or CFTC. Neither connection is present here.

Factual Background

Today, the DOJ concluded its investigation of whether, between July 1992 and May 1993, employees of Trading and its United Kingdom subsidiary, AIG Trading Ltd., entered into an agreement with other defendant trading firms to reduce the price of commissions paid to brokers, located mainly abroad, for transactions in specified Brent (North

Sea) oil spread contracts and contracts for differences relating to Brent oil prices.* In its complaint, the DOJ did not allege that any employee of AIG or any AIG affiliate providing services to registered investment companies was involved in the activities under investigation. AIG also has confirmed to us that no such employee of AIG or any AIG affiliate was involved in those alleged activities.

The Order resolving this matter will dismiss, with prejudice, the DOJ's complaint against all defendants, including Trading. It requires the defendants, *inter alia*: (i) to comply with Section 1 of the Sherman Act; (ii) to maintain antitrust compliance programs; (iii) to file annual statements with the DOJ for five years concerning the manner of their compliance with law; and (iv) to permit the DOJ periodic access to their personnel and records regarding compliance with the Order. A copy of the Order is enclosed.**

Trading is a wholly-owned subsidiary of AIG Trading Group Inc. ("Trading Group"), which is 80 percent owned by AIG and 20% owned by certain employees of Trading Group. Trading is the only AIG affiliate that is a party to the Order.

* Cargoes of Brent crude oil are bought and sold in the Brent market in privately negotiated transactions. Brent spread contacts involve transactions in which there is a simultaneous purchase of a Brent contract for a given month forward and sale of a Brent contract for a different month forward. Contracts for differences involve the making of payments based on the difference between a current Brent oil price and the price one month forward. These transactions are not effected on an exchange and occur principally outside of the United States.

** Under 15 U.S.C. § 16 (Supp. 1996), which specifies the procedure for the entry of consent judgments in actions brought by the DOJ under the federal antitrust laws, the district court may not enter the proposed Order until at least 60 days following its publication in the Federal Register. During this 60-day waiting period, the court may consider comments submitted by the public and any responses by the DOJ thereto. Before entering the Order, the court must determine that entry of the Order is in the "public interest," as defined in 15 U.S.C. § 16(e).

AIG is the leading U.S.-based international insurance organization and among the nation's largest underwriters of commercial and industrial coverages. As of December 31, 1996, AIG had consolidated total assets of approximately \$149 billion.

Each of the following four entities within the AIG group of companies is either an SEC-registered investment adviser, or an SEC-registered broker-dealer that serves as an investment company distributor:

1. AIG Capital Management Corp. -- an indirect wholly-owned subsidiary of AIG -- serves as the investment adviser to: AIG All Ages Funds, Inc. ("All Ages Funds"), which is a registered series fund currently comprised of AIG Children's World Fund-2005 and AIG Retiree Fund-2003; First Global Equity Portfolio, a registered master fund in which the All Ages Funds series invest a significant portion of their assets; and AIG Money Market Fund, a separate series of a registered investment company, the other series of which are advised by firms not affiliated with AIG.

2. AIG Global Investment Corp. -- an indirect wholly-owned subsidiary of AIG -- serves as the investment sub-adviser to All Ages Funds (both series), First Global Equity Portfolio, and two other registered investment companies that are advised by firms not affiliated with AIG.

3. AIG International Asset Management Inc. ("Asset Management") is registered as an investment adviser, but does not serve as an investment adviser or investment sub-adviser to any registered investment company. Asset Management is 70 percent owned by AIG Trading Services Inc., which in turn is a wholly-owned subsidiary of Trading Group; the other 30 percent of Asset Management is owned by AIG Global Investment Group, Inc., which is wholly owned by AIG.

4. AIG Equity Sales Corp. -- a wholly-owned subsidiary of AIG -- serves as distributor of All Ages Funds, placement agent of First Global Equity Portfolio, exclusive sub-distributor of AIG Money Market Fund, and principal underwriter of several 1940 Act registered separate accounts.

AIG controls each of these four entities, and, therefore, each is an affiliated person of the other and of Trading for purposes of the 1940 Act.

Inapplicability of Sections 9(a)(2)
and (3) to the Proposed Order

Section 9(a)(2) bars entities subject to certain court injunctions from providing specified services to registered investment companies, including serving as an investment adviser or depositor of any registered investment company or as principal underwriter for any registered open-end investment company or registered unit investment trust. See 15 U.S.C. § 80a-9(a)(2). Under Section 9(a)(3), any affiliated person of an entity covered by Section 9(a)(2) is prohibited from acting in the capacities identified above.

We believe that Section 9(a)(2) does not apply to the Order (and, therefore, that Section 9(a)(3) does not apply to any of affiliated person of Trading that, now or in the future, provides investment advisory or distribution services to registered investment companies) for a number of reasons, including the following:

First, assuming arguendo for purposes of this request that the Order is an "injunction" (but without conceding that it is), we do not believe that the Order is, as required by Section 9(a)(2), an injunction issued "by reason of any misconduct." Although the Order will dismiss with prejudice the DOJ's complaint alleging antitrust violations, the Order does not, unlike the typical settlement of actions brought by the SEC, contain findings of fact involving misconduct. Rather, the Order provides that parties have "agreed to the entry of this stipulation and order without trial or adjudication of any issue of fact or law herein and without this stipulation and order constituting any evidence against or an admission by any party with respect to any such issue." (Order, p. 1).

Second, the text and legislative history of Section 9(a)(2) support our view that this provision applies only to conduct relating to the purchase or sale of securities and financial fraud subject to the securities or commodities laws, as opposed to alleged misconduct under the antitrust laws. None of these elements is present here.

By its terms, Section 9(a)(2) applies to orders enjoining a party from engaging in specified activities governed by the federal securities laws and the Commodity Exchange Act ("CEA"), specifically:

"[i] from acting as an underwriter, broker, dealer, investment adviser, municipal securities

dealer, government securities broker, government securities dealer, transfer agent, or entity or person required to be registered under the Commodity Exchange Act, [ii] or as an affiliated person, salesman, or employee of any investment company, bank, insurance company, or entity or person required to be registered under the Commodity Exchange Act, or [iii] from engaging in or continuing any conduct or practice in connection with any such activity or [iv] in connection with the purchase or sale of any security; . . ."

15 U.S.C. § 80a-9(a)(2).

Moreover, the legislative history of Section 9(a) expressly indicates that subsection (2) was included in the Act to disqualify persons "enjoined by a court in connection with a security or financial fraud." H.R. REP. No. 76-2639, at 14 (1940); S. REP. No. 76-1775, at 14 (1940).

Even assuming the Order is a court injunction issued by reason of misconduct (but not conceding either point), the applicability of Section 9(a)(2) depends on whether the Order prohibits Trading: (i) from "acting as" any of the first group of entities enumerated in Section 9(a)(2) (the "First Financial Group"); (ii) from "acting as" an affiliated person, salesman, or employee of any of the second group of enumerated entities (the "Second Financial Group"); (iii) from engaging in or continuing any conduct "in connection with any such activity"; or (iv) from engaging in or continuing any conduct in connection with the purchase or sale of a "security."

The Order clearly does not enjoin conduct in three of the four possible circumstances specified in Section 9(a)(2). As to (i) and (ii), the Order does not enjoin Trading from "acting as" any entity in the First Financial Group or as an affiliated person, salesman, or employee of any entity in the Second Financial Group. As to (iv), it is our opinion that the Brent oil spread contracts and related contracts for differences covered by the Order are not "securities" under the federal securities laws.*

* These short-term contracts are not bought and sold "to raise money for the general use of a business enterprise," but rather are "exchanged to facilitate the
(continued...)

Accordingly, the critical question is whether the Order could be deemed to enjoin conduct covered by clause (iii), *i.e.*, conduct "in connection with any such activity." By its terms, the phrase "in connection with" requires a linkage between the conduct affected by the Order and the activities of an entity in the First Financial Group or an affiliated person, salesman, or employee of an entity in the Second Financial Group.

Although Trading is an affiliated person of an entity in the Second Financial Group (*e.g.*, an insurance company), the requisite linkage required by clause (iii) between the Order and Trading's activities as such an affiliated person is not present here. The Order does not apply to all of Trading's activities, but only to activities in connection with transactions in "Brent spread contracts" and "contracts for differences" relating to Brent oil prices. (*See* Order, § III Applicability, p. 4). In fact, the Order expressly permits Trading to engage in any lawful activity relating to Brent oil spread contracts and related contracts for differences, including negotiating with other counterparties the terms of such contracts, negotiating commissions with brokers, paying brokerage commissions required or authorized by any U.S. government agency or self-regulatory organization, or paying brokerage commissions to foreign brokers and, unless the DOJ objects after notice, to U.S. brokers required or authorized by any foreign government agency or self-regulatory organization.

Moreover, the purchase and sale of 15-day Brent oil spread contracts or related contracts for differences is not customarily conducted by entities in the First Financial Group or affiliated persons, salesmen, or employees of entities in the Second Financial Group. Trading is not required to be registered under the CEA in order to engage outside the United States in the trading of 15-day Brent oil spread contracts or related contracts for differences, because such transactions are excluded from the jurisdiction of the CEA. *See, e.g., Statutory Interpretation Concerning Brent Oil Contracts*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,925, at 37,364 (Sept. 25, 1990).

* * *

* (...continued)

purchase and sale of" a commodity, *i.e.*, crude oil.
Reves v. Ernst & Young, 494 U.S. 56, 66 (1990).

Douglas J. Scheidt, Esq.

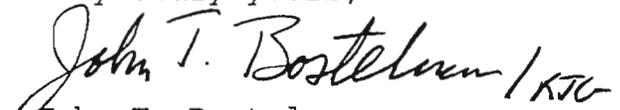
-8-

For the reasons set forth above, we have concluded that Section 9(a)(2) should not apply to the Order, and, therefore, that Section 9(a)(3) would not apply to any AIG subsidiaries or other affiliated persons of Trading providing services, now or in the future, to registered investment companies. Nevertheless, given the serious consequences that could result if Sections 9(a)(2) or (3) were deemed to apply, AIG and the potentially affected AIG subsidiaries seek the SEC staff's interpretative advice that, based on the facts stated herein, the Order is not a disqualifying event under Sections 9(a)(2) or (3) for them or any other affiliated person of Trading. In the alternative, we respectfully request on their behalf that the SEC staff take the position that it would not recommend that the SEC take any enforcement action under Sections 9(a)(2) or (3) if affiliated persons of Trading provide investment advisory or distribution services to registered investment companies at any time after the Order becomes effective without obtaining an exemption under Section 9(c).

As required by Investment Company Act Release No. 6330, we are submitting this letter and the Order in triplicate.

If you have any questions about this matter, please contact me at 212-558-3840.

Very truly yours,


John T. Bostelman

(Enclosure)