Exhibit 17(C)(2)  
  
  
 MEMORANDUM OF UNDERSTANDING  
  
 This MEMORANDUM OF UNDERSTANDING is entered into as of April 26, 1999  
among the plaintiffs ("Plaintiffs") in the Actions (as defined herein), Xxxxxxx  
International Group Inc. ("Xxxxxxx"), the members of Xxxxxxx'x Board of   
Directors (the "Xxxxxxx Board"), Hay Island Holding Corporation ("Hay Island")  
and SIGI Acquisition Corporation ("SIGI"), by their undersigned attorneys.  
Except as otherwise stated in this Memorandum of Understanding, capitalized  
terms herein have the meaning given them in the Agreement and Plan of Merger  
dated as of December 9, 1998 among Xxxxxxx, XXXX and Hay Island (the "Merger  
Agreement"}.  
  
 WHEREAS, there are now pending six actions in the Court of Chancery of  
the State of Delaware (the "Court"), styled Xxxxxx Xxxxxx v. Xxxxxxx X.  
Brighton, et al., Civil Action No. 16834NC; Xxx Xxxx x. Xxxxxxx Xxxxxxx, III, et  
al., Civil Action No. 16839NC; Xxxx Xxxxxxx Xxxxxx v. Xxxxxxx X. Brighton, et  
al., Civil Action No. 16837NC; Harbor Finance Partners v. Xxxxxxx Xxxxxxx, III,  
et al., Civil Action No. 16838NC; Xxxxxx Xxxxxxx v. Xxxxxxx X. Brighton, et al.,  
Civil Action No. 16842NC; and Xxxxxx Xxxxx v. Xxxxxxx Xxxxxxx, III, et al.,  
Civil Action No. 16861NC (collectively and, if hereafter consolidated, "the  
Actions"); and  
  
 WHEREAS, the Actions were filed as putative class actions on behalf of  
a class of public holders of Xxxxxxx common stock (the "Class"), relating to the  
proposed merger (the "Transaction") of Xxxxxxx and SIGI, as set forth in the  
Merger Agreement; and  
  
 WHEREAS, collectively the Actions name as defendants Xxxxxxx, the  
members of the Xxxxxxx Board and SIGI; and  
  
 WHEREAS, the Actions seek declaratory and injunctive relief, monetary  
damages and/or rescission with respect to the Transaction based upon the   
allegation, inter alia,  
  
  
  
  
  
  
  
that the conduct of the members of the Xxxxxxx Board in connection with the   
Transaction constitutes a breach of their fiduciary duties; and  
  
 WHEREAS, the defendants deny that they have committed or have attempted  
to commit any violation of law or breach of duty, including breach of any duty  
to any Swisher shareholders, or have otherwise acted in any improper manner; and  
  
 WHEREAS, following negotiations between the parties, counsel for the  
parties have reached an agreement in principle providing for the proposed  
settlement of the Actions on the terms and conditions set forth below (the  
"Settlement"); and  
  
 WHEREAS, counsel for the plaintiffs believe that the proposed  
Settlement is in the best interests of the public shareholders of Xxxxxxx;  
  
 NOW, THEREFORE, IT IS HEREBY AGREED IN PRINCIPLE AS FOLLOWS:  
  
 1. Principal Terms of Settlement. Subject to the additional conditions,  
terms and limitations described herein, as a result of the bringing of the  
Actions, the parties agree in principle as follows:  
  
 x. Xxxxxxx agrees that prior to dissemination to its shareholders  
 of a proxy statement seeking shareholder approval of the Transaction  
 (the "Proxy Statement"), it shall provide a non-public draft or drafts  
 of such Proxy Statement to co-lead counsel for Plaintiffs for review  
 and comment. Notwithstanding the foregoing, Plaintiffs recognize that  
 Xxxxxxx shall be under no obligation to include comments provided by  
 Plaintiffs' counsel in the Proxy Statement. Plaintiffs further agree  
 that any drafts of the Proxy Statement received by Plaintiffs' counsel  
 hereunder shall be used solely for the purposes described in this  
  
  
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 subparagraph and for no other purpose, and shall be held strictly  
 confidential and shall not be disclosed by Plaintiffs or Plaintiffs'  
 counsel.  
  
 b.(i) Prior to the dissemination to Xxxxxxx shareholders of the  
 Proxy Statement, Xxxxxxx shall, to the extent not already in the  
 possession of Plaintiffs' counsel, provide Plaintiffs' counsel  
 Xxxxxxx'x Annual Report on Form 10-K for the year ended December 31,  
 1998, together with preliminary summary information concerning  
 Xxxxxxx'x earnings for the quarter ended March 31, 1999 (the  
 "Information"). Plaintiffs understand and agree that the Information is  
 provided solely to enable Plaintiffs to form a belief as to the  
 fairness of the Merger Consideration to the members of the Class as of  
 the present time and for no other purpose, and the Information shall be  
 held strictly confidential and shall not be disclosed by Plaintiffs or  
 Plaintiffs' counsel except to a single independent expert retained or  
 to be retained by Plaintiffs to assist Plaintiffs in evaluating   
 fairness as aforesaid. The identity of Plaintiffs' independent expert   
 shall be disclosed to Xxxxxxx at or before the time any Information is   
 disclosed to such independent expert. Plaintiffs, Plaintiffs' counsel   
 and such expert hereby covenant and agree that they will not, while  
 in possession of such Information and for such time as such Information  
 is not publicly available, trade in any securities of Xxxxxxx.  
  
 (ii)(a) If Plaintiffs shall conclude, upon review of the  
 Information, that the Merger Consideration is not fair to the members  
 of the Class, then the settlement agreed to in principle herein shall  
 he void and of no effect, and each party hereto shall immediately   
 return all information (including the Information)  
  
  
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 received from any other party and any copies, notes, extracts or other  
 information derived therefrom to the party originally providing such  
 information, and no parties hereto shall have any obligation to any  
 other party hereto arising out of this Memorandum of Understanding  
 except with respect to the agreements concerning confidentiality,  
 non-disclosure, and securities trading contained herein.  
  
 (b) If Plaintiffs shall conclude, upon review of the Information,  
 that the Merger Consideration is fair, then that fact may, at Xxxxxxx'x  
 option, be disclosed in the Proxy Statement or any supplement thereto   
 as Xxxxxxx shall in its sole discretion determine.  
  
 x. Xxxxxxx, the Xxxxxxx Board, and SIGI agree that pending  
 consideration of the settlement provided for herein by the Court and,  
 if the Court shall approve the terms of the settlement provided for   
 herein, thereafter they will not:  
  
 (i) prior to the earlier of effectiveness of the Transaction or  
 termination thereof pursuant to the Merger Agreement, disband the  
 Special Committee or restrict the current scope of its authority  
 relating to the Transaction, or  
  
 (ii) for a period of twelve months following the date hereof,  
 without consultation and negotiation with the Special Committee,  
 cause Xxxxxxx to engage in any freeze-out merger other than the  
 Transaction pursuant to which the shares of stock of Xxxxxxx held  
 by the public are converted into cash without their consent;  
 provided, however, that it is  
  
  
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 expressly understood and agreed that the foregoing shall not be  
 deemed to limit in any respect the right of Xxxxxxx, XXXX, Hay  
 Island or any other person or entity to purchase shares of Xxxxxxx  
 stock on the open market, in privately negotiated transactions, by  
 tender offer or otherwise except as expressly restricted above.  
  
 2. Stipulation of Settlement. The parties to the Actions will attempt  
in good faith to agree upon and execute an appropriate Stipulation of Settlement  
(the "Stipulation") and such other documentation as may be required in order to  
obtain Final Court Approval (as defined below) of the Settlement and the  
dismissal of the Actions upon the terms set forth in this Memorandum of  
Understanding (collectively, the "Settlement Documents"). The Stipulation will  
expressly provide, inter alia, for certification of a non-opt out settlement  
class pursuant to Delaware Court of Chancery Rules 23(b)(1) and (b)(2) of  
holders of Class A common stock of Xxxxxxx and their successors in interest and  
transferees, immediate and remote, from December 9, 1998 through and including  
the Effective Time (the "Class"); for entry of a judgment dismissing the Actions  
with prejudice; for a complete release and settlement of all claims, whether  
asserted directly, derivatively or otherwise, against defendants or any of their  
families, parent entities, affiliates, subsidiaries, predecessors, successors  
or assigns, and each and all of their respective past, present or future  
officers, directors, associates, stockholders, controlling persons,  
representatives, employees, attorneys, financial or investment advisors,  
consultants, accountants, investment bankers, commercial bankers, engineers,  
advisors or agents, heirs, executors, trustees, general or limited partners or  
partnerships, personal representatives, estates or administrators, which have  
been, or could have been, asserted relating to the Transaction, the actions of  
Xxxxxxx, the Xxxxxxx Board (including each member herein). Hay  
  
  
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Island or SIGI relating to the Transaction, the related disclosure materials,  
disclosures, facts and allegations that are or could (insofar as such  
transactions, disclosures, facts and allegations relate to, or occurred in  
connection with, the subject matter of the Actions) be the subject of the  
Actions or of an action in any other forum; that defendants have denied and  
continue to deny that they have committed or attempted to commit any violations  
of law or breaches of duty of any kind; that defendants are entering into the  
Stipulation solely because the proposed Settlement as described above would  
eliminate the burden, risk and expense of further litigation, and is in the best  
interests of Xxxxxxx and all its shareholders; and that any of the defendants  
shall have the right to withdraw from the proposed Settlement in the event that  
(x) any claims related to the Transactions or the subject matter of the Actions  
(whether direct, derivative or otherwise) are commenced against any person in  
any court prior to Final Court Approval of the Settlement, and such claims are  
not dismissed or stayed in contemplation of dismissal or (y) any of the  
additional conditions set forth in paragraph 5 below shall not have been  
satisfied. The parties agree to use their good faith efforts to obtain the  
dismissal or stay in contemplation of dismissal of any action covered by clause  
(x) in the foregoing sentence and further agree that the defendants shall have  
the right to withdraw from this Memorandum of Understanding if such efforts do  
not result in the dismissal or stay in contemplation of dismissal of such an  
action.  
  
 3. Notice and Court Approval. Subject to prior Court approval of the  
Stipulation and the form of the Settlement Documents, the parties to the  
respective Actions will present the Settlement Documents to the Delaware Court  
of Chancery for approval as soon as practicable following appropriate notice to  
the Xxxxxxx shareholders of the proposed Settlement with the named Plaintiffs  
and the shareholders of Xxxxxxx on whose behalf the Actions were brought of all  
claims asserted in the Actions, with no right to opt out of the Settlement and  
  
  
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without costs to any party except as provided herein. Xxxxxxx shall disseminate  
the notice of proposed settlement approved by the Court to its shareholders and  
shall pay the costs and expenses related thereto. As used herein, "Final Court  
Approval" of the Settlement means that the Delaware Court of Chancery has  
entered an order approving the Settlement and that such order is finally  
affirmed on appeal or is no longer subject to appeal and the time for any  
petition for reargument, appeal or review, by certiorari or otherwise, has  
expired. Plaintiffs' counsel intend to apply to the Delaware Court of Chancery  
for an award of attorneys' fees and reasonable out-of-pocket disbursements.  
Subject to the terms and conditions of this Memorandum of Understanding and the  
contemplated Stipulation of Settlement, Plaintiffs' counsel will apply for an  
award of fees and expenses in an aggregate amount not exceeding $350,000, which  
the defendants in the Actions will not oppose, to be paid by defendants within  
10 days after Final Court Approval to Xxxxxxx Xxxxx Xxxxxxx Xxxxx & Xxxxxx LLP,  
as receiving agent for Plaintiffs' counsel.  
  
 4. Other Conditions. The consummation of the Settlement is subject to:  
(a) the drafting and execution of the Settlement Documents and the other  
agreements necessary to effectuate the terms of the proposed Settlement; (b) the  
completion by Plaintiffs of appropriate discovery in the Actions reasonably  
satisfactory to Plaintiffs' counsel; and (c) Final Court Approval (as defined  
above) of the Settlement and dismissal of the Actions with prejudice and  
without awarding costs to any party, except as provided herein. This Memorandum  
of Understanding shall be null and void and of no force and effect if (i) any of  
these conditions all not met or (ii) Plaintiffs' counsel in the Actions  
determine that the Settlement is not fair and reasonable. In such event, this  
Memorandum of Understanding shall not be deemed to prejudice in any way the  
positions of the parties with respect to the Actions, shall be subject to Rule  
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the Delaware Rules of Evidence, and shall not entitle any party to recovery any  
costs or expenses incurred in connection with the implementation of this   
Memorandum of Understanding.  
  
 5. Interim Stay of the Actions. The parties to the Actions agree that  
except as expressly provided herein, the Actions shall be stayed pending  
submission of the proposed Settlement to the Court for its consideration.  
Plaintiffs' counsel agrees that the defendants' time to answer or otherwise  
respond to any complaint in the Actions is extended without date. Counsel shall  
enter into such documentation as shall be required to effectuate the foregoing  
agreements.  
  
 6. Miscellaneous. (a) This Memorandum of Understanding may be executed  
in counterparts by any of the signatories hereto and as so executed shall  
constitute one agreement; (b) this Memorandum of Understanding and the  
Settlement contemplated by it shall be governed by and construed in accordance  
with the laws of the State of Delaware without regard to that State's rules  
concerning conflict of laws; (c) this Memorandum of Understanding shall be  
binding upon and inure to the benefit of the parties and their respective  
agents, executors, heirs, successors and assigns, subject to the conditions set  
forth herein; (d) Plaintiffs and their counsel represent and warrant that none  
of the claims or causes of action asserted in the Actions have been assigned,  
encumbered or in any manner transferred, in whole or in part; (e) except as  
provided herein, the defendants in the Actions shall bear no expenses, costs,  
damages or fees alleged or incurred by any named Plaintiff, any member of the  
Class or their respective attorneys, experts, advisors, agents or  
representatives; and (f) the provisions contained in this Memorandum of  
Understanding shall not be deemed a presumption, concession or admission by any  
defendant in the Actions of any breach of duty, liability, default or wrongdoing  
as to any facts or claims alleged or asserted in the Actions, or in any other  
actions or proceedings, and  
  
  
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shall not be interpreted, construed, deemed, invoked, offered or received in  
evidence or otherwise used by any person in the Actions or in any other action  
or proceeding of any nature whatsoever.  
  
  
  
  
  
 /s/ Xxxxxx X. Xxxxxxxxx  
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