



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

Act Advisers Act
Section § 202(a)(11)
Rule
Public
Availability 6-24-96

June 24, 1996

Barry Reder, Esq.
Coblentz, Cahen, McCabe & Breyer, LLP
222 Kearny Street
San Francisco, CA 94108-4510

Re: Real Goods Trading Corporation

Dear Mr. Reder:

Based on the facts presented in your letter dated June 21, 1996 ("Letter"), it is the view of: (i) the Division of Corporation Finance that the activities of Real Goods Trading Corporation ("RGTC") in connection with the establishment and maintenance of the System would not require that offers or sales made through the System be registered under the Securities Act of 1933; and (ii) the Division of Investment Management that RGTC may engage in the activities described in your letter without registering under the Investment Advisers Act of 1940.

On the basis of the facts presented in your Letter, the Division of Market Regulation will not recommend an enforcement action to the Commission under Section 5, 6, or 15 of the Securities Exchange Act of 1934 ("Exchange Act") if RGTC operates the System in the manner described in that Letter without registration as a national securities exchange under Section 6 or as a broker-dealer under Section 15 of the Exchange Act. This is a position of the Division of Market Regulation regarding enforcement action under Sections 5, 6, and 15 of the Exchange Act only, and does not express any legal conclusions regarding the applicability of Sections 5, 6, or 15 of the Exchange Act or other statutory or regulatory provisions of the federal securities laws. This no-action position is subject to changes in current law, regulation, and interpretations governing issuer-based bulletin boards; any change may require the Division of Market Regulation to reevaluate and revoke or modify this no-action position.

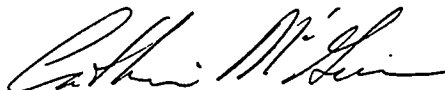
In reaching these positions, the Divisions note the following: (1) RGTC will provide the described notices regarding operation of and participation on the System that will be set forth or contained on the screens and/or hard copy by which System information is provided; (2) RGTC is a Section 12 registrant and will retain that status or, if it should cease to be a Section 12 registrant, otherwise undertake to make publicly available the information required by Section

Barry Reder
June 24, 1996
Page 2

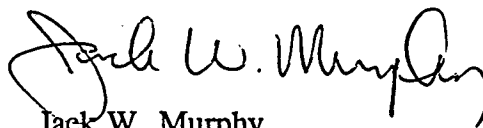
13(a) of the Exchange Act in the same manner that Participants will obtain access to the System (e.g., electronic mail, facsimile, mail, RGTC's World-Wide Web site, etc.); (3) RGTC will keep records of all quotes entered into the system and make those records available to the Commission and the Pacific Stock Exchange (or any other regulated market on which RGTC securities are listed) upon reasonable request; (4) RGTC's advertising will comply with the representations set forth in your letter; (5) neither RGTC nor any affiliate of RGTC will use the System, directly or indirectly, to offer to buy or sell securities, except in compliance with the securities laws, including any applicable registration requirements (absent an available exemption therefrom); and (6) neither RGTC nor any affiliate of RGTC will (i) receive any compensation for creating or maintaining the System; (ii) receive any compensation for the use of the System; (iii) be involved in any purchase or sale negotiations arising from the System; (iv) provide information regarding the advisability of buying or selling Common Stock or any other securities; or (v) receive, transfer, or hold funds or securities as an incident of operating the System.

Because these positions are based on the representations made to the Divisions, any different facts or conditions might require different conclusions.

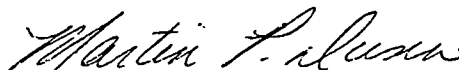
Sincerely,



Catherine McGuire
Associate Director (Chief Counsel)
Division of Market Regulation



Jack W. Murphy
Associate Director (Chief Counsel)
Division of Investment Management



Martin P. Dunn
Chief Counsel
Division of Corporation Finance

Attachment

CM/dn

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OFFICE OF CHIEF COUNSEL

JUN 22 1996

DIVISION OF MARKET REGULATION

Re: **Real Goods Trading Corporation**
Securities Exchange Act of 1934 (Sections 5, 6 and 15);
Investment Advisers Act of 1940 (Section 203(a));
Securities Act of 1933 (Section 5)

Dear Ms. McGuire, Mr. Murphy and Mr. Dunn:

We are counsel to Real Goods Trading Corporation ("RGTC"), a California corporation. Its stock is traded on the Pacific Stock Exchange and registered under Section 12 of the Securities Exchange Act of 1934, as amended (the "Exchange Act"). RGTC sells alternative energy and conservation products primarily through mail order. As part of its mission, RGTC encourages the use of solar power devices permitting its customers to live "off the grid," *i.e.*, without traditional power sources.

I. BACKGROUND

On October 1, 1991, RGTC commenced its initial offering of 200,000 shares of common stock ("Common Stock") pursuant to Rule 504 under the Securities Act of 1933, as

Catherine McGuire
Martin Dunn
Jack Murphy
June 21, 1996
Page 2

amended (the "Securities Act"). The offering was fully subscribed. On February 26, 1993, RGTC commenced an offering of up to 600,000 shares of Common Stock under Regulation A under the Securities Act. That offering also was fully subscribed. Both offerings were made as direct offerings with only limited use of selling agents. The shares of RGTC Common Stock became registered under Section 12 of the Exchange Act on March 25, 1994, and have been traded on the Pacific Stock Exchange since April 7, 1994.^{1/} U.S. Stock Transfer Corporation is the transfer agent of the Common Stock.

Trading in the Common Stock is extremely light and the market for it is very illiquid. Assuming 21 trading days per month, its average daily trading volume during 1995 was fewer than 850 shares. The share price for the Common Stock was primarily in the \$5.00 to \$7.00 range in 1995. More than 17% of the transactions were in odd lots. During 1995 there were approximately 3.25 transactions per day on average, including odd lot trades.

Consistent with the mission of its business and its direct public offerings, RGTC proposes to establish an "off the grid" trading system (the "System") for the Common Stock. The System would function as a passive "bulletin board" providing information to prospective sellers and buyers of Common Stock ("Participants"). The information to be listed in the System would include: (i) the names, addresses, and telephone numbers (or other contact mechanisms, such as electronic mail addresses) of interested buyers and sellers; (ii) the number of shares of Common Stock offered for sale or desired to be purchased; (iii) the price at which the Common Stock is offered for sale or desired to be purchased; and (iv) the date on which the information was entered into the System. Participants would transmit the above information either (i) by direct interface using RGTC's World Wide Web site or (ii) by telephone, facsimile, mail or electronic mail directed to RGTC, which would enter the data into the System. The information would remain in the System until such time as a Participant indicates that a transaction was completed or the Participant no longer is interested in buying or selling, although RGTC also may put a time limit on how long the information will be posted. RGTC anticipates that Participants will obtain access to the System primarily by electronic mail, although information may also be relayed by telephone, facsimile, mail or any other method, including via RGTC's World Wide Web site.

No transactions would be effected by the System itself, and RGTC will have no role in effecting transactions between Participants; rather all transactions would be effected only by direct contact between the Participants. Although RGTC would have no transaction records, it will retain records of the quotations listed for not less than three years and make them

^{1/} RGTC may at some future time list its shares on a different national securities exchange or on NASDAQ. In our view, the same result obtains without regard to whether the Common Stock is listed on the New York Stock Exchange, the American Stock Exchange, the Pacific Stock Exchange, any other national securities exchange, or NASDAQ.

Catherine McGuire
Martin Dunn
Jack Murphy
June 21, 1996
Page 3

available to the staff of the Securities and Exchange Commission (the "Commission") and to the Pacific Stock Exchange (or any other regulated market on which the shares are listed) on reasonable request therefor. Each Participant would be required to rely on its own exemption under the Securities Act including, without limitation, Section 4(1) thereof. Through its newsletters and otherwise, RGTC proposes to advertise to shareholders and other members of the public the availability and possible benefits of the System. The System may be free standing or may be integrated into RGTC's World Wide Web site or both.

Neither RGTC nor any affiliate of RGTC will (i) receive any compensation for creating or maintaining the System; (ii) receive any compensation for the use of the System; (iii) be involved in any purchase or sale negotiations arising from the System; (iv) give advice regarding the merits or shortcomings of any particular trade; (v) use the System, directly or indirectly, to offer to buy or sell securities, except in compliance with the securities laws, including any applicable registration requirements (absent an available exemption therefrom)^{2/}; or (vi) receive, transfer or hold funds or securities as an incident of operating the System.

The screens and hard copy by which the System data is provided to Participants will include the following information:

- Identification of the national securities exchange or other regulated securities market that lists RGTC Common Stock;
- RGTC is not a registered national securities exchange, securities information processor, broker, dealer or investment adviser;
- The information set forth on the System does not consist of firm quotes, but rather is merely a list of the names, addresses and telephone numbers of interested sellers and buyers, the number of shares of Common Stock offered or desired to be purchased, and the price at which the proposed transaction would occur. RGTC does not assure that any particular transaction will occur as to any particular number of shares or at any particular price. All transactions

^{2/} Offers and sales of nonrestricted securities by persons other than RGTC or affiliates of RGTC could be made in reliance upon the exemptions from registration provided by Sections 4(1), 4(3) or 4(4), as appropriate. Offers and sales of controlled or restricted securities may be made through a registered offering or in reliance upon an exemption from registration, such as the Section 4(1) exemption, if the requirements of Rule 144 are satisfied. In this regard, it is recognized that the "manner of sale" requirements of Rule 144 would be applicable to such transactions. Offers or sales of securities by RGTC may be made either in registered transactions or in accordance with an available exemption, such as Regulation A or Rule 504 of Regulation D under the Securities Act.

Catherine McGuire
Martin Dunn
Jack Murphy
June 21, 1996
Page 4

between Participants must be executed by the Participants independent of RGTC or any of its affiliates;

- All applicable state and federal securities laws (including the anti-fraud and anti-manipulation provisions) apply to any offer made or transaction consummated using the System;
- The name, address and telephone number of RGTC's transfer agent;
- Any person that is a broker-dealer, an associated person of a broker-dealer, or who has a state securities license is responsible for identifying that fact;
- "Two-sided quotes" in which a person indicates a bid to buy at one price and an offer to sell at a higher price are prohibited^{2/};
- The registration requirements of the federal securities laws apply to all offers and sales through the System, absent an available exemption. Offers and sales of controlled or restricted securities may be made in reliance upon the Section 4(i) exemption if the requirements of Rule 144, including the "manner of sale" requirements, are satisfied. Please note that the public information, volume, manner of sale and notification requirements of Rule 144 do not apply to transactions that satisfy the requirements of Rule 144(k).

RGTC may make announcements relating to, and advertise or otherwise publicize, the existence and availability of the System and provide information about the use and benefits of the System. RGTC communicates with shareholders primarily through a quarterly publication which is distributed to both its shareholders and certain customers who pay a modest fee to receive both special publications and a discount on purchases of goods sold by RGTC. Although RGTC would initially plan to make its shareholders and other members of the public aware of the System through this newsletter, RGTC may use any other mechanism for providing information about the System. In its communications with the public, RGTC will not characterize itself or the System as being a "broker," a "dealer," or an "exchange." To the same extent as required of any company whose securities are traded on a national securities exchange or NASDAQ, RGTC will be mindful of the statutory provisions relating to solicitations of an offer to buy. If RGTC provides information about RGTC or the System

^{2/} RGTC may in the future permit two-sided quotes. If RGTC chooses to permit two-sided quotes, the screens and hard copy by which the System data is provided to Participants will include a statement that: Any person providing "two-sided quotes" in which a person indicates a bid to buy at one price and an offer to sell at a higher price may, in certain circumstances, be considered a dealer who is required to register with the SEC and comply with applicable provisions of the federal securities laws.

Catherine McGuire
Martin Dunn
Jack Murphy
June 21, 1996
Page 5

during an offering of its securities that is registered with the Commission, RGTC also will be sensitive to and abide by the general limitations of the federal securities laws regarding publicity by a company that is "in registration." Of course, all information provided by RGTC regarding either the System or RGTC will be consistent with the antifraud and antimanipulation requirements of the federal securities laws.

We respectfully request that the staff (the "Staff") of the Commission concur with our view that RGTC may establish and operate the System as described herein without (i) RGTC registering as an "investment adviser" under Section 203(a) of the Investment Advisers Act of 1940, as amended (the "Advisers Act"); (ii) RGTC, or any of its personnel who will manage and operate the System, registering as a "broker" and/or "dealer" under Section 15(a) of the Exchange Act; (iii) the registration of the System as a "national securities exchange" under Section 6 of the Exchange Act; or (iv) the registration of offers and sales made through the System under the Securities Act.

II. REGISTRATION ISSUES

Broker and Dealer

Subject to certain exceptions, Section 15(a) of the Exchange Act requires registration of any broker or dealer. Section 3(a)(5) of the Exchange Act defines a "dealer" as "any person engaged in the business of buying and selling securities for his own account." Section 3(a)(4) defines a "broker" as "any person engaged in the business of effecting transactions in securities for the account of others . . ." RGTC will not be engaging in any activities requiring it to register as a broker or dealer under Section 15(a). This conclusion is consistent with the Staff's determination regarding a system similar to the System in *Farmland Industries, Inc.* (August 26, 1991).

Requiring RGTC to register as a broker-dealer would not provide the Participants with any additional protection. Because RGTC will not handle or hold funds or shares of Common Stock of any Participant, a minimum capital requirement is unnecessary. Any financial failure of RGTC would result only in the loss of the Participants' access to the System, and not a loss of their funds. Furthermore, the costs of compliance with the record keeping and periodic reporting requirements would far outweigh any benefits.

National Securities Exchange

Section 5 of the Exchange Act provides that it is unlawful for an exchange to effect any transaction in a security unless such exchange is registered as a national securities exchange under Section 6 of the Exchange Act or is exempted from such a registration upon application to the Commission.

Catherine McGuire
Martin Dunn
Jack Murphy
June 21, 1996
Page 6

Section 3(a)(1) of the Exchange Act defines an "exchange" as:

any organization, association or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange.

Based on the law and the foregoing facts, we are of the opinion that the System would not be an "exchange" within the meaning of the Exchange Act. In addition, RGTC notes that it is a Section 12 registrant and will retain that status or, if it should cease to be a Section 12 registrant, otherwise undertake to make publicly available the information required by Section 13(a) of the Exchange Act in the same manner that Participants will obtain access to the System (e.g., electronic mail, facsimile, mail, RGTC's World-Wide Web site, etc.). Consequently, there are no issues raised regarding the necessity of providing information to System Participants.

Investment Adviser

Subject to certain exceptions, Section 203(a) of the Advisers Act requires the registration of an investment adviser. Section 202(a)(11) of the Advisers Act defines an "investment adviser" as:

any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities . . .

As indicated above, neither RGTC nor the System will provide information regarding the advisability of buying or selling Common Stock or any other securities. Similarly, RGTC will not receive any compensation for operating the System. The System will merely provide a passive medium for Participants to obtain information regarding other Participants who are interested in buying or selling Common Stock. Thus, RGTC will not be engaging in any activities requiring registration as an investment adviser under the Advisers Act. This conclusion is consistent with the Staff's determination regarding a system similar to the System in *Farmland Industries, Inc., supra*.

Catherine McGuire
Martin Dunn
Jack Murphy
June 21, 1996
Page 7

Securities Act of 1933

Section 5 of the Securities Act makes it unlawful for any person to offer, sell, or solicit an offer to purchase any security unless a registration statement has been filed with respect to that security, absent an available exemption. In view of the manner in which the System will be established and operated, RGTC believes that the operation of the System does not constitute an offer to sell or the solicitation of an offer to buy RGTC Common Stock on the part of RGTC. As such, RGTC's activities in connection with the establishment and maintenance of the System would not require Securities Act registration of offers or sales made through the System.

III. CONCLUSION

For the foregoing reasons, we request that the Staff concur with our view that RGTC may establish and operate the System without (i) RGTC registering as an "investment adviser" under Section 203(a) of the Advisers Act; (ii) RGTC, or any of its personnel who will manage and operate the System, registering as a "broker" and/or "dealer" under Section 15(a) of the Exchange Act; (iii) the registration of the System as a "national securities exchange" under Section 6 of the Exchange Act; or (iv) registering offers and sales made through the System under the Securities Act.

In the event that the Staff does not concur with any of our views, we kindly request an opportunity to discuss the matter prior to any final decision thereon. If you have any questions or wish to receive any further information, please contact me at (415) 391-4800.

Very truly yours,

COBLENTZ, CAHEN, McCABE & BREYER, LLP


Barry Reder

BR/pjw
cc: John Schaeffer

Dictated but not read.
Signed in Mr. Reder's
absence to avoid delay.