JAN 12 1993

Our Ref. No. 92-669-CC
Robertson, Stephens & Company
File No. 8-23192

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

By letter dated January 8, 1993, you request assurance that the staff would not recommend enforcement action to the Commission under the Investment Company Act of 1940 (the "1940 Act") if, as more fully described in your letter, Robertson, Stephens & Company ("Robertson Stephens") implements a custodial receipt program involving cumulative convertible preferred stock (the "Preferred Stock") without registering the program as an investment company under the Investment Company Act.

Your letter states that approximately seven issuers would privately place substantially identical Preferred Stock with a group primarily composed of institutional investors. 1/ Each issuer participating in the custodial receipt program would be a company with a publicly traded class of securities registered under Section 12 of the Exchange Act. The Preferred Stock would be offered together such that each purchaser in the private placement would purchase Preferred Stock issued by each issuer in the program in proportion to the aggregate face amount of the Preferred Stock sold by the issuer through the program. Each share of Preferred Stock would be convertible at any time at the option of the holder into the common stock of the issuer of the Preferred Stock. Although the shares of Preferred Stock would be offered together, holders could break up the package, and sell or convert individual shares, at any time.

Each Preferred Stock would automatically convert into the common stock of its issuer if, at any time after three years and prior to six years from the date of issuance of the Preferred Stock, the weighted average per-share market price of the common stock of the participating issuers increased to at least 125% of the weighted average per-share conversion price. After six years from the date of issuance of the Preferred Stock, each issuer's Preferred Stock would convert into common stock of its issuer if the per-share market price of that particular issuer's common

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1/ You state that the debentures would be issued in a private placement exempt from registration pursuant to Section 4(2) of the Securities Act of 1933 (the "1933 Act"). We provide no opinion as to whether the terms of the placement you describe would conform to the requirements of Section 4(2).

stock exceeded 125% of the conversion price of that issuer's Preferred Stock.

The Preferred Stock issued pursuant to the program would be deposited with a commercial bank serving as a custodian, which would issue to each investor a receipt or receipts. Each receipt would represent at least one particularly identified share, or fraction thereof, of Preferred Stock issued by each of the participants in the program, and in no event would more than one investor have an ownership interest in any share, or fraction thereof, of Preferred Stock. Each investor would be free at any time to present its receipts to the custodian and receive in exchange the corresponding Preferred Stock. A holder of the Preferred Stock represented by a receipt would in all respects have the same rights as would a holder of the receipt. The automatic conversion features of the Preferred Stock would apply whether or not the Preferred Stock had been removed from the receipt program and individual shares sold or converted by a holder.

The Preferred Stock would be transferable primarily under the terms of rule 144A under the 1933 Act. Transfer of the receipts also would take place primarily under the terms of rule 144A.

The role of the custodian with respect to the program would be purely ministerial. The primary duties of the custodian would be to hold the Preferred Stock and to maintain records of the holder of each receipt and the Preferred Stock underlying each receipt. The custodian would also act as transfer agent to register transfers of the receipts and the underlying Preferred Stock. It might also act as a conduit for payments to holders of the Preferred Stock. The custodian also might be used as a conduit for delivery of the shares issued upon conversion of Preferred Stock to the holders of the Preferred Stock.

On the basis of the facts and representations contained in your letter, we would not recommend enforcement action to the Commission under the 1940 Act if Robertson Stephens implements the custodial receipt program described in your letter without registering it as an investment company. This conclusion is based in particular on your representations that: 1) each receipt will represent the entire and undivided ownership interest in discrete underlying shares of Preferred Stock, and holders of receipts will be permitted to withdraw the underlying Preferred Stock from the receipt program at any time, subject to no more than a moderate transaction fee; 2/ 2) after withdrawing shares

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2/ Telephone conversation between Gregory Priest, counsel for Robertson Stephens, and the undersigned on December 29,

(continued...)

of Preferred Stock from the receipt program, owners will be able to sell or convert individual shares of Preferred Stock at any time; 3) each holder's ownership interest in particular shares of Preferred Stock will be identified and recorded by the custodian; 4) each holder will have the right, upon default in payment or other default on one or more of the underlying shares of Preferred Stock, to proceed directly and individually against the issuer of the shares represented by the receipt, and is not required to act in concert with other holders or with the custodian; 5) the custodian will perform only clerical or ministerial services in connection with the program; 6) the custodian will undertake to notify receipt holders in the event of a default with respect to the Preferred Stock, and to forward to receipt holders copies of all communications relating to any default with respect to a share of Preferred Stock; 7) the Preferred Stock underlying the receipt will not be considered the assets of the custodian or of Robertson Stephens; and 8) the custodian will be a bank. 3/

Our position is based particularly on the representations and undertakings set forth above. Because this position is based on the facts and representations in your letter, you should note that any different facts or representations may require a different conclusion. Further, we emphasize that this response expresses the Division's position on enforcement action only, and does not purport to express any legal conclusions on the questions presented or acceptance of your legal analysis. In particular, we believe that the receipts created by the program may be separate securities under the Securities Act of 1933.

We have considered your request for confidential treatment of your letter and our response for a period of 60 days from the date of our response. 4/ We have determined that your request is reasonable and appropriate under 17 CFR 200.81(b). Accordingly, your letter and our response will not be made public until the earlier of March 13, 1993 or the date that information regarding

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2/(...continued)
1992.

3/ Compare CRT Government Securities, Ltd. (pub. avail. Aug. 4, 1992); Bear Stearns & Co., Inc. (pub. avail. Jan. 28, 1992); Merrill Lynch, Pierce, Fenner & Smith Inc. (pub. avail. Sept. 6, 1990).

4/ In a telephone conversation with the undersigned on January 12, 1993, Gregory Priest, counsel for Robertson Stephens, stated that Robertson Stephens requested that its letter and the staff's response be given confidential treatment for 60 days, and not for the 120 days requested in Robertson Stephens' no-action request.

the proposed transaction is made public in any fashion. Please inform this office immediately if information regarding the program is made public in any fashion prior to the expiration of the 60 day period.

E. Nathans

Eli Nathans
Special Counsel

WILSON, SONSINI, GOODRICH & ROSATI
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COUNSEL

ACT INVESTMENT COMPANY ACT
SECTION 3 (a)
RULE
PUBLIC AVAILABILITY MARCH 13TH 1993

Investment Company Act of 1940-- Section 3

January 8, 1993

VIA FEDERAL EXPRESS

Thomas S. Harman
Associate Director and General Counsel
Division of Investment Management
Securities and Exchange Commission
450 5th Street, N.W.
Judiciary Plaza
Washington, DC 20549

Re: No-action Request Concerning BioBonus™ Program -- Confidential Treatment Requested, Original Letter Dated November 13, 1992, Supplemental Letter Dated December 18, 1992

Dear Mr. Harman:

As we discussed with you in our telephone conversation earlier today, we are writing on behalf of our client Robertson, Stephens & Company ("RS&Co") and the Issuers (as defined below) in a proposed convertible preferred stock program (the "BioBonus™ Program") to provide you information relating to certain changes to the BioBonus™ Program from the description provided in our original letter to you of November 13, 1992 (the "Original Letter") and our supplemental letter to you of December 18, 1992 (the "Supplemental Letter" and, together with the Original Letter, the "Previous Letters").

As we discussed in the above-referenced telephone conversation, in response to concerns expressed by the Staff of the Division of Investment Management (the "Staff"), we are modifying the BioBonus™ Program to eliminate the requirements, discussed in the Previous Letters, that for six years following the closing of the sale of the Preferred (as defined below) a holder may not convert or sell one Issuer's Preferred without simultaneously converting or selling a proportionate amount of each other Issuer's Preferred. Accordingly, there will be no restrictions on a holder's ability to convert or sell shares of one Issuer's Preferred either alone or along with the shares of the other Issuers' Preferred (subject to compliance with applicable securities laws).

You have also requested that we provide a complete restatement of the terms of the BioBonus™ Program as described in the Previous Letters and modified as described above, and our legal analysis of the issues raised by the proposed structure. In this letter, we have therefore provided a restated description of the BioBonus™ Program and our legal analysis of the issues under the Investment Company Act of 1940, as amended (the "Investment Company Act") raised by the BioBonus™ Program. The description of the BioBonus™ Program and the legal analysis in this letter therefore supersede the description and analysis in the Previous Letters.

We respectfully request that you confirm that the Division of Investment Management will not recommend that the Commission take any enforcement action under the Investment Company Act against RS&Co, any Issuer or any other person or entity if the BioBonus™ Program (in the revised form described in this letter) is implemented without any registration of an investment company under the Investment Company Act.

The BioBonus™ Program

Issuers participating in the BioBonus™ Program would issue in private placements primarily to institutional investors cumulative convertible preferred stock (the "Preferred"). RS&Co, a registered broker-dealer under Section 15(b) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), would act as best efforts private placement agent in connection with the sale of the Preferred. Additional registered broker-dealers may also act as placement agents. The Preferred would be deposited with a commercial bank as custodian (the "Custodian") that would issue depositary receipts (the "Receipts") to each investor.

RS&Co anticipates that approximately seven issuers (the "Issuers") would participate in the BioBonus™ Program by privately placing varying amounts of Preferred (approximately $20 to $40 million per Issuer) and that the aggregate amount raised in the private placements would be approximately $200 to $250 million. Each Issuer participating in the BioBonus™ Program would be a company with a publicly-traded class of securities registered under Section 12 of the Exchange Act. Each Issuer would issue substantially identical Preferred in private placements to a group primarily composed of institutional investors. The Preferred would be offered together such that each purchaser in the private placement would purchase Preferred issued by each Issuer in the BioBonus™ Program in proportion to the aggregate amount of Preferred sold by such Issuer. Thus, for example, if the amount of Preferred issued by one participating Issuer constituted twelve percent of the total amount of Preferred issued pursuant to the BioBonus™ Program, twelve

percent of each investor's purchase would consist of that Issuer's Preferred.

As a convenience for holders of the Preferred, the Preferred issued pursuant to the BioBonus™ Program could in the investor's discretion be deposited with the Custodian, which would issue to each investor a Receipt or Receipts. Each Receipt would represent at least one particular identified Preferred certificate issued by each of the participants in the BioBonus™ Program, and in no event would a Receipt evidence a partial interest in any particular Preferred certificate. Each investor would be free at any time to present its Receipt(s) to the Custodian and receive in exchange the specific corresponding Preferred certificates, and a holder of a Receipt would in all respects have the same rights as would a holder of the underlying Preferred represented by the Receipt.

The role of the Custodian with respect to the BioBonus™ Program would be purely ministerial. The primary duties of the Custodian would be to hold the Preferred and to maintain records of the holder of each Receipt and of the Preferred underlying such Receipt. The Custodian would also act as transfer agent to register transfers of the Receipts and in some cases of the underlying Preferred. It is possible that, for administrative convenience, the Custodian would also be designated as paying agent for the issuers of the Preferred. In such role, the Custodian would act as a conduit for payments of dividends to the holders of the Preferred by receiving cash from each Issuer in trust for holders of the Preferred on each date for the payment of dividends and would immediately disburse such cash to the holders of the underlying Preferred as provided in the terms of the Certificate of Designation of Rights, Preferences, Privileges and Restrictions (the "Certificate of Designation") with respect to each Preferred that the Issuer of such Preferred would file with the secretary of state of its jurisdiction of incorporation. This role would be administrative only. Upon conversion of the Preferred, the Custodian may be used as a conduit between the Issuers and the holders of the Preferred for the delivery of securities issuable upon conversion of the Preferred to the holders of such Preferred.

Each Issuer would authorize its Preferred pursuant to the terms of a separate Certificate of Designation defining the rights, preferences and privileges of that Issuer's Preferred. Each Preferred issued by a participating Issuer in the BioBonus™ Program would be substantially identical to each other Preferred, with the exception that each Preferred would be solely the obligation of, and be convertible into the Common Stock of, its Issuer. Each Preferred would be convertible at any time at the option of the holder into the common stock of the Issuer of that

Preferred. In addition, each Preferred would automatically convert into Common Stock of its Issuer if, at any time after three years and prior to six years from the date of issuance of the Preferred, the weighted average per-share market price of the common stock of the participating Issuers (such weighting to be performed based upon the amount of Preferred issued by each Issuer) increased to at least 125% of the level of the weighted average per-share conversion price. For example, if the aggregate conversion price of a basket including a proportionate number of shares of common stock of each of the participating Issuers were $1,000, and subsequent to three years following the issuance of the Preferred the aggregate value of the basket of shares of common stock exceeded $1,250, then at that point all of the Preferred would automatically convert into the common stock of their respective Issuers. After six years from the date of issuance of the Preferred, each Issuer's Preferred would convert into the common stock of its Issuer if the per-share market price of that particular Issuer's common stock exceeded 125% of the conversion price of that Issuer's Preferred.

Resales of the Preferred and the Receipts would be accomplished primarily through Rule 144A. Each Issuer would covenant with the purchasers of its Preferred to make available information about such Issuer necessary to make Rule 144A available to holders of the Preferred for resales of the Preferred and the Receipts representing the Preferred to qualified institutional buyers, subject to the limitations on such resales discussed below.

Because the Preferred would be offered privately primarily to institutions, RS&Co does not anticipate that the initial number of holders would exceed 100. However, trading of the Preferred under Rule 144A could result in the number of holders of Preferred at a particular point subsequent to the initial private placement aggregating more than 100. Because RS&Co believes that investors would have concerns about artificial limits on the ability of a holder of Preferred to resell such Preferred in reliance on Rule 144A, the BioBonus™ Program as currently contemplated could not be operated in reliance on the exemption from registration under the Investment Company Act set forth in Section 3(c)(1) thereof.

Legal Analysis

In three recent no-action letters, the Division of Investment Management (the "Division") has applied substantially identical analyses to the question whether programs similar to the BioBonus™ Program required registration of an entity pursuant to the Investment Company Act. See CRT Government Securities, Ltd. (available August 4, 1992); Bear, Stearns & Co., Inc.

(available January 28, 1992); and Merrill Lynch, Pierce, Fenner & Smith Incorporated (available September 6, 1990).

Each of these letters also requested the confirmation of the Division of Corporation Finance that the instruments involved could be issued without registration under the Securities Act of 1933, as amended (the "Securities Act"). As the Preferred involved in the BioBonus™ Program would be issued in private placements exempt from registration pursuant to Section 4(2) of the Securities Act, we are not requesting any such confirmation.

In each of the above-referenced letters, the response of the Commission's Staff focused primarily on the three factors that are discussed below:

1. Each Holder of a Receipt Must Have all of the Rights and Privileges of a Holder of the Preferred.

As discussed above, the Receipts represent a convenience only. Each holder of a Receipt would have precisely the same rights and privileges as a holder of the Preferred that underlie the Receipt, and a holder of a Receipt would have no rights in addition to those of a holder of the Preferred. Indeed, a holder of a Receipt could, at any time, exchange such Receipt for the particular Preferred represented by that Receipt. The holder could then convert or sell any shares of Preferred that it wished, subject to compliance with applicable securities laws.

2. Each Receipt Holder, as a Real Party in Interest, Must Have the Right, upon Default in Payment of Dividends on One or More Underlying Preferred, to Proceed Directly and Individually Against the Issuer of the Preferred Represented by Such Receipt.

Each Receipt holder would have the same right to proceed against each Issuer of a Preferred upon default in payment of dividends or any other obligation as any holder of that particular Preferred.

3. A Receipt Holder Shall Not be Required to Act in Concert with Other Receipt Holders or the Custodian.

As discussed in response to (2) above, each holder would be entitled to proceed against the Issuer of each Preferred in the same manner as such holder would be entitled to proceed against the Issuer of any other standard cumulative convertible preferred stock. Holders would be entitled to vote their shares of Preferred of each Issuer along with other stockholders, but no concerted action with other Receipt holders or the Custodian would be required.

The above-referenced no-action letters have also identified the following six additional factors relevant to the inquiry:

1. Each Receipt Must Evidence an Entire and Undivided Ownership Interest in Each Preferred Certificate.

As discussed above, each Receipt would evidence an entire and undivided ownership interest in at least one Preferred certificate of each issuer, and no investor would receive a partial interest in any certificate representing shares of Preferred. The Custodian would maintain a record of the particular Preferred underlying each Receipt, and each holder of a Receipt would be entitled to exchange it for the particular underlying Preferred certificates represented by such Receipt at any time.

2. The Custodian Must Perform Only Clerical Administrative Services on Behalf of Each Preferred Holder.

The principal role of the Custodian would be to hold the Preferred and to maintain a record of the holders of the Receipts and of the Preferred underlying each Receipt. In addition, the Custodian would act as transfer agent with respect to transfers of the Receipts and in some cases of the underlying Preferred. As discussed above, the Custodian may also act as paying agent on behalf of the Issuers. All of these tasks are nondiscretionary and ministerial.

3. Neither the Custodian nor the Placement Agents may Guarantee or Otherwise Enhance the Creditworthiness of any Preferred or Receipt.

RS&Co and the other broker-dealers would be acting as a private placement agent for the Issuers only and would not be obligated in any way to holders of Preferred or Receipts with respect to performance of the obligations set forth in the Certificate of Designation with respect thereto. In addition, as discussed above, the Custodian would perform only administrative tasks and would not in any event become obligated on the Receipt or on any underlying Preferred.

4. The Custodian Will Undertake to Notify Receipt Holders in the Event of a Default and to Forward to Receipt Holders Copies of All Communications Relating to Any Dividend Payment Default on a Preferred.

Such an undertaking would be included in the custodial agreement.

5. Neither the Preferred nor the Receipts Will be Considered Assets of the Depositary or any Placement Agent.

Neither the Preferred nor the Receipts would be assets of RS&Co or any other placement agent except to the extent that they purchased the Preferred, and the placement agents would not treat them as such. The custodial agreement would provide that the Custodian will not treat the Preferred or Receipts as its assets.

6. No Other Factors are Present, Such as Remarketing Agreements, that Would Require the Receipt Holders to Rely Upon the Custodian or any Third Party to Obtain the Benefit of their Investment.

No such factors are present.

Conclusion

In summary, we are of the opinion that no new security would be created by the BioBonus™ Program. Any one Issuer involved in the BioBonus™ Program could issue preferred stock with terms substantially identical to the terms of Preferred offered pursuant to the BioBonus™ Program. The fact that a number of Issuers would be issuing such securities simultaneously and that a Custodian would be engaged to offer investors the convenience of having a single Receipt that represents specific identified underlying Preferred certificates, without any substantive effect on the rights of the holders of the Preferred, would not result in the creation of any security other than the issues of Preferred themselves.

Confidential Treatment Requested

As noted in the Original Letter, pursuant to 17 CFR §200.81, we request confidential treatment of the contents of this letter, our communications with the Commission's Staff with respect thereto and the response of the Commission's Staff until a date 120 days after release of your response to us.

* * * *

If you determine that you are unable to render the advice that we have requested, we would appreciate the opportunity to discuss our request with the Staff prior to the issuance of a written response to this letter or to either of the Previous Letters. We are available at your convenience to meet in person or by telephone for this purpose.

If you have any questions, please direct them to the undersigned or to Gregory M. Priest, Esq., also of this office. As we have indicated in our telephone conversations with the Staff, we would hope to receive a response to our request at the earliest possible date. We would therefore greatly appreciate your prompt attention to this matter.

Very truly yours,

WILSON, SONSINI, GOODRICH & ROSATI
Professional Corporation

Alan K. Austin

Alan K. Austin

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cc: Eli Nathans, Esq., Division of
Investment Management
Dr. J. Misha Petkevich, Robertson,
Stephens & Company
Gregory M. Priest, Esq., Wilson,
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Investment Company
Act of 1940--
Section 3

December 18, 1992

VIA FEDERAL EXPRESS

Thomas S. Harman, Esq.
Associate Director and General Counsel
Division of Investment Management
Securities and Exchange Commission
450 5th Street, N.W.
Judiciary Plaza
Washington, DC 20549

Re: No-action Request Concerning Bonus™ Program - Confidential Treatment Requested, Original Letter Dated November 13, 1992

Dear Mr. Harman:

As we have discussed in recent telephone conversations with Eli Nathans, Esq. of your office, we are writing to provide you information relating to certain changes to the proposed Bonus™ Program as described in our original letter to you of November 13, 1992 (the "Original Letter"). Unless otherwise defined herein, capitalized terms herein have the meanings set forth in the Original Letter.

Except as described herein, the Bonus™ Program remains substantially identical to the description provided in the Original Letter. As we have discussed with Mr. Nathans, we do not believe that the changes in the Bonus™ Program described herein are relevant to the legal analysis contained in the Original Letter. We therefore continue to believe that implementation of the Bonus™ Program without registration of an investment company under the Investment Company Act is entirely consistent with the Investment Company Act.

Accordingly, we respectfully renew our request that you confirm that the Division of Investment Management will not recommend that the Commission take any enforcement action under the Investment Company Act if the Bonus™ Program (in the revised form described in this letter) is implemented without any registration of an investment company under the Investment Company Act.

Changes to the Bonus™ Program

The following are the substantive changes that have been made in the program:

1. The instrument underlying each Receipt has been changed from a Debenture to a share of cumulative convertible preferred stock (the "Preferred"). Although the nature of the instrument underlying the Receipt has changed, the fundamental terms of the Bonus™ Program are as described in the Original Letter. Each Receipt would represent ownership of identified certificates representing shares of Preferred, and a holder of a Receipt would have all of rights and privileges of a holder of the Preferred, with the same rights to proceed against the issuer of the Preferred as a holder of the Preferred. The Custodian would play the same role with respect to the Receipts and the Preferred as it was to have played with respect to the Receipts and the Debentures as described in the Original Letter.

As a consequence of the shift from Debentures to Preferred, there would no longer be an Indenture. The provisions of the Indenture described in the Original Letter would be replaced by the rights, preferences and privileges of the Preferred, which would be set out in a Certificate of Designation of Rights, Preferences and Privileges that each issuer would file with the secretary of state of its jurisdiction of incorporation. As with the Debenture structure, each issuer's Certificate of Designation would be substantially identical to each other issuer's Certificate of Designation.

The conversion features of the Preferred would be substantially identical to those described with respect to the Debentures in the Original Letter, except that the period during which each issuer's Preferred would convert into the Common Stock of its issuer based on the index of several issuers' Common Stocks would be six years rather than five as had originally been contemplated. As we have discussed orally with the Staff and now confirm in writing, after the expiration of such period each issuer's Preferred would become convertible into its issuer's Common Stock based on the value of that issuer's Common Stock rather than based on the performance of the entire index.

2. The period during which the Preferred would be traded together if withdrawn from custody by the Custodian would be the first six years after the date of issuance, instead of five years as described in the Original Letter. If the holders of the Preferred wished to "unbundle" trading of the securities during this six-year period, they could do so at their option in either of two ways:

(a) Any holder of Preferred could convert its shares of Preferred into Common Stock, as long as during the first six years all shares of Preferred underlying a single Receipt were converted simultaneously. The Common Stock of the various issuers received upon conversion of the Preferred would then be tradeable without any restriction whatsoever, subject to compliance with the federal and state securities laws. The requirement of simultaneous conversion could be eliminated at any time by the vote of the holders of a majority of the Preferred.

(b) Holders of a majority of the Preferred could elect to eliminate the requirement that a proportionate number of shares of each issuer's Preferred be traded together, in which event shares of Preferred could be traded separately at any time thereafter without any restriction whatsoever, subject to compliance with the federal and state securities laws.

Legal Analysis

We do not believe that the changes to the Bonus™ Program described above alter the legal analysis in the Original Letter as regards the Investment Company Act. Other than changes necessary to accomplish the change from Debentures to Preferred, which changes in no way affect either the terms of the Receipts or any of the legal analysis contained in the Original Letter, the other changes ensure that the securities are bound together only to the extent that their holders wish them to be. Specifically, the holders of the Preferred would be permitted to eliminate the conversion and trading restrictions at any time prior to six years from the date of issuance by the simple medium of a majority vote. In addition, a holder of the Preferred who wished to convert a proportionate number of shares of each issuer's Preferred into Common Stock could do so and could freely resell the resulting Common Stock (subject to applicable securities laws) without any requirement that the Common Stock of other issuers be sold concurrently.

In summary, we continue to be of the opinion that no new security would be created by the custodial arrangement involved in the Bonus™ Program as described in the Original Letter with the further refinements described herein.

Confidential Treatment Requested

As noted in the Original Letter, pursuant to 17 CFR §200.81, we request confidential treatment of the contents of this letter, our communications with the Commission's Staff with respect thereto and the response of the Commission's Staff until a date 120 days after release of your response to us.

* * * *

If you determine that you are unable to render the advice that we have requested, we would appreciate the opportunity to discuss our request with the Staff prior to the issuance of a written response to this letter or to the Original Letter. We are available at your convenience to meet in person or by telephone for this purpose.

If you have any questions, please direct them to the undersigned or to Gregory M. Priest, Esq., also of this office. As we have indicated in our telephone conversations with the Staff, we would hope to receive a response to our request prior to Christmas. We would therefore greatly appreciate your prompt attention to this matter.

Very truly yours,

WILSON, SONSINI, GOODRICH & ROSATI
Professional Corporation

Alan K. Austin/by DJD

Alan K. Austin

:b

cc: Eli Nathans, Esq., Division of Investment Management
Dr. J. Misha Petkevich, Robertson, Stephens & Company
Gregory M. Priest, Esq., Wilson, Sonsini, Goodrich & Rosati

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JOHN ARNOT WILSON
COUNSEL

Investment Company
Act of 1940--
Section 3

November 13, 1992

VIA FEDERAL EXPRESS

Thomas S. Harman
Associate Director and General Counsel
Division of Investment Management
Securities and Exchange Commission
450 5th Street, N.W.
Judiciary Plaza
Washington, DC 20549

Re: No-action Request Concerning Bonus™ Bond Program - Confidential Treatment Requested

Dear Mr. Harman:

As we have discussed in our recent telephone conversations with Mr. Lawrence Stadulis of your office, we are writing with respect to a convertible debenture program (the "Bonus™ Program") being proposed by our client Robertson, Stephens & Company ("RS&Co"), a registered broker-dealer under Section 15(b) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"). Issuers participating in the Bonus™ Program would issue in private placements to institutional investors convertible subordinated debentures (the "Debentures"). These Debentures would be deposited with a commercial bank as custodian (the "Custodian") that would issue depository receipts (the "Receipts") to each investor. A more complete discussion of the Bonus™ Program follows below.

We respectfully request that you confirm that the Division of Investment Management will not recommend that the Securities and Exchange Commission (the "Commission") take any enforcement action under the Investment Company Act of 1940, as amended (the "Investment Company Act"), if the Bonus™ Program is implemented without any registration of an investment company under the Investment Company Act.

The Bonus™ Program

RS&Co. anticipates that approximately seven to 14 issuers would participate in the Bonus™ Program by privately placing varying amounts of Debentures (approximately $15 to $80 million

per issuer) and that the aggregate amount raised in the private placements would be approximately $300 to $700 million. Each issuer participating in the Bonus™ Program would be a company with a publicly-traded class of securities registered under Section 12 of the Exchange Act. Each issuer would issue substantially identical Debentures in private placements to a group primarily composed of institutional investors. The Debentures would be offered together such that each purchaser in the private placement would purchase Debentures issued by each issuer in the Bonus™ Program in proportion to the aggregate face amount of Debentures sold by such issuer. Thus, for example, if the face amount of Debentures issued by one participating issuer constituted twelve percent of the total face amount of Debentures issued pursuant to the Bonus™ Program, twelve percent of each investor's purchase would consist of that issuer's Debentures.

As a convenience for holders of the Debentures, the Debentures issued pursuant to the Bonus™ Program would be deposited with the Custodian, which would issue to each investor a Receipt or Receipts. Each Receipt would represent at least one particular identified Debenture issued by each of the participants in the program, and in no event would a receipt evidence a partial interest in any particular Debenture. Each Investor would be free at any time to present its Receipt(s) to the Custodian and receive in exchange the specific corresponding Debentures, and a holder of a Receipt would in all respects have the same rights as would a holder of the underlying Debentures represented by the Receipt.

The role of the Custodian with respect to the Bonus™ program would be purely ministerial, and it would not act as trustee under any of the indentures pursuant to which the Debentures would be issued. The primary duties of the Custodian would be to hold the Debentures and to maintain records of the holder of each Receipt and of the Debentures underlying such receipt. The Custodian would also act as transfer agent to register transfers of the Receipts and the underlying Debentures. It is possible that, for administrative convenience, the Custodian would also be designated as paying agent for the issuers of the Debentures. In such role, the Custodian would act as a conduit for payments of principal and interest to the holders of the Debentures by receiving cash from each issuer in trust for holders of the Debentures on each date for the payment of interest or principal and would immediately disburse such cash to the holders of the underlying Debentures as provided in the terms of the indenture with respect to each Debenture. This role would be administrative only. Upon conversion of the Debentures, the Custodian may be used as a conduit between the issuers and the Debenture holders for the delivery of securities issuable upon conversion of the Debenture to the holder of such Debenture.

As is standard in the convertible debenture market, each issuer would sell its Debentures pursuant to the terms of a separate indenture defining the rights and obligations of the issuer and the holders of that issuer's Debentures. Each Debenture issued by a participating issuer in the Bonus™ Program would be substantially identical to each other Debenture, with the exception that each Debenture would be solely the obligation of, and be convertible into the Common Stock of, its issuer. Each Debenture would have a ten-year term and would be convertible at any time at the option of the holder into the common stock of the issuer of the Debenture. In addition, each Debenture would automatically convert into Common Stock of its issuer if, at any time after three years from the date of issuance of the Debentures, the weighted average per-share market price of the common stock of the participating issuers (such weighting to be performed based upon the face amount of Debentures issued by each issuer) increased to at least 125% of the level of the weighted average per-share conversion price established at the time the Debentures were sold. For example, if on the date the Debentures were sold the aggregate conversion price of a basket including a proportionate number of shares of common stock of each of the participating issuers were $1,000, and subsequent to three years following the issuance of Debentures the aggregate value of the basket of shares of common stock exceeded $1,250, then at that point all of the Debentures would automatically convert into the common stock of their respective issuers.

Resales of the Debentures and the Receipts would be accomplished primarily through Rule 144A. Each issuer would covenant with the purchasers of its Debentures to make available information about such issuer necessary to make Rule 144A available to holders of the Debentures for resales of the Debentures and the Receipts representing the Debentures to qualified institutional buyers, subject to the limitations on such resales discussed below.

RS&Co believes that, for the Debentures to be a reasonably liquid investment for the purchasers in the Rule 144A trading market, the resale of each Debenture would need to be restricted for a period of time such that it could only be resold simultaneously with the resale of a proportionate face amount of Debentures issued by each participating issuer. In this manner, each investor would be a participant in a single approximately $300 to $700 million market, rather than multiple separate $15 to $80 million markets. Accordingly, during the first five years of each Debenture's term, it would not be transferable except in connection with a transfer to the same buyer of proportionate amounts of the Debentures issued by the other participants in the Bonus™ Program. Because each Receipt would evidence a

proportionate face amount of each participating issuer's Debentures, each Receipt would be tradeable at any time without violation of the above restrictions subject to compliance with Rule 144A. If the investor held Debentures, it could sell them under Rule 144A subject to the requirement that a proportionate number of each issuer's Debentures be sold to the same buyer concurrently. After the first five years of each Debenture's term, that Debenture could be transferred separately. The Debentures would be convertible at any time at the option of the holder into the underlying common stock provided that, during the first five years, a proportionate face amount of each of the Debentures issued pursuant to the program were converted simultaneously.

Because the Debentures would be offered privately primarily to institutions, RS&Co does not anticipate that the initial number of holders would exceed 100. Indeed, it is probable that the number would be considerably less than that. However, trading of the Debentures under Rule 144A could conceivably result in the number of holders of Debentures at a particular point subsequent to the initial private placement aggregating more than 100. Because RS&Co believes that investors would have concerns about artificial limits on the ability of a holder of a Debenture to resell such Debenture in reliance on Rule 144A, the Bonus™ Program as currently contemplated could not be operated in reliance on the exemption from registration under the Investment Company Act set forth in Section 3(c)(1) thereof.

Legal Analysis

In three recent no-action letters, the Division of Investment Management (the "Division") has applied substantially identical analyses to the question whether programs similar to the Bonus™ Program required registration of an entity pursuant to the Investment Company Act. See CRT Government Securities, Ltd. (available August 4, 1992); Bear, Stearns & Co., Inc. (available January 28, 1992); and Merrill Lynch, Pierce, Fenner & Smith Incorporated (available September 6, 1990).

Each of these letters also requested the confirmation of the Division of Corporation Finance that the instruments involved could be issued without registration under the Securities Act of 1933, as amended (the "Securities Act"). As the Debentures involved in the Bonus™ Program would be issued in private placements exempt from registration pursuant to Section 4(2) of the Securities Act, we are not requesting any such confirmation.

In each of the above-referenced letters, the response of the Commission's Staff focused primarily on the three factors that are discussed below:

1. Each Holder of a Receipt Must Have all of the Rights and Privileges of a Holder of the Debentures.

As discussed above, the Receipts represent a convenience only. Each holder of a Receipt would have precisely the same rights and privileges as a holder of the Debentures that underlie the Receipt, and a holder of a Receipt would have no rights in addition to those of a holder of the Debentures. Indeed, a holder of a Receipt could, at any time, exchange such Receipt for the particular Debentures represented by that Receipt.

2. Each Receipt Holder, as a Real Party in Interest, Must Have the Right, upon Default in Payment on One or More Underlying Debentures, to Proceed Directly and Individually Against the Issuer of the Debentures Represented by Such Receipt.

Each holder would have the same right to proceed against each issuer of a Debenture upon default in payment of principal or interest that such holder would have if it only held that particular Debenture. The provisions regarding procedures to be followed in the event of default would be the same as those customarily found in convertible subordinated debentures.

3. A Receipt Holder Shall Not be Required to Act in Concert with Other Receipt Holders or the Custodian.

As discussed in response to (2) above, each holder would be entitled to proceed against the issuer of each Debenture in the same manner as such holder would be entitled to proceed against the issuer of any other standard convertible subordinated debenture. Convertible subordinated debentures customarily provide that certain remedies in the event of default (including acceleration of maturity) must be approved by the holders of a specified percentage of the outstanding Debentures. Such provisions would be present in the Indentures with respect to each Debenture, but they would require no greater degree of concerted action than is customary for convertible subordinated debentures. In addition, the Debentures would include a provision stating that each holder of a Debenture shall have the right, absolute and unconditional, to receive payment of the principal of and interest on such Debenture and to convert such Debenture and to institute suit for the enforcement of any such right to payment or conversion, without acting in concert with the Custodian, other Debenture holders or any other parties.

The above-referenced no-action letters have also identified the following six additional factors relevant to the inquiry:

1. Each Receipt Must Evidence an Entire and Undivided Ownership Interest in Each Debenture.

As discussed above, each Receipt would evidence an entire and undivided ownership interest in at least one Debenture of each issuer, and no investor would receive a fractional interest in any Debenture. The Custodian would maintain a record of the particular Debentures underlying each Receipt, and each holder of a Receipt would be entitled to exchange it for the particular underlying Debentures represented by such Receipt at any time.

2. The Custodian Must Perform Only Clerical Administrative Services on Behalf of Each Debenture Holder.

The principal role of the Custodian would be to hold the Debentures and to maintain a record of the holders of the Receipts and of the Debentures underlying each Receipt. In addition, the Custodian would act as transfer agent with respect to transfers of the Receipts and the underlying Debentures. As discussed above, the Custodian may also act as paying agent on behalf of the issuers. All of these tasks are nondiscretionary and ministerial.

3. Neither the Custodian nor RS&Co may Guarantee or Otherwise Enhance the Creditworthiness of any Debenture or Receipt.

RS&Co would be acting as a private placement agent for the issuers of the Debentures only and would not be obligated in any way to holders of Debentures or other Receipts with respect to performance of the obligations set forth therein. In addition, as discussed above, the Custodian would perform only administrative tasks and would not in any event become obligated on the Receipt or on any underlying Debenture.

4. The Custodian Will Undertake to Notify Receipt Holders in the Event of a Default and to Forward to Receipt Holders Copies of All Communications Relating to Any Payment Default on a Debenture.

Such an undertaking would be included in the custodial agreement.

5. Neither the Debentures nor the Receipts Will be Considered Assets of the Depository or RS&Co.

Neither the Debentures nor the Receipts would be assets of RS&Co except to the extent that it purchases them, and RS&Co

would not treat them as such. The custodial agreement would provide that the Custodian will not treat the Debentures or Receipts as its assets.

6. No Other Factors are Present, Such as Remarketing Agreements, that Would Require the Receipt Holders to Rely Upon the Custodian or any Third Party to Obtain the Benefit of their Investment.

No such factors are present.

Conclusion

In summary, we are of the opinion that no new security would be created by the custodial arrangement involved in the Bonus™ Program. Any one issuer involved in the Bonus™ Program could issue a debenture with terms substantially identical to the terms of Debentures offered pursuant to the Bonus™ Program. The fact that a number of issuers would be issuing such securities simultaneously and that a Custodian would be engaged to offer investors the convenience of having a single Receipt that represents specific identified underlying Debentures, without any substantive effect on the rights of the holders of such Debentures, would not result in the creation of any security other than the Debentures themselves.

Confidential Treatment Requested

Pursuant to 17 CFR §200.81, we hereby request confidential treatment of the content of this letter, our communications with the Commission's Staff with respect thereto and the response of the Commission's Staff until a date 120 days after release of your response to us. Certain features of the Bonus™ Program are innovative and have not previously been offered in any other program of which we are aware. Intellectual property protection of such features would be very difficult, if not impossible, to achieve. Accordingly, RS&Co's ability to bring the Bonus™ Program to investors before other investment banks can create similar programs based upon RS&Co's structure (which has been outlined in detail herein) requires RS&Co's ability to maintain the confidentiality of that structure for as long as possible. We therefore respectfully request confidential treatment as described above.

* * * *

If you determine that you are unable to render the advice that we have requested, we would appreciate the opportunity to discuss our request with the Staff prior to the issuance of a

written response to this letter. We are available at your convenience to meet in person or by telephone for this purpose.

If you have any question, please direct them to the undersigned or Gregory M. Priest, Esq. also of this office. RS&Co has informed us that it believes that time is of the essence to its ability to move forward with the Bonus™ Program. We would therefore greatly appreciate your prompt attention to this matter.

Very truly yours,

WILSON, SONSINI, GOODRICH & ROSATI
Professional Corporation

Alan K. Austin/DZD
Alan K. Austin

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cc: Lawrence Stadulis, Esq., Division of Investment Management
Mr. J. Misha Petkevich, Robertson, Stephens & Company
Gregory M. Priest, Esq., Wilson, Sonsini, Goodrich & Rosati