UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
CORPORATION FINANCE

February 10, 1999

Louis Rorimer
Jones, Day, Reavis & Pogue
Northpoint
901 Lakeside Avenue
Cleveland, OH 44114

Re: American Bar Association

Dear Mr. Rorimer:

In regard to your letter of January 20, 1999, our response thereto is attached to the enclosed photocopy of your correspondence. By doing this, we avoid having to recite or summarize the facts set forth in your letter.

Sincerely,

Catherine T. Dixon

Catherine T. Dixon
Chief Counsel

American Bar Association
Section of Business Law
Committee on Federal Regulation of Securities
Subcommittee on Employee Benefits, Executive Compensation and Section 16

January 20, 1999

99 FEB -9 AM 11:07

Catherine T. Dixon, Esq.
Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Re: Section 16 of the Securities Exchange Act of 1934

Dear Ms. Dixon:

On behalf of the Subcommittee on Employee Benefits, Executive Compensation and Section 16 of the American Bar Association Section of Business Law's Federal Regulation of Securities Committee, we are writing to request the staff's views on several questions of general applicability relating to the rules under Section 16 of the Securities Exchange Act of 1934 ("1934 Act").

1. Availability of Rule 16b-3 for Transactions Involving Subsidiaries

Rule 16b-3 provides a series of exemptions for transactions "between the issuer (including an employee benefit plan sponsored by the issuer)" and its directors and officers. The term "issuer" is not defined in the rules under Section 16, and Rule 16b-3 is silent on whether the rule is broad enough to include transactions effected through subsidiaries of the issuer.

Many issuers conduct all or a part of their business through subsidiaries. For a variety of operating and tax reasons, issuers often choose to maintain employee benefit plans at the subsidiary level. As Rule 16a-1(f) makes clear, officers of subsidiaries can be officers of the issuer if they exercise significant policy making functions. The employee benefit plans in which they participate often make awards that involve an "equity security of such issuer" within the meaning of Rule 16a-1(d). Several examples include:

- A deferred compensation plan maintained by a subsidiary that permits participants to defer amounts into phantom stock of the issuer-parent;
- A 401(k) plan sponsored by the subsidiary that permits participants to invest in common stock of the issuer-parent; and
- A stock option plan maintained by a subsidiary in which common stock of the issuer-parent is made available to the subsidiary to satisfy the exercise of options.

The above examples are not meant to be exhaustive. Other situations raising the same considerations include acquisitions or dispositions of issuer stock by a subsidiary from or to an officer or director of the issuer.

We are seeking interpretive advice that the term "issuer" in Rule 16b-3 includes subsidiaries of which the issuer is a greater than 50% owner. Although it appears that the staff has not addressed the availability of Rule 16b-3 for transactions through any type of subsidiary under either the current or former versions of Rule 16b-3, we believe that where the issuer has a majority ownership interest, it effectively controls the subsidiary and can treat it as its alter ego. In such situations, we are not aware of any policy reason why Rule 16b-3 should not be available. Moreover, such an interpretation would be consistent with the staff's position in *Chadbourne & Parke* (January 10, 1992), in which it was held that the term "issuer" encompasses direct or indirect majority owned subsidiaries for purposes of the exclusion from the definition of derivative securities provided in Rule 16a-1(c)(5) for interests in employee benefit plans.

We believe that the manner in which an issuer elects to structure its operations should not be relevant to the availability of the Rule 16b-3 exemption. If majority-owned subsidiaries were included within the term "issuer" for purposes of the Rule 16b-3 exemption, the transactions effected through such subsidiaries for which an exemption is sought would still (i) involve issuer securities, (ii) be subject to the issuer's ultimate control, (iii) not involve any market participants on the other side of the transaction, and (iv) need to meet the transaction-specific requirements *(e.g.,* approval by the board of directors or a committee) of the rule. Accordingly, we ask that you confirm that transactions with a subsidiary that is more than 50% owned by the issuer, or a benefit plan sponsored by such a subsidiary, are eligible for exemption under Rule 16b-3.

2. Excess Benefit Plans Under Rule 16b-3

a. Benefits Lost due to Code Section 401(a)(17) Limit

Rule 16b-3(b)(2) defines an "excess benefit plan" as a plan that is operated in conjunction with a qualified plan and provides only the benefits or