801.10

[redacted]

[redacted]

September 19, 2007

VIA E-MAIL MVERNE@FTC.GOV

B. Michael Verne, Esq.
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Interpretation of 16 C.F.R. 801.10

Dear Mike:

I write to confirm our telephone conversation of September 13, 2007 and your advice with respect to when an acquisition price for the exchange of voting securities is "determined" for purposes of 16 CFR § 801.10.

In the transaction in question, COMPANY A is privately held and COMPANY B is publicly traded. The parties have structured the transaction as a stock-for-stock exchange, whereby COMPANY A merges with a subsidiary of COMPANY B, and COMPANY A survives as a wholly-owned subsidiary of COMPANY B. COMPANY B acquires 100 percent of the shares of COMPANY A and COMPANY A's shareholders are issued shares of COMPANY B. As we discussed, the Agreement does not contemplate a single fixed ratio for the exchange. There are currently three (3) different classes of COMPANY A shares (Preferred Class A, Preferred Class B, and common). COMPANY A shareholders will be issued preferred and common shares of COMPANY B consistent with the following provisions:

> Conversion of Company A Stock. At the Effective Time, by virtue of the Merger and without any action on the part of Merger Sub, COMPANY B, Company A or the holder of any of the following securities:
>
> Subject to Article II, each share of Series A preferred stock, par value $0.001, of Company A (the "Series A Preferred Stock") issued and outstanding immediately prior to the Effective Time except for shares of the Series A Preferred Stock owned by Company A as treasury stock or owned, directly or indirectly, by Company A or any of its wholly-owned Subsidiaries, shall be converted into the right to receive:
>
> that number of shares of the Series A preferred stock, par value $0.001 per share of COMPANY B (the "COMPANY B Series A Preferred Stock") equal to the quotient of (A) the sum of (1) the $1.00 liquidation preference on such share of Series A Preferred Stock plus (2) all accrued but unpaid dividends on such share of Series A Preferred Stock (collectively, the "Series A Preference"), divided by (B) $55.70; provided that the aggregate number of shares of

[redacted]

[redacted]

11

[redacted]

COMPANY B Series A Preferred Stock issuable pursuant to this Section 1.4(a)(i) shall not exceed 448,833 (the "COMPANY B Preferred Limit"); and

to the extent that the aggregate number of shares of COMPANY B Series A Preferred Stock issuable pursuant to Section 1.4(a)(i) would exceed the COMPANY B Preferred Limit, then, in lieu thereof, any share of Series A Preferred Stock (or portion thereof) that otherwise would have converted into shares of COMPANY B Series A Preferred Stock shall instead convert into that number of shares of the common stock, par value $0.001 per share, of COMPANY B (the "COMPANY B Common Stock") equal to the quotient of (A) the Series A Preference, divided by (B) $4.07.

For the avoidance of doubt, to the extent that the aggregate Series A Preference exceeds $25,000,000, the holders of Series A Preferred Stock shall be allocated shares of COMPANY B Series A Preferred Stock and COMPANY B Common Stock to be issued pursuant to this Section 1.4(a) on a pro rata basis.

Subject to Article II, each share of Series B preferred stock, par value $0.001, of Company A issued and outstanding immediately prior to the Effective Time (the "Series B Preferred Stock"), except for shares of the Series B Preferred Stock owned by Company A as treasury stock or owned, directly or indirectly, by Company A or any of its wholly-owned Subsidiaries, shall be converted into the right to receive:

that number of shares of COMPANY B Series A Preferred Stock equal to the quotient of (A) the $1.00 liquidation preference on such share of Series B Preferred Stock (the "Series B Preference"), divided by (B) $55.70; provided that the aggregate number of shares of COMPANY B Series A Preferred Stock issuable pursuant to this Section 1.4(b)(i) shall not exceed an amount equal to (a) 448,833 minus (b) the number of shares of COMPANY B Series A Preferred Stock issuable pursuant to Section 1.4(a)(i) (the "Junior COMPANY B Preferred Limit"); and

to the extent that the aggregate number of shares of COMPANY B Series A Preferred Stock issuable pursuant to Section 1.4(b)(i) would exceed the Junior COMPANY B Preferred Limit, then, in lieu thereof, any share of Series B Preferred Stock (or portion thereof) that otherwise would have converted into shares of COMPANY B Series A Preferred Stock shall instead convert into that number of shares of COMPANY B Common Stock equal to the quotient of (A) the Series B Preference, divided by (B) $4.07.

For the avoidance of doubt, solely for purposes of calculating the total number of shares of Series B Preferred Stock issued and outstanding immediately prior to the Effective Time, all Deferred B Shares shall be deemed to be issued and outstanding; provided, however, that any shares of COMPANY B Series A Preferred Stock and COMPANY B Common Stock that would otherwise be issuable at the Effective Time pursuant to this Section 1.4 in consideration of such Deferred B Shares shall not be issued and instead, shall be reserved for issuance pursuant to Section 6.21. For the further avoidance of doubt, to the extent that the aggregate Series B Preference (including the Series B Preference on any Deferred B. Shares) exceeds the Series B Remainder, the holders of Series B Preferred Stock shall be allocated shares of COMPANY B Series A Preferred Stock and COMPANY B Common Stock to be issued pursuant to this Section 1.4(b) on a pro rata basis. As used herein, "Series B Remainder" means an amount equal to the product of (i) the Junior COMPANY B Preferred Limit and (ii) $55.70. As used herein, "Deferred B Shares" means any shares of Series B Preferred Stock that either (x) have been issued pursuant to the terms of the Deferred Stock Awards but are still held by Company A or (y) are issuable (but not actually issued) pursuant to the Deferred Stock Awards.

[redacted]

Subject to Article II, each share of common stock, par value $0.001, of Company A issued and outstanding immediately prior to the Effective Time the ("Common Stock"), except for shares of the Common Stock owned by Company A as treasury stock or owned, directly or indirectly, by Company A or any of its wholly-owned Subsidiaries, shall be converted into the right to receive that number of shares of COMPANY B Common Stock equal to the product of (i) the Common Stock Ratio, times (ii) the Remaining COMPANY B Common Stock.

In no event shall COMPANY B be obligated to issue more than 9,064,941 shares of COMPANY B Common Stock pursuant to this Agreement or the Deferred Stock Awards. For purposes of this Agreement, the "Common Stock Ratio" shall mean the quotient of (x) one, divided by (y) the total number of shares of Common Stock (including shares of common stock issuable upon conversion of Series A and Series B Preferred Stock (including any Deferred B Shares)). For purposes of this Agreement, the "Remaining COMPANY B Common Stock" shall mean the difference of (1) 9,064,941 and (2) the number of shares of COMPANY B Common Stock issuable pursuant to Sections 1.4(a) and (b).

All of the shares of Company A Capital Stock converted into the right to receive COMPANY B Capital Stock pursuant to this Article I shall no longer be outstanding and shall automatically be cancelled and shall cease to exist as of the Effective Time, and each certificate (each a "Certificate") previously representing any such shares of Company A Capital Stock shall thereafter represent only the right to receive (i) a certificate representing the number of whole shares of COMPANY B Capital Stock and (ii) cash in lieu of fractional shares into which the shares of Company A Capital Stock represented by such Certificates have been converted pursuant to this Section 1.4 and Article II. Certificates previously representing shares of Company A Capital Stock shall be exchanged for certificates representing whole shares of COMPANY B Capital Stock and cash in lieu of fractional shares issued in consideration therefor upon the surrender of such Certificates in accordance with Article II, without any interest thereon. If, prior to the Effective Time, the outstanding shares of COMPANY B Capital Stock or Company A Capital Stock shall have been increased, decreased, changed into or exchanged for a different number or kind of shares or securities as a result of a reorganization, recapitalization, reclassification, stock dividend, stock split, reverse stock split, or other similar change in capitalization, or there shall be any extraordinary dividend or distribution, an appropriate and proportionate adjustment shall be made to the exchange ratios set forth in Section 1.4(a), Section 1.4(b) and/or Section 1.4(c), as applicable.

Notwithstanding anything in the Agreement to the contrary, at the Effective Time, all shares of Company A Capital Stock that are owned, directly or indirectly, by Company A or any of its wholly-owned Subsidiaries shall be cancelled and shall cease to exist and no stock of COMPANY B or other consideration shall be delivered in exchange therefor.

In discussing these provisions with you, I explained that I had reviewed prior advice letters which stated that an acquisition price will only be considered "determined" for purposes of Section 801.10 if the share exchange is based on a fixed ratio. You confirmed the position of the Premerger Notification Office on this issue remains the same today. I concluded based on the foregoing provisions that the ratio was not fixed and the acquisition price was therefore not "determined" under Section 801.10. Based on my description of these provisions (but without your having read the provisions quoted above), you agreed that the acquisition price is not "determined" for purposes of Section 801.10 and that the proper valuation method is therefore the "fair market value" of the share exchange. The "fair market value" is to be determined in good faith by the board of directors of the ultimate parent entity included within the acquiring person. You advised that COMPANY B, the publicly traded entity, would be considered the acquiring person. Such determination must be made as of any day within 60 calendar days prior to the

[redacted]

filing of the notification required by the act, or, if such notification has not been filed, within 60 calendar days prior to the consummation of the acquisition.

As always, Mike, your guidance on these issues is much appreciated. If I have in any way misstated your conclusions from our conversation, please contact me as soon as possible.

Very truly yours,

[redacted]

Agree
9/20/07