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FACSIMILE
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September 10, 2003

VIA FACSIMILE

Ms. Nancy M. Ovuka
Premerger Notification Office
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Confirmation of Advice Received on September 9, 2003

Dear Ms. Ovuka:

I am writing to confirm the advice I received from you on September 9, 2003 in connection with the following factual scenario. Company A intends to acquire 100% of the voting securities of Company B in a stock-for-stock transaction and merge a newly-formed subsidiary of Company A into Company B. Each shareholder of Company B will thus receive a certain number of Company A's voting securities for each share of Company B voting securities that he/she holds. Both Company A and Company B are publicly-held corporations.

As we discussed, the agreement does not contemplate a single, fixed exchange ratio. Rather, the exchange ratio (*i.e.*, the number of Company A voting securities each shareholder of Company B will receive in exchange for each share of Company B voting securities that he/she holds) fluctuates depending on the volume-weighted average of the closing price for Company A's stock on each of the 15 trading days prior to closing (hereafter referred to as "market value"). Thus, if the market value of Company A's stock is equal to or greater than \$7.89, the exchange ratio is 1.330; if the market value of Company A's stock is less than \$6.23, the exchange ratio is 1.685; and if the market value of Company A's stock is equal to or greater than \$6.23, but less than \$7.89, the exchange ratio is determined by dividing \$10.50 by the market value of Company A's stock.

Pursuant to 16 C.F.R. § 801.10(a)(1)(i), if the acquisition price has been determined, the value of the voting securities to be acquired is the greater of the acquisition price or the market price. According to Informal Interpretation 96 of the most recent Premerger Notification Practice Manual (which you graciously faxed to me), in a stock-for-stock transaction, the acquisition price will be the market price of the voting securities that will be given as consideration for the purchase. If the acquisition price has not been determined,

Ms. Nancy M. Ovuka
September 10, 2003
Page 2

pursuant to 16 C.F.R. § 801.10(a)(1)(ii), the value of the voting securities to be acquired is the market price of the voting securities to be acquired.

In our discussion, you advised me that the acquisition price will be deemed "determined" only if the stock-for-stock transaction is based on a fixed ratio. Because the exchange ratios in the above-described transaction are not fixed in that manner, but rather depend on the 15-day volume-weighted average of Company A's stock prior to closing, the Premerger Notification Office will deem the acquisition price not to be "determined."¹ As such, pursuant to Section 801.10(a)(1)(ii), the value of the voting securities to be acquired will be the market price for Company B's voting securities. Thus, regardless of the market price of Company A's voting securities at any time, if the lowest closing price for Company B's voting securities in the 45 days prior to consummation of the acquisition reveals that the value of Company B's voting securities to be acquired is less than \$50 million dollars, the transaction will not be subject to the notification and reporting requirements of the HSR Act.

Thank you for your assistance in this matter and please let me know as soon as possible if I have misstated any of the analysis that we discussed.

Sincerely,

[Redacted signature block]

Confirmed advice ^{9/11}
w/ writer NMO
M. Verhe concurs

¹ Indeed, Informal Interpretation 96 states that where the number of the acquirer's shares to be given as consideration is subject to "a five-day average formula, the acquisition price cannot be determined."

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