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[redacted]

June 5, 2008

BY ELECTRONIC MAIL
CONFIDENTIAL

Marian Bruno
Associate Director
Premerger Notification Office
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Restricted Stock Units

Dear Ms. Bruno:

We respectfully request that the Premerger Notification Office (the "PNO") reconsider its position on the HSR reportability of restricted stock unit ("RSU") awards to company officers or directors.

For the reasons described below, the vesting of voting shares under RSU awards should be treated as other analogous situations in which acquiring persons acquire voting securities through no act of their own. We are not aware of any authority which suggests that Congress ever intended, or even foresaw, that HSR filing obligations (and their attendant costs and fees) could fall on individual executives and directors (and their companies) when they receive shares under RSU awards. No competitive consequences flow from the awards to people who already manage the company at issue. Not surprisingly, many companies and their executives and directors may not even realize that they should consult HSR counsel before RSUs are awarded or vest.

Background

We are writing on behalf of [redacted]. In 2005 [redacted] was an officer and director of [redacted] At that time, [redacted] awarded to [redacted], in his capacity as an executive officer of [redacted] RSUs in respect of 26,350 shares of [redacted] common stock which vested (or will vest) in four tranches in January 2006, 2007, 2008, and 2009. [redacted] already held at that time, and at all times since, in excess of $50 million (as adjusted) worth of [redacted] common stock. He also satisfied the applicable size-of-person test at that time and at all

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times since. He is no longer an officer of [redacted] but he is still a director. [redacted] has not filed an HSR form to report his acquisition of shares of [redacted] stock pursuant to the RSUs.

In recent years it has become common for companies to award RSUs to employees, officers, and directors as a component of their compensation packages. RSUs represent the right to receive stock at future dates, subject to specified conditions (such as achievement of performance targets or other events). The stock is issued by the company automatically under the terms of the RSUs. RSUs are awarded to officers of public companies either by a compensation committee comprised of a subset of the board of directors or by the full board of directors. Officers cannot serve on the compensation committee, as the compensation committee must be comprised solely of independent directors. The decision to award the 2005 RSUs to [redacted] was initially made by the Compensation Committee in the context of awarding RSUs to all of the executive officers of the company.

In January 2006, the RSUs issued to [redacted] vested as to 10% of the underlying shares and [redacted] received 2,635 shares of [redacted] common stock. [redacted] did not have a filing obligation at that time because he immediately transferred the shares to a family trust under his control. He was aware at that time that the family trust had an existing 10b5-1 plan under which a plan administrator was instructed to sell shares of [redacted] stock held by the family trust automatically if the market price of the [redacted] stock had reached specified thresholds, and [redacted] was aware that the [redacted] stock was trading on the Nasdaq Stock Market in excess of such thresholds. The day after the 2,635 shares were delivered, the plan administrator sold 51,681 shares of [redacted] common stock held by the family trust -- a number much larger than the number of shares that vested in January 2006 and that would vest in January 2007, 2008, and 2009 under the 2005 RSU award.

In January 2007 and January 2008, 5,270 shares and 7,905 shares, respectively, of [redacted] common stock were issued to [redacted] and delivered to his family trust, as the January 2005 RSU award vested in additional tranches. [redacted] did not make a HSR filing before the vesting of either tranche, because he did not realize any such filing could be required. Between the time that he received the RSU award in January 2005 and the most recent vesting of a tranche of the RSUs in January 2008, [redacted] engaged in multiple sales of [redacted] common stock totaling over 1,500,000 shares. During the same period, an aggregate of 15,810 shares have been issued to him pursuant to the RSUs.

RSU Awards Should be Treated Like Other Acquisitions in Which Acquiring Persons Acquire Voting Securities Through No Act of Their Own

Generally, HSR notifications are not required if acquiring persons acquire voting securities through no act of their own. That is why forced or automatic conversions of notes, warrants, or non-voting securities into voting securities are not reportable.

Thus, HSR notifications are not required when a conversion of an instrument to a voting security happens automatically upon the occurrence of triggering events that the acquirors did not know with certainty would occur when they acquired the underlying instrument. In fact, the FTC does not view such occurrences as "conversions" under 16 C.F.R. § 801.1(f)(3). *See, e.g.*, ABA Section of Antitrust Law, *Premerger Notification Practice Manual* (4th ed. 2007) (hereafter, "*Practice Manual*") at Interpretation #156 (if non-voting securities were acquired

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during the issuer's "quiet period," no HSR filing is required when such securities automatically convert into voting securities at an IPO) and June 15, 1999 letter to Richard B. Smith, HSR Informal Interpretation # 9906013 (no HSR filing required when non-voting securities automatically convert into voting securities at an IPO where "no action was being taken by [the acquiring person] to 'convert' the convertible preferred securities, the 'conversion' was beyond its control, and it had not taken the stock in anticipation of the conversion"). *Cf.* October 15, 1990 letter to Marian Bruno, Informal Staff Opinion # 9010004 (no HSR filing required when voting rights were acquired upon the issuer's failure to pay dividends).

In addition, HSR notifications are not required when the issuer, rather than the acquiring person, "forces" a conversion of non-voting securities or another type of instrument into voting securities. *See, e.g,* October 28, 2004 letter to Michael Verne printed on the PNO's website, Informal Staff Opinion 0410012 (no HSR filing obligation arises when an issuer converts notes held by a stockholder into voting securities).

Indeed, this principle led the FTC expressly to exempt from HSR filing requirements "[a]quisitions resulting from a gift, intestate succession, testamentary disposition or transfer by a settlor to an irrevocable trust." 16 C.F.R. § 802.71. The Statement of Basis and Purpose for this section states the following: "The acquisitions exempted by the rule are typically involuntary and without consideration. The Commission believes that the likelihood of an antitrust violation resulting from such an acquisition is significantly less than from cases in which an acquiring person actively seeks to purchase assets or voting securities." 43 *Federal Register* at 33505 (July 13, 1978).

The "likelihood of an antitrust violation resulting from" the vesting of shares under an RSU award to a company officer or director is much less than the likelihood of an antitrust violation resulting from a gift, transfer by a settlor to an irrevocable trust, or a forced or automatic conversion of an instrument into voting securities – all non-reportable acquisitions. This is because the latter acquisitions may in fact involve acquisitions by third parties who may not even be current stockholders of the acquired issuer, whereas RSU awards to employees, officers, or directors are awards to the individuals who already manage the company at issue.

A conclusion that RSU grants and the subsequent vesting of shares under such grants to a company's officers or directors are not reportable would not require any amendment to the HSR rules, would be consistent with how the PNO treats other "involuntary" acquisitions of voting securities, and would be consistent with the underlying policies of the HSR Act because there is virtually no risk of an antitrust violation flowing from an officer's or director's acquisition of shares of his or her own company. Moreover, a contrary position has resulted, and will continue to result, in unintended technical violations of the HSR Act and a needless waste of public and private resources. Many companies and their management simply do not know that they should consult with HSR counsel before awarding RSUs, or before such RSUs vest.

Even if the PNO is not prepared at this point to conclude that RSU grants and the subsequent vesting of the underlying shares are not reportable, we respectfully request an opinion from the PNO that [redacted] did not in fact miss reporting obligations in January 2007 and January 2008 when certain shares under the 2005 RSU award vested. We emphasize that [redacted]s net stake in AEI declined significantly between the 2005 RSU grant and the vesting that occurred in January of 2007 and 2008. Moreover, the vesting of shares under the 2005 RSU

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award is analogous to the other categories of "involuntary" acquisitions described above which are non-reportable.

We appreciate your consideration of the issues raised above and are happy to discuss them with you and answer any questions you may have.

Sincerely,

[redacted]

cc: Mike Verne, FTC Premerger Notification Office

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We don't think that restricted stock units that vest on a date certain in the future are sufficiently different from stock options that are exercised by an executive to warrant a change in policy for this particular class of acquisition.

BM
6/10/08

M. BRUNO CONCURS