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September 19, 2005

Via E-Mail

Mr. B. Michael Verne
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
Room 303
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

RE: Application of Hart-Scott-Rodino Antitrust Improvements Act

Dear Mike:

Thank you for taking the time to speak with me last week and both [redacted] and me today regarding our questions on the application of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR Act"), to the transaction described below. I am writing to confirm the conclusions from our conversations and to ensure that neither Aki nor I will misstate the views of the Premerger Notification Office to our respective clients. The transaction is described as followed:

- My client, Company A, proposes to purchase certain of the assets constituting the foreign correspondent banking business of Company B. In connection with this acquisition, Company A will have the right to offer employment to the employees of Company B in its foreign correspondent banking business and intends to offer positions consistent with its needs.

- This foreign correspondent banking business primarily provides correspondent banking and trade-finance products and services to international financial institutions (principally foreign banks). These services include payments, account and cash management, letters of credit, short-term financing, bank-to-bank reimbursements, export bill collections, and foreign exchange.

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- These international financial institutions who are customers of Company B in its foreign correspondent banking business are not required to use the services offered in this business from either Company B or Company A. In fact, no assurances can be given that these customers of Company B will become customers of Company A. These customers are free to use the correspondent banking and trade-finance products and services of other companies that are competitors of Company A. Of course, Company A and Company B expect that substantially all of these customers will become customers of Company A.

- The foreign correspondent banking business of Company B is a single line of business. Company B conducts many other lines of business, including providing many different types of loans, as well as letters of credit and bankers' acceptances, in its domestic businesses.

- In connection with this acquisition:

  1. Company A will pay Company B a base amount that is in excess of the size-of-transaction threshold. This base amount is, in essence, a "referral fee" for which Company B will refer its customers in its foreign correspondent banking business to Company A (Company A would, of course, be contacting these customers directly to persuade them to continue as customers of this business after it is sold to Company A). This base amount is subject to adjustment upwards depending on the number of customers of Company B's foreign correspondent banking business that become customers of Company A in this same business and downwards depending on the number of such customers that are still customers as of the time the acquisition is consummated. Both the potential upward and downward adjustments are subject to caps.

  2. Company A will pay Company B an amount equal to the net book value of the non-banking assets held by Company B for use primarily in its foreign correspondent banking business that Company A intends to acquire. The assets include books and records, prepaid expenses, certain intellectual property, and the option to acquire, at Company A's election, certain contracts for the provision of data processing services outside the United States.

  3. Company A will assume a "risk participation" on certain of Company B's loans, letters of credit and banker's acceptances in its foreign correspondent banking business. In essence, Company A will reimburse Company B for any losses in connection with the risk participated loans, letters of credit and bankers' acceptances, which will include those

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outstanding as of the closing as well as, at Company A's option, certain additional ones that Company B may enter into after the closing to support certain ongoing services it will provide to the foreign correspondent banking business on a transitional basis. Company A will not have a reimbursement obligation to the extent that the losses result from the improper performance by Company B of its administrative duties. In consideration for Company A assuming this risk participation, Company B will pay Company A a percentage of the basis point spread associated with the risk participated loans, letters of credit and bankers' acceptances during the term for the risk participation. Company A will also have an option (exercisable for a period of approximately 180 days after the closing) to purchase the loans, letters of credit and bankers' acceptances outright, in which event Company A would pay Company B their book value and the related risk participation would terminate.

In our discussion, I referred to Int. #115 in the Premerger Notification Practice Manual (3rd ed.), which addressed whether payments under a recruiting agreement, where a seller is paid to assist in persuading its employees to become employees of the buyer, should be included in determining the "acquisition price" for purposes of the size-of-transaction test. Int. #115 concluded that the consideration paid under the recruitment agreement would not be included in the "acquisition price." Only the value of the consideration for the assets is to be included. Although you did not indicate whether Int. #115 was directly analogous, you did remark that it is analogous to situations in the insurance industry where a buyer pays a seller to assist in transferring a seller's customers to a buyer. As a result, you concluded that the amount paid by Company A to Company B for transferring the customer relationships did not need to be included in the acquisition price for purposes of the size-of-transaction test.

In our subsequent conversation, I referred to informal interpretations from the FTC website that indicated that indemnity reinsurance arrangements did not involve the acquisitions of assets for purposes of the HSR Act. I suggested that these risk participations were analogous to these indemnity reinsurance arrangements in that Company A obligation to pay Company B arises only if Company B requests reimbursement and has complied with its administrative duties (e.g., Company B has not improperly permitted a draw on a letter of credit). You agreed that the risk participations did not need to be considered in determining the reportability of this transaction under the HSR Act.

In our initial conversation, I also referred to Int. #8 in the Premerger Notification Practice Manual (3rd ed.), which addressed whether the acquisition of consumer loans was exempt under Section 7A(c)(1) of the HSR Act. I referred to this interpretation for purposes of analyzing the purchase by Company A of the loan portfolio and indicated that Company B would continue making various types of loans in its other lines of business, although it would no longer be making loans in the foreign correspondent banking business (which is being sold

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to Company A) other than loans to support "transitional" services it will provide to Company A for a period of about 180 days post-closing. You confirmed that the purchase of this loan portfolio in this transaction would be exempt pursuant to Section 7A(c)(1) of the HSR Act. In our subsequent conversation, I referred to Int. #31 in the Premerger Notification Practice Manual (3rd ed.), which stated that the acquisition of an option to acquire assets would not be treated by the Premerger Notification Office as an acquisition of assets, and you confirmed that this remains the position of the Premerger Notification Office.

We then discussed the remaining assets that are being purchased. You pointed out that the value of these assets will be the greater of their fair market value or, if determined and greater, their acquisition price (of course, the value should also include any assumed liabilities). Such value will be the acquisition price for purposes of the size-of-transaction test (and filing fee thresholds).

Accordingly, whether a filing is required under the HSR Act and, if so, the amount of the filing fee will depend on the acquisition price for the assets identified in #2 above without regard to (i) payments for the customer relationships (#1 above), (ii) the acquisition of the risk participation (#3 above) and (iii) the potential payment for the portfolio of loans, letters of credit and bankers' acceptances (#3 above).

Please let me know at your earliest convenience whether the foregoing correctly reflects our conversations and the view of the Premerger Notification Office of the Federal Trade Commission. I can be reached at the phone number or e-mail address listed above. Thank you again for your time and attention.

Very truly yours,

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Agree -
B Michael Verne
9/19/05

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