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June 5, 1973

Financial Accounting Standards Board
High Ridge Park
Stamford, Connecticut 06905

Attention: Mr. Marshall Armstrong, Chairman

Restrictions on Resales of Stock
Issued in Poolings of Interest Transactions

Gentlemen:

We are writing to urge the Board to reconsider the apparent position of the American Institute of Certified Public Accountants that Accounting Principles Board Opinion No. 16 precludes accounting for an acquisition as a poolings of interest if the acquiring corporation imposes restrictions on resales of its common stock that go beyond requirements of applicable securities or other laws. We believe it is consistent with A.P.B. 16 and in the best interests of an acquiring corporation and all its stockholders, as well as the stockholders of the acquired corporation, to permit reasonable restrictions on resales which may go beyond the technical requirements of the securities laws, if such restrictions are imposed to maintain an orderly market for the acquiring corporation's common stock and to encourage the owner-managers of the acquired company to retain an equity interest in the combined entity for a reasonable period of time after the acquisition.

We have several clients engaged in acquisition programs in which they have made and intend to make a number of acquisitions of smaller, usually privately-owned businesses on a stock for stock exchange basis which they wish to account for on a poolings of interest basis. Because of the large number of shares being issued in such transactions relative to the public "float" (one client has issued nearly 50% of its outstanding shares of common stock in acquisitions effected in the past 18 months), there is a strong desire on the part of the issuing corporation to not have such shares resold in a disorganized fashion which could adversely affect the market price for its common stock and cause undue declines in the value of the stockholdings of all the corporation's stockholders, including those who become stockholders via acquisitions. Also, the owner-managers of an acquired business typically continue to operate the business after acquisition, and the acquiring corporation has a legitimate interest in such persons' retaining an equity interest in the combined entity for a reasonable period after acquisition. Consequently, the acquiring corporation and the stockholders of a company to be acquired should be permitted to negotiate, at arm's length, reasonable provisions in the acquisition agreement which permit the acquiring corporation to require that resales be made in an organized manner through responsible securities dealers and limit the number of shares which may be sold in specified periods. An example of a provision which we would consider reasonable would be an agreement that public resales will be made only pursuant to a prospectus which the acquiring corporation agrees to provide at least annually, that the acquiring corporation may require that such sales be made in an "organized secondary" or underwritten public offering, and that not more than 20% of the stock received may be sold in each of the five years following acquisition (on a cumulative basis). Private resales or gifts would be permitted, subject to the right of the issuer to require that such transferees abide by the same resale provisions.

Such reasonable restrictions on resale are consistent in our judgment with the requirement of paragraph 47b of A.P.B. 16 that the acquiring corporation issue common stock with rights "identical" to those of the majority of its outstanding voting common stock. The rights referred to in that paragraph should be interpreted to mean those rights which the applicable state corporation statutes or the governing instruments of the issuing corporation provide with respect to common stock, such as voting rights (which are specifically covered by paragraph 47f) and dividend and liquidation rights. Such rights are the basic concerns of all stockholders, and are readily ascertainable from the statutes and charter and by-laws of the corporation. To include the ability to resell shares in the rights which must be "identical" could be an administrative nightmare. It is usually the case that all shares other than those registered with the Securities and Exchange Commission and issued in public offerings have or have had restrictions upon their resale imposed by securities laws, such as those imposed (both before and after the adoption of Rule 144 by the SEC) on resale of shares issued in reliance upon a private placement exemption from registration and restrictions on distributions of shares held by controlling persons. In addition, shares issued prior to the current interpretations of poolings requirements or in purchase transactions frequently are restricted as to resales by contract with the issuer. The logical extreme of including resale restrictions in the rights which must be identical would be to require an issuer to survey the status of all its outstanding shares of voting common stock, and if a majority of such shares were restricted, to similarly restrict shares issued in an acquisition it wished to account for as a poolings -- not only a foolish result, but impossible because existing resale restrictions differ as to type and expiration.

We recognize that the "continuity of interests" interpretation of Accounting Release Bulletin No. 48, whereby restrictions on resales were <u>imposed</u> on recipients

of stock issued in acquisitions accounted for as poolings, were specifically rejected in A.P.B. 16 (although SEC Accounting Series Releases Nos. 130 and 135 seem to constitute a partial resurrection of the old rules). We are not asking that the old rules be reimposed, but only that acquiring corporations and the stockholders of acquired corporations with legitimate interests in orderly resales be permitted to negotiate reasonable resale restrictions that may technically go beyond requirements imposed by law without defeating poolings accounting.

In view of the A.I.C.P.A. interpretations, the SEC, New York Stock Exchange and independent accountants have been raising questions concerning the propriety of poolings accounting where such resale restrictions are imposed. As our clients are currently negotiating acquisition agreements and would like to include reasonable restrictions and account for the acquisitions on a poolings basis, we would appreciate your letting us know as soon as possible whether you agree with our position. If you need further information in your consideration of this request, please feel free to telephone the undersigned collect at 312-263-1131.

Very truly yours,

BELL, BOYD, LLOYD, HADDAD & BURNS

By JHB
John H. Bitner

JHB/ks
copy to: Mr. J. T. Ball ✓