

June 9, 1987

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BY HAND

Mr. Wayne Kaplan
Premerger Notification Office
Room 303
Federal Trade Commission
Sixth Street & Pennsylvania Ave., N.W.
Washington, D.C. 20580

Re: Corporate Reorganization

Dear Mr. Kaplan:

On May 19, 1987, you and I discussed whether or not the Hart-Scott-Rodino premerger notification requirements might apply to a proposed corporate reorganization in which a new company ("Newco"), to be owned by an employee stock ownership plan (the "ESOP") and by certain members of Newco management, would be "spun-off" as an independent legal entity. On the basis of the facts described by me, and after deliberations among you and your colleagues, you informed me that the transactions as described would not be subject to HSR reporting obligations largely due to the new exemption covering certain ESOP acquisitions at 16 C.F.R. § 802.35, given that the transactions described were all interdependent and due to occur more or less simultaneously. This letter responds to your request at the end of our conversation that I provide you with a brief written summary of the proposed transaction for your records.

As described in our telephone conversation, our client, Company A, plans to spin-off a substantial number of operating businesses (valued in excess of \$100 million) to a new independent company which will be controlled by an ESOP to be formed prior to closing for the benefit of Newco's employees. The ESOP will be run by an independent institutional trustee initially selected before closing by Company A but subject to appointment and replacement by

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Newco's Board of Directors. At closing, the ESOP will pay Company A a substantial sum in cash for 99.5 percent of Newco's common stock, which consideration will be paid out of funds obtained through two loans. The Newco common stock to be acquired by the ESOP will be allocated to the accounts of Newco's employees over time.

Members of Company A's existing management, who will be leaving to run the new company after closing, will acquire at closing a 0.5 percent equity stake in Newco for well under \$15 million. However, under a restricted stock plan, Newco management may be awarded over time up to an additional 9.5 percent of Newco common stock on a fully diluted basis.


Company A at closing will be issued preferred stock, with the power to appoint two Newco directors (or a majority of Newco directors under certain defined circumstances involving default not otherwise anticipated to occur) and warrants convertible into up to 34 percent of Newco common stock, the anticipated fair market value of which will be substantially in excess of \$15 million.

In addition to the Newco preferred stock and warrants, and the cash received from the sale of Newco common stock to the Newco ESOP and management team, Company A at closing will receive a substantial cash payment (financed by bank debt and publicly-offered debentures) in consideration for the operating facilities to be transferred to Newco. It is anticipated that a portion of such debentures will be offered in conjunction with warrants to purchase up to 5 percent of the common stock of Newco on a fully diluted basis.

In the event of full dilution, then, the ESOP will own 51 percent of Newco, Company A 34 percent (upon exercise of all the warrants), Newco management 10 percent (upon the awarding and vesting of all shares available under the restricted stock plan), and others 5 percent (upon exercise of all warrants).

As noted previously, all of the foregoing transactions are presently contemplated to occur more or less simultaneously and are all interdependent.


On the basis of the foregoing, you advised that the ESOP's acquisition of Newco common stock would be exempt under § 802.35, Newco's acquisition of the operating businesses from Company A for cash, non-voting


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preferred stock and warrants, would be exempt in this particular case as part of one interdependent and contemporaneous ESOP transaction, Company A's acquisition of the non-voting preferred stock would not be subject to HSR reporting because such securities confer only the power to appoint, and not the power to vote for the election of, Newco directors, and that Company A's acquisition of the warrants would not be reportable until such time as Company A might choose to exercise them. (While we did not address the issue during our telephone conversation, the acquisition of Newco common stock by the individual members of Newco management would not be subject to HSR reporting as the HSR Act's size-of-person and size-of-transaction tests would not be met by any of those acquisitions, and the acquisitions of warrants by debenture-holders will not be subject to HSR reporting until such time as the warrants may be exercised.)

I trust the foregoing is responsive to your request. Thank you again for your assistance in this matter.

Yours very truly,


OK. Wayne Kaplan 6/10/87
but limited to these specific facts.