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William E. Morley, Esq.
Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
450 Fifth Street, N.W.
Judiciary Plaza
Washington, D.C. 20549

Re: Section 16 of the Securities Exchange Act of 1934 (the "Exchange Act")

Dear Mr. Morley:

This letter amends and restates my letters of April 26, 1991, May 14, 1991 and November 22, 1991 wherein I requested interpretive advice regarding the term "derivative securities" under Rule 16a-1(c), promulgated by the Securities and Exchange Commission (the "Commission") on February 8, 1991, as published in Release No. 34-28869 (the "Release"). I would appreciate receiving the Commission's general interpretive advice with respect to the situations set forth below concerning the issue of when a right becomes a derivative security. I believe that such advice would be of interest to the various clients of my firm who have a class or classes of equity securities registered pursuant to Section 12 of the Exchange Act.

Each of the situations assumes that (a) the issuer has in effect a stock option plan (the "Plan") that provides for the grant of options to, among others, employees of the issuer; (b) the Plan states that the Board of Directors of the issuer, or a committee appointed by the Board, in its sole discretion, shall determine the individuals to whom options are to be granted, the number of shares covered by the option, the period during which the option is exercisable and the option price per share, in each case taking into consideration, among other factors, the nature of employment, annual compensation and present and potential contribution of the person to the success of the issuer; (c) options granted under the Plan are subject to termination in the event of cessation of employment but are not otherwise subject to revocation; and (d) the Plan does not provide for any particular grants.

A. An option to purchase 100,000 common shares of the issuer was granted to an officer thereof on January 1, 1991 pursuant to the provisions of the Plan. At the time of the grant, the Plan did not meet the requirements for an exemption pursuant to then existing Rule 16b-3. The exercise price was fixed on the date of the grant at $5 per share, such price being equal to the fair market value of the issuer's common shares on the date of grant. The option expires five years from the date of grant, and is exercisable to the extent of 25,000 shares each as of April 15, 1992, 1993, 1994 and 1995. The respective 25,000 share installments are not exercisable in the event the issuer's earnings for the prior fiscal year do not meet a certain threshold. For example, the right to purchase the 25,000 shares effective with each April 15 anniversary date could be dependent upon the issuer having net income, or a certain level of net income, for the prior fiscal year. Thus, if the threshold were met for the first fiscal year, the entire 25,000 share installment would be exercisable until five years from the date of grant. If the threshold were not met, no shares would be exercisable with respect to such anniversary date. Each following fiscal year and anniversary date, separate determinations would be made as to whether the 25,000 share annual installment were exercisable.

The Release indicates, in Section III.D. thereof, that a grant of a derivative security is a reportable event, "whether or not the derivative security is presently exercisable." In addition, as indicated in the Note to Rule 16b-3, neither the vesting of the right to receive a security nor the lapse of restrictions relating to a security is a transaction subject to Section 16. Consequently, it is our view that the option granted to the officer would be reportable as the acquisition of a derivative security as of the date of grant as to the maximum number of shares exercisable during the entire term of the option (i.e., the 100,000 shares) and that each annual determination as to whether the 25,000 share installment is exercisable should be considered a non-event. The basis for this view is that such annual determination does not represent the acquisition of a right affording the insider an opportunity to profit. Such right arose at the time of the determination of the exercise price. The only unknown element is the number of shares eligible for purchase each year, a factor which should not distinguish this option from a more conventional option where, due to vesting requirements, its ultimate exercisability is often not known at the time of grant. In such a conventional option circumstance, it is clear that a derivative security for the full number of shares subject to the option is acquired as of the grant date, notwithstanding that a portion or all of such option is not then exercisable and may, in fact, never be exercisable. If the annual determination of the number of shares subject to a fixed price option were deemed to be the date upon which the optionee acquired a derivative security, the holder would risk Section 16(b) liability if he sold shares during the period extending six months before and after the date of each annual earnings determination, effectively precluding him from the market for a substantial period of time.

B. Would the Commission's answer to part A be different if, instead of being subject to forfeiture in its entirety, the 25,000 share option installment were subject to adjustment in that the number of shares as to which the option could be exercised would be adjusted downward in proportion to the amount by which actual earnings fell short of a target number? In the example discussed in part A above, the option to purchase 25,000 shares on each April 15 anniversary date either would remain intact if the threshold were met as to the prior fiscal year, or would be forfeited in its entirety if not met. In the situation referred to in this part B, the option to purchase the 25,000 shares would be reduced proportionately to the extent the threshold was not met. For example, the option would be reduced one share for each $100 that net income was less than $2,500,000 for the prior fiscal year. In the event there were no earnings for the year, the full option to purchase the 25,000 share installment would be forfeited. Again, separate annual determinations would be made as to each 25,000 share installment.

We view the situation set forth above in this part B as substantially similar to the situation described in part A. In the part A scenario, the fact that the option is subject to forfeiture based on the level of the issuer's earnings should not change the result that the option should be reported as of the date of grant and not as of the vesting date. In the situation set forth in part B, the condition of forfeiture is variable but the range of possible results is limited to the results which could occur in the first situation (i.e., either the right to purchase no shares or the full 25,000 shares). The possibility of a partial forfeiture should not affect the treatment of the option grant under the rules since on the date of grant the officer had the conditional option to purchase shares at a fixed exercise price.

C. Would the Commission's answer to part A be different if, instead of fixing on the grant date the maximum number of shares subject to the option, the number of shares, if any, which may be purchased is to be determined on an annual basis over a period of years pursuant to a formula based upon the issuer's earnings? Consequently, neither the actual nor the maximum number of shares that may be purchased can be ascertained until audited financial statements have been released for the relevant fiscal year. As an illustration of the foregoing, on January 1, 1991, the officer was granted an option to purchase such number of common shares of the issuer as shall equal the dollar amount of 1% of the issuer's net income for each of the following four years. The exercise price for any options which may be exercisable was fixed on the date of grant at $5 per share. If the issuer does not have net income for any of the years ended December 31, 1991, 1992, 1993 or 1994, the officer will have no right to purchase any shares pursuant to the option. If, however, for example, the issuer had net income of $2,500,000 for the year ended December 31, 1991, the officer would have the right to purchase 25,000 common shares (1% of $2,500,000) at an exercise price of $5 per share. Pursuant to the option grant, such option would expire five years from the date of initial grant. Again, separate determinations would be made as to each fiscal year.

Rule 16a-1(c), clause (6), excludes from the definition of derivative securities "rights with an exercise or conversion privilege at a price that is not fixed" but does not address the converse situation present here, where the exercise price is fixed but the number of shares, if any, which can be purchased is not known until the occurrence of a future event.

We view the facts set forth in this part C as similar to those set forth in parts A and B. In each case, the exercise price is fixed on the grant date and the determination of the number of shares to be exercisable is subject to, and based upon, the issuer's earnings for the prior fiscal year. In fact, in each of the situations presented in parts A, B and C, if the issuer's net income for the first fiscal year was $2,500,000, the officer would be entitled to purchase 25,000 common shares and if the issuer did not have earnings for such fiscal year, no shares could be purchased based upon such results. The only difference in part C is the elimination of a cap on the number of shares subject to the option. However, as discussed above, since the potential for speculative abuse exists at the time of option grant (when the exercise price is fixed), such distinction should not lead to a different result. Moreover, by simply placing a high cap subject to reduction (per part B), an issuer could accomplish the result provided for in part C without following the part C format. We believe that form over substance should not be controlling. Accordingly, we are of the view that the option described in part C, as in parts A and B, should be deemed a derivative security upon the initial option grant and that the annual determination of the number of shares, if any, subject to the option should not be a Section 16 event.

D. Would the Commission's answer to part A, B or C of this question be different if the option were:

(a) granted before May 1, 1991 under a plan complying with the then existing Rule 16b-3 requirements for an exemption;

(b) granted on or after May 1, 1991 (and prior to September 1, 1992) under a plan complying with the pre-May 1, 1991 Rule 16b-3 requirements for an exemption where the issuer has elected to rely on such pre-May 1, 1991 Rule 16b-3 requirements;

(c) granted on or after September 1, 1992 under a plan complying with the current Rule 16b-3 requirements for an exemption;

(d) granted on or after September 1, 1992 under a plan which does not comply with the current Rule 16b-3 requirements for an exemption; or

(e) exercisable for a period of five years commencing with the date of the report of the issuer's independent certified public accountants with regard to the subject fiscal year instead of commencing with the date of initial grant?

It is our view that, with regard to questions (a) through (d), since the issue relates to current Rule 16a-1(c) and not current Rule 16b-3, the reasoning set forth above applies equally to each of the circumstances described therein. As to question (e), we believe that the fixing of the actual expiration date at a later time should not result in a different conclusion since, as discussed above, the potential for speculative abuse occurs at the time the exercise price is fixed.

If you have any questions regarding this letter, please call the undersigned collect at (516) 296-7048. Thank you for your consideration of this matter.

Very truly yours,

Fred Skolnik

FS/lc