

Rule(s):

Staff: Alice Villavicencio

Response: "Writer was called on 4/18/2002 and informed that the parties would be required to file for the consolidation and for shareholder R's purchase of stock in Z (the new company). Shareholder R will hold a higher % of stock than he originally held in Y.(Also see Marian Bruno's notes attached)"

File #: 0204003

(redacted)

April 16, 2002

Ms. Alice Villavicencio
Federal Trade Commission
Premerger Notification Office
Room 303
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: HSR Filing Requirements

Dear Alice:

On March 28, 2002, April 10, 2002 and April 11, 2002 (redacted) and I had discussions with you regarding the following transaction and you suggested that we put our analysis of the transaction into this summary letter. Specifically, we discussed possible corporate and shareholder level filing requirements arising from two mergers. We understood from you that the FTC would not treat the two mergers as simultaneous transaction and that this would result in a required corporate-level filing for the second merger. We accept your position on this point and have incorporated this into our analysis. However, since we are required to view the mergers in a sequence, we hope to convince you that this leads to the conclusion that no shareholder filings are required.

Facts

Company X and Company Y are in the business of owning and operating restaurants. Company X and Company Y are jointly managed by the same individuals from the same principal place of business.

The capitalization of each of Company X and Company Y is set forth on Schedule 1, attached. As can be seen by comparing the capitalization tables for each company, the shareholders of Company X and Company Y are substantially the same and have substantially the same percentage ownership in each Company, although the shareholdings are not identical. Since nobody controls Company X and Company Y, each of them is its own ultimate parent entity for HSR purposes.

The valuation of the stock of each of Company X and Company Y is above \$50 million and below \$100 million. Each of Company X and Company Y have total assts and/or net sales in excess of \$100 million.

The shareholders of Company X and Company Y desire to form Company Z, a holding company that will hold all of the shares of Company X and Company Y. First, a subsidiary of Company Z will be merged into Company X, and each shareholder of Company X will transfer all of his or her shares of Company X to Company Z in exchange for shares of Company Z. Second, another subsidiary of Company Z will be merged into Company Y, with each shareholder of Company Y receiving additional shares of Company Z in exchange for Company Y shares. The shares of Company Z received by the shareholders of Company X in the first transaction will be in the exact same relative percentages as such Company X shareholders held in Company X. After the second transaction, the shareholdings of each Z shareholder will represent the weighted average of his or her proportionate shareholdings in X and Y: The resulting capitalization of Company Z after the two mergers is set forth on Schedule 1.

After the second transaction, only one shareholder, Shareholder R, will hold voting securities of Company Z valued at greater than \$50 million. Shareholder R's overall percentage ownership in Company Z after the first transaction will be identical to his shareholding in X, and his shareholding in Z will decrease as a result of the second transaction.

Analysis

Part I- Filings by the Corporations

You indicated to us on our call on April 10, 2002 that the two mergers could not be viewed as simultaneous transactions, but that they must be viewed in a sequence. This position "Y" seems consistent to us with the position set forth in the letters from the FTC set forth on Exhibit A hereto. As stated in the marginalia of the letters set forth on Exhibit A, we should "analyze all sequences and report for the minimum number of reportable transactions."

The first transaction in the sequence is the acquisition of the shares of Company X by Company Z in exchange for shares of Company Z. This transaction should be exempt from HSR Act 15 U.S.C. § 18a filing pursuant to two theories: (i) immediately prior to the acquisition, Company Z would not meet the size-of-the-person test (cf., 16 C.F.R. § 801.11(e)); and (ii) the holding company formation exemption, which is 15 U.S.C. § 7A(c)(10) and 16 C.F.R. § 802.10 and applied in Interpretation # 38 in the ABA Premerger Notification Practice Manual and in the rulings set forth on Exhibit B hereto. (I explained that the combination of X and Y to form Z is a consolidation within the meaning of Rule 801.2(d), and the Premerger Notification Office's interpretation of such a corporation as that described here.)

The second transaction in the sequence is the acquisition of the shares of Company Y by Company Z in exchange for shares of Company Z. If the transactions could be viewed as simultaneous, then this transaction too would fail to meet the size of person test. However, since the transactions cannot be treated as simultaneous and Company Z owns the stock of Company X after the first transaction, we can no longer argue that Company Z does not meet the size-of- test when it proceeds to acquire Company Y. Assuming the FTC is not willing to extend the holding company exemption to cover this situation (despite the inconsequential changes in shareholdings involved) a corporate level filing would appear to be required for this second step. (Please advise us, however, on the application of the first letter set forth on Exhibit B to this question.)

Part II -- Filings by the Shareholders

With the exception of Shareholder R, none of the shareholders of Company X and Company Y will be receiving total shares in Company Z valued at \$50 million or more. Thus, the acquisitions by these shareholders will not meet the size of transaction test, and we have focused our analysis on Shareholder R.

In analyzing Shareholder R's acquisitions, we similarly should not consider the transactions to be simultaneous but rather should "analyse all sequences and report for the minimum number of reportable transactions." In the first transaction, the acquisition of Company Z shares in exchange for his shares of Company X should be exempt under the formation of a holding company exemption pursuant to 15 U.S.C. § 7A(c)(10) and 16 C.F.R. § 802.10. This analysis was used in #38 of the new *Premerger Notification Practice Manual* and (In #38 shareholders did not increase % of shares in new company) in the letters set forth on Exhibit B hereto. In addition, since R will be receiving somewhat less than \$50 million in Z stock as a result of the first transaction, R's acquisition of Z shares in the first transaction will not meet the size of transaction test.

In the second transaction, the receipt by Shareholder R of the shares of Company Z in exchange for his shares in Company Y will decrease, rather than increase his overall percentage (but % age of shares in Z will be higher than the percentage of holds in Y), ownership of Company Z. Thus, the transaction should be exempt under 15 U.S.C. § 7A(c)(10), which exempts voting securities acquisitions where "the voting securities acquired do not increase, directly or indirectly, the acquiring person's per centum share of outstanding voting securities of the issuer." Note that this analysis was apparently applied in the similar context of back-to-back mergers in the first letter set forth on Exhibit B.

We note that our conclusion that no filings are required by Shareholder R is consistent with an analysis of a straight-forward merger of Company Y into Company X. In that scenario, because his overall percentage ownership in Company X would be decreasing as a result of the merger, Shareholder R would not be required to file pursuant to the exemption set forth in 15. U.S.C. § 7A(c)(10).

Please let me know the FTC's position on the filing obligations of the parties to these transactions. Thank you for your time and attention to this matter.

Sincerely,

(redacted)

cc: (redacted)

(redacted)

SCHEDULE 1

**CAPITALIZATION OF
COMPANY X AND COMPANY Y
AND RESULTING CAPITALIZATION
OF COMPANY Z**

Shareholder	Company X		Company Y		Company Z
	# Shares	% of Stock	# Shares	% of Stock	Planned %
A	2,500	2.500%	249,300	2.493%	2.498%
B	200	0.200%	20,000	0.200%	0.200%
C	5,000	5.000%	300,000	3.000%	3.893%
D	1,000	1.000%	100,000	1.000%	1.000%
E	100	0.100%	10,000	0.100%	0.100%
F	23,725	23.725%	1,372,500	13.725%	18.189%
G	1,000	1.000%	100,000	1.000%	1.000%
H	1,000	1.000%	50,000	0.500%	0.723%
I	200	0.200%	20,000	0.200%	0.200%
J	200	0.200%	20,000	0.200%	0.200%
K	100	0.100%	10,000	0.100%	0.100%
L	200	0.200%	20,000	0.200%	0.200%
M	2,500	2.500%	150,000	1.500%	1.946%
N	200	0.200%	20,000	0.200%	0.200%
O	300	0.300%	30,000	0.300%	0.300%
P	300	0.300%	30,000	0.300%	0.300%
Q		0.000%	1,309,243	13.062%	7.248%
R	44,975	44.975%	3,537,099	35.371%	38.885%
S		0.000%	1,098,828	10.988%	6.088%
T	10,000	10.000%	1,000,000	10.000%	10.000%
U	3,500	3.500%	350,000	3.500%	3.500%
V	3,000	3.000%	202,032	2.020%	2.458%
Totals	100,000	100.000%	10,000,000	100.000%	100.000%

® = Higher than what R held in company Y