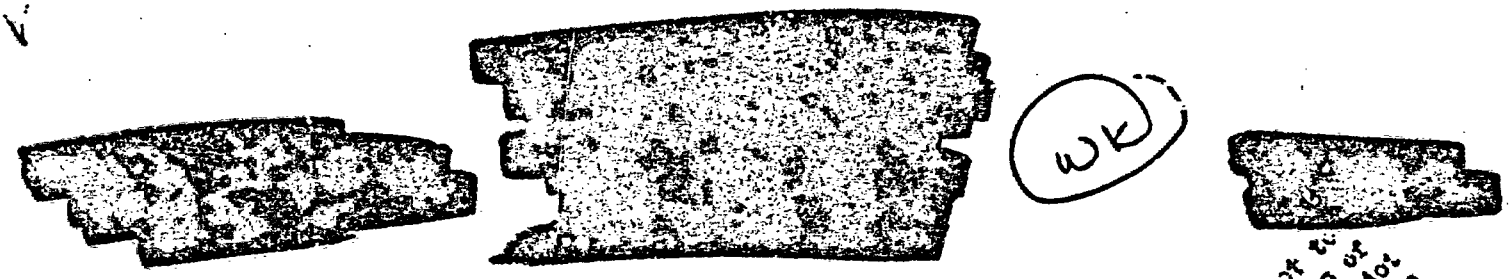

November 24, 1986

Wayne Kaplan, Esq.
Office of Premerger Notification
Federal Trade Commission
6th Street & Pennsylvania Avenue, N.W., Room 301
Washington, D.C. 20580

Dear Mr. Kaplan:

I am writing to request your advice with respect to interpretive position we have reached regarding the Hart Scott-Rodino Antitrust Improvements Act of 1976 and the regulations thereunder (collectively, the "Act"). The relevant hypothetical facts and an analysis of our interpretation follows. If you disagree with our conclusions, or have any additional questions, please contact the undersigned no later than 3:00 p.m. on November 24, 1986. If we have not heard from you by that time, we will assume that your office does not disagree with our position.

Summary of the Hypothetical Facts

A, a small, closely-held corporation all of whose stock is held by one man and his children, proposes to enter into an agreement to purchase assets from corporation B. A and B each satisfies the "size of person" test under the Act. As a result of the acquisition, A will not hold more than 15 percent of the assets of B.

Under 15 U.S.C. §18a(a)(3)(B), it is necessary to determine whether, as a result of the acquisition, A will hold assets of B the value of which is in excess of $15 million. Pursuant to 16 C.F.R. §801.13(b)(1), such value is to be determined in accordance with 16 C.F.R. §801.10(b). That subsection, in turn, states that "the value of assets to be acquired shall be the fair market value of the assets, or, if determined and greater than the fair market value, the acquisition price." You may assume for purposes of this letter that the acquisition price is determinable. Pursuant to 16 C.F.R. §801.10(c)(2), the "acquisition price" with respect to any transaction shall include "the value of all consideration for such ... assets to be acquired."

The acquisition price to be paid by A for the assets to be acquired from B will be paid in several forms. A portion will be paid in cash, the amount and "value" of which is clear. In addition, a portion of the acquisition price is represented by the assumption by A of certain indebtedness secured by a mortgage on a piece of property being acquired by A. We have assumed for purposes of this analysis that the "value" of that indebtedness is equal to the principal balance as of the closing date of the acquisition plus any interest then due.

Another portion of the acquisition price will be represented by A agreeing to repay (without interest), and to hold B harmless with respect to, the balance remaining of amounts previously deposited with B by its customers as security for the return of reusable containers which are part of the assets being acquired by A. Finally, a portion of the acquisition price will be paid in the form of an unsecured note of A, issued by A in a private unregistered offering.

Analysis

It appears clear that 16 C.F.R. §801.10(c)(2) requires that when the consideration for assets being acquired is in a form other than cash, the "value" of that consideration must be determined by reference to its fair market value, and not necessarily to its "nominal" or "face" value. Thus, for example, if part of the consideration for an acquisition of assets were paid by the acquiring person in the form of preferred or common stock, the fair market value of that stock, and not its par value, would be added to the cash consideration and the total would constitute the acquisition price in respect of the transaction.

In the factual setting described above, we have concluded, first, that it is appropriate to value the acquiring person's "hold harmless" undertaking at what is determined to be its fair market value, which is likely to be less than the aggregate of the deposit refund amounts. We believe this is justified for two significant reasons. First, there is considerable historical experience in the industry that some of these deposits are abandoned, and in fact never need to be and never are repaid. Second, there is also considerable industry experience that, even if the deposits are not abandoned, some are not claimed for

[redacted]

considerable periods of time and should, for this reason alone, be discounted to their actual present value. Thus, there is historical experience to prove that 100 percent of the "nominal" deposit refund amounts will never be paid by A pursuant to its "hold harmless" undertaking.

We have also concluded that it is appropriate to value the note to be given by the acquiring person at its fair market value which is likely to be something less than its face value. It is standard business and accounting practice to discount the value of such a note for most purposes, Moreover, with reference to a note with specific terms such as those of the note in question (i.e., an indeterminate term and low interest), it is reasonable and appropriate to discount it. Accordingly, it is clear that insofar as the "value" of the note must be taken into account under 16 C.F.R. §801.10(c)(2), that value is the discounted fair market value of the note.

In summary, we would appreciate it if you would indicate your concurrence with our conclusions that, under 16 C.F.R. §801.10(c)(2), it is appropriate to value both A's "hold harmless" undertaking and A's note at their respective fair market values for purposes of determining the acquisition price.

Conclusion

We look forward to your concurrence with our position. If you do not agree or have further questions, please call the undersigned at [redacted] before 3:00 p.m. on Monday, November 24, 1986.

Very truly yours,

[redacted]

[redacted] Letter incorrect. Since portions of the consideration are undetermined, the acquiring person must in good faith determine the fair market value of assets.
W E Kaplan - 11/24/86
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