89-16

UNITED STATES OF AMERICA
COMMODITY FUTURES TRADING COMMISSION
2033 K Street, N.W.
Washington, D.C. 20581

CONFID

September 30, 1988

Re: Proposed Issuance of Floating Rate Notes

Dear

This is in response to a letter dated August 5, 1988, submitted by (August 5 Letter), as supplemented by a letter dated September 28, 1988 (September 28 Letter), on behalf of (Issuer), a corporation engaged internationally in the business of

The Issuer is proposing the distribution to its shareholders of rights (Rights) to purchase floating-rate notes (Notes) with interest varying with changes in the price of which, together with certain by-products and co-products, accounted for more than 75% of the Issuer's consolidated net sales in 1987, which exceeded $1.7 billion. Your firm has requested that the staff of the Commodity Futures Trading Commission (Commission) confirm that it will not recommend to the Commission that it initiate any enforcement action against the Issuer due to its participation in the offering described in the August 5 and September 28 Letters. Based upon the representations contained in the August 5 and September 28 Letters, as supplemented by discussions with Commission staff, we understand that the relevant facts include the following.

The Issuer had consolidated total assets of more than $3.3 billion as of June 30, 1988. The Issuer's common shares are listed on the New York Stock Exchange (NYSE) and on various foreign stock exchanges. As of May 2, 1988, the Issuer had more than million outstanding shares of common stock, of which there were more than holders of record. More than holders of record of the Issuer's outstanding common shares, representing approximately 55% of the outstanding shares, have U.S. addresses.

The Issuer proposes to distribute to its shareholders Rights to purchase up to million aggregate principal amount of floating rate Notes. The Issuer contemplates declaring a dividend of one Right for each common share owned. A certain number of Rights, yet to be determined by the Issuer, would entitle the holder to purchase one Note having a principal amount of for a cash payment equal to such principal amount. 1/ The Rights would be exercisable on and after the date of issuance for no less than 21 and no more than 72 days. You anticipate that the Rights would be listed on the NYSE and traded on a when-issued basis prior to their issuance. The Issuer's financial advisor, , anticipates that a majority of the Issuer's common shareholders would sell their Rights in the open market prior to the expiration of such Rights.

The Notes will be registered under the Securities Act of 1933 (Securities Act) and issued in accordance with the requirements of state securities commissions. If listed on the NYSE, the Notes also would be registered under the Securities Exchange Act of 1934 (Exchange Act). The Issuer will deposit cash or Notes to a sinking fund such that the total amount deposited would fully amortize the Notes. The Notes will be redeemable by the Issuer at its option at any time, and the Notes may be subordinated to the Issuer's other indebtedness.

Interest on the Notes would be payable semi-annually, at an annualized rate equal to a fixed rate of at least (Floor Rate) plus a variable interest component calculated by reference to the average market price for on a three-month forward basis, as quoted in U.S. dollars on the during the six-month period ending one month prior to the commencement of the relevant interest payment period. The Floor Rate would be adjusted to equal at least 35% of the rate that the Issuer could expect to pay on a fixed-rate debt issue of comparable size.

1/ You have represented that the Issuer may permit holders of Rights who are citizens to elect to purchase Notes denominated in dollars. You further represent that, based on current exchange rates, the minimum denomination of Notes of that series would equal approximately .

variable interest payments calculated by reference to the price of will not exceed 20% of the principal amount of the Notes on an average annualized basis.

In an Advance Notice of Proposed Rulemaking Relating to the Regulation of Certain Hybrid and Related Instruments (Advance Notice), 52 Fed. Reg. 47022 (December 11, 1987), the Commission has requested comment on a proposed regulatory framework which, among other things, would provide an exemption from Commission regulation for certain "otherwise-regulated" instruments having only incidental option-like components. In view of the fact that the Advance Notice remains pending and that the Commission has not reached a final determination with respect to the proposals set forth therein, the staff believes that it is appropriate, in limited circumstances such as this, to address certain instruments on a case-by-case basis. Based upon the representations contained in the August 5 and September 28 Letters, as supplemented by discussions with Commission staff, the staff has compared the proposed offering to the criteria set forth in the Advance Notice, as summarized below. 2/

(1) Term to Maturity

You have represented that the Notes will have a maturity of either or years, which is in excess of the minimum three-year term specified in the Advance Notice.

(2) Maximum Commodity-Based Return and Minimum Non-Commodity Based Return

As proposed in the Advance Notice, the exemption for certain otherwise-regulated instruments would be conditioned upon compliance with a requirement that the hybrid instrument have a minimum annual yield or return independent of its commodity-related component equal to at least 35% of the estimated annual yield at the time of issuance for a comparable pure debt or depository instrument and a maximum average potential return on

---

2/ As represented to us, the Rights will have no value except as a mechanism enabling the purchase of a Note. In view of the facts and circumstances of the proposed offering, the staff has not separately analyzed the Rights against the criteria set forth in the Advance Notice. We note, however, that in other circumstances, rights offerings may potentially warrant separate scrutiny.

its commodity-related component of 20% on an annualized basis of the total principal or face amount of the hybrid instrument. As described in the August 5 Letter, the Notes would bear interest, payable semi-annually, at an annualized rate between the Floor Rate, which will be fixed at no less than and a ceiling rate anticipated to be but, in any event, affording a commodity-related return no greater than the 20% maximum average annualized return proposed in the Advance Notice. Thus, subject to the 18% (or adjusted) ceiling, interest payable on the Notes will be comprised of the fixed, non-commodity yield (Floor Rate) and a variable component, calculated by reference to the average price of on a three-month forward basis during the six-month period ending one month prior to the commencement of the relevant interest-payment period.

As stated in the August 5 Letter, the Issuer and its financial advisor have indicated that the Notes will have a floor, non-commodity-indexed interest rate that will not be less than % and that this rate will be fixed in such a manner that it will equal or exceed 35% of the estimated annual yield for comparable fixed-rate debt of the Issuer at the time of issuance of the Notes. You have further represented that although the 18% ceiling rate for the aggregate commodity-related and non-commodity-related return may be adjusted, in no event will the Notes' commodity-related return exceed the maximum 20% average annualized return proposed in the Advance Notice.

(3) Line of Business

The Issuer is engaged in the business of

products. The commodity-related return on the Notes is indexed to the price of which accounted for more than 75% of the Issuer's consolidated net sales in 1987.

(4) Otherwise-Regulated

The August 5 Letter states that the Issuer has been registered with the Securities and Exchange Commission (SEC) for many years and files periodic reports under the Exchange Act and pursuant to various foreign securities regulatory and stock exchange requirements. The Notes will be registered under the Securities Act, and appropriate filings will be made with state securities commissions. You anticipate that the Notes will be listed for trading on the NYSE. If the Notes are listed on the NYSE, they also would be registered under the Exchange Act. The Notes will be issued pursuant to an indenture complying with the requirements of the Trust Indenture Act of 1939 and of the

Issuer's jurisdiction of incorporation. A prospectus relating to the Notes will be filed with the SEC, certain state securities commissioners and the securities regulator of the Issuer's jurisdiction of incorporation.

(5) Marketing and Disclosure

The Notes will be marketed as securities, with the indexing feature of the Notes to be disclosed as required by the disclosure requirements of applicable securities laws.

(6) Special Calls

The exemptive relief proposed in the Advance Notice would also be conditioned upon the Issuer's undertaking to submit to special calls for information to demonstrate compliance with the conditions of the staff's no-action position. You have represented that the Issuer will agree to comply with such requests for information by the Commission.

(7) Net Worth and Cover

In the Advance Notice, the Commission proposed to condition exemptive relief upon compliance with a requirement that the Issuer have at least $100 million of net worth and maintain specified cover to ensure performance of the commodity-related obligations created by the hybrid instrument. The August 5 Letter states that, as of June 30, 1988, the Issuer's consolidated net worth exceeded $1.3 billion. The August 5 Letter further represents that the Issuer has sufficient reserves to sustain production of at 1987 levels for more than 30 years. In addition, you have represented that assuming (i) a $300 million offering, (ii) prices at but not higher than the price presently expected to trigger the maximum possible interest rate and (iii) production at constant 1987 levels, the commodity related component of the interest expense ($42 million per annum) would account for less than 10% of the value of the Issuer's annual production of and its principal co-product. You have further represented that the Issuer intends to maintain reserves adequate to cover the commodity-related portion of its obligations on the Notes.

(8) Minimum Unit Price

The Advance Notice proposes a minimum unit price for qualifying hybrid instruments of $20,000. The Issuer proposes to issue the Notes in a minimum denomination of $500. Notes can only be purchased by accumulating a sufficient number of Rights, which rights will accrue only to existing shareholders. Therefore, effectively, there is no public offering of the Notes independent of the Issuer's common stock.

You have cited several reasons for the proposed $500 denomination of the Notes. The Issuer represents that if million of Notes were offered in $20,000 denominations, more than 99% of the Issuer's individual shareholders would receive too few Rights to enable purchase of a Note. 3/ Based upon the currently anticipated size of the offering, million, only 0.7% of the Issuer's individual shareholders would receive sufficient Rights to enable them to purchase a $20,000 Note. However, virtually all shareholders holding 100 or more common shares, approximately 35% of all common shareholders, would receive a sufficient number of Rights to purchase one or more $500 Notes in a to million offering.

If the Notes were offered in $20,000 denominations, you represent that it is likely that most small shareholders would receive insufficient Rights to permit purchase of a Note,

---

3/ You have represented in your September 28 Letter that approximately 65% of the Issuer's total shareholders hold fewer than 100 shares each. the Issuer's financial advisor, has calculated that in the event of a milion offering, a shareholder would need approximately 7,050 Rights to purchase one Note with a $20,000 denomination. Based on recent market prices, the 7,050 common shares necessary to obtain such number of Rights would be worth more than $193,900. Only 0.7% of the Issuer's record shareholders would receive sufficient Rights to purchase a Note in those circumstances. You also have calculated that if the Notes were offered at a $20,000 denomination in a million offering, only 0.6% of the Issuer's record shareholders would receive sufficient Rights to permit them to purchase a Note. Thus, if million of Notes were offered in $20,000 denominations, more than 99% of the Issuer's record shareholders would receive too few Rights to enable purchase of the Notes. You have noted, however, that approximately 56% and 64% of all record shareholders holding 100 or more common shares (approximately 35% of all common shareholders are at least "round-lot" holders) would receive a sufficient number of Rights to purchase one or more $500 Notes in, respectively, a million and a million Rights offering.

potentially adversely affecting the value of the Rights and tending to frustrate the Issuer's attempt to achieve a wide distribution of Notes to facilitate development of a liquid exchange market for the benefit of non-institutional Note holders. In addition, as the proposed offering is not an underwritten offering, if the Notes were not accessible to purchase by the Issuer's small shareholders, the absence of a standby underwriting commitment with respect to the proposed offering could result in a shortfall in the subscription of Notes to a degree below the offering size sought by the Issuer.

Based upon our understanding of the representations in your August 5 and September 28 Letters, as supplemented by discussions with Commission staff, the staff has concluded that the proposed offering as outlined in your letters is consistent with the criteria for exemptive relief set forth in the Advance Notice except the requirement of a minimum unit size of $20,000. The staff is of the view, however, that the special circumstances of the proposed offering, which is to be made to existing common shareholders of the Issuer, render application of the minimum denomination requirement proposed in the Advance Notice unwarranted. Rather than providing a protection to potential purchasers of hybrid instruments, the proposed minimum unit size could, in the circumstances of this proposed offering, cause a reduction in the value of the Rights to be distributed to existing shareholders. The lower unit size proposed for the Notes has the potential to enhance the ability of a broader class of shareholders to realize the value of the Rights distributed to them, while also facilitating the listing and trading of the Notes on a national securities exchange.

Therefore, the staff will not recommend to the Commission that it initiate any enforcement action under Section 4c of the Commodity Exchange Act, 7 U.S.C. §6c (1982), based solely upon the distribution of Rights and issuance and offering of Notes as specified in the August 5 and September 28 Letters. This position does not excuse the Issuer from complying with any otherwise applicable provisions of the Commodity Exchange Act or Commission regulations thereunder, nor does it address any other instrument or proposed instrument. This position is based upon our understanding of the facts as contained in your letters, as supplemented by discussions with the staff. Any different, omitted or changed facts or conditions may require a different conclusion. In this regard, you should notify the staff in the event that the proposed offering of Rights or Notes differs in any respect from the particulars contained in your letters and discussions with the staff.

Finally, it should be noted that this position is that of the staff and is not binding upon the Commission and that any subsequent determination by the Commission with regard to the rulemaking proceeding initiated by the Advance Notice may require a reconsideration of this staff position.

Sincerely,

Marshall E. Hanbury
Co-Chairman
Off-Exchange Task Force

Paula A. Tosini
Co-Chairman
Off-Exchange Task Force