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July 13, 1999

VIA FACSIMILE: 202-326-2624

Mr. James Ferkingstad
Federal Trade Commission
Washington, D.C. 20580

Re: HSR Filing Issues

Dear Mr. Ferkingstad:

As you may recall, [redacted]) and I spoke with you by telephone on Monday, June 28th regarding HSR filing issues that have arisen in connection with a transaction between parties that my firm represents and parties that [redacted]'s firm represents. We appreciated your time and assistance. By this letter, we would like to confirm the matters that we discussed.

It is our understanding from our conversation with you that where a corporation being acquired has outstanding convertible voting securities (options and warrants) that will be exercised immediately before or contemporaneously with the closing of the transaction, it is necessary to identify the "ultimate parent entity" ("UPE") of the acquired corporation on a "post-exercise" basis. Therefore, if:

(i) the corporation being acquired has two stockholders each of which holds 50% of the outstanding voting securities of the corporation (other than convertible voting securities);

(ii) the corporation being acquired has outstanding convertible voting securities held by third parties that will be exercised immediately before (or contemporaneously with) the consummation of the transaction;

(iii) because of such exercise, no person will hold 50% or more of the outstanding voting securities of the corporation being acquired (or, in the case of a contemporaneous exercise, no person will receive 50% or more of the consideration being paid in respect of the voting securities of the corporation being acquired) at the time of consummation of the transaction; and

(iv) no person has, and no person will at closing have, the contractual power to presently designate 50% or more of the directors of the corporation;

the corporation being acquired would be deemed to be its own UPE for purposes of determining HSR notification filing requirements in connection with the transaction.

In order to ensure that we provided you with all relevant information concerning this issue, discussed below are the facts of the proposed transaction as we currently understand them. In short, the transaction involves the acquisition by a public corporation ("Corporation A") of the voting securities of two private corporations ("Corporation B" and "Corporation C"), for consideration in the form of voting securities of Corporation A. Corporation B and Corporation C have two common 50% stockholders ("Stockholder X" and "Stockholder Y"). Corporation C has outstanding options and warrants that will be exercised immediately before or contemporaneously with the consummation of the transaction.

The option/warrant issue does not affect our analysis with respect to the acquisition of voting securities of Corporation A by Stockholder X and Stockholder Y. As discussed in Section 4 below, Stockholder Y will not file as an acquiring person because Stockholder Y does not meet the size-of-person filing threshold. However, as discussed in Section 3 below, Stockholder X will file as an acquiring person, with Corporation A as the acquired person. Therefore, the option/warrant issue does not affect whether a filing must be made in connection with the transaction.

The option/warrant issue does, however, affect our conclusions with respect to whether Corporation A must file as an acquiring person in connection with the acquisition by Corporation A of the voting securities of Corporation B and of Corporation C. If the exercise of the options/warrants were ignored for HSR filing purposes, Corporation A would be the acquiring person for two separate acquired persons (Stockholder X as the UPE of Corporation B and Corporation C, and Stockholder Y as the UPE of Corporation B and Corporation C). Under the facts as they currently exist and ignoring the exercise of the Corporation C options and warrants, for purposes of determining whether Corporation A must file as an acquiring person:

(a) the Corporation A/Stockholder X (Corp. B & Corp. C) portion of the transaction would meet both the size-of-persons and size-of-transaction filing thresholds; but

(b) the Corporation A/Stockholder Y (Corp. B & Corp. C) portion of the transaction would not meet the size-of-persons threshold.

Therefore, Corporation A would file as an acquiring person once in connection with the acquisition of voting securities of Corporation B and of Corporation C, with Stockholder X as the acquired person.

Considered on a "post-exercise" basis, however, Corporation A would be the acquiring person for three, rather than two, separate acquired persons (Stockholder X as a UPE of Corporation B, Stockholder Y as a UPE of Corporation B, and Corporation C as its own UPE). However, on a "post-exercise" basis but otherwise under the facts as they currently exist, for purposes of determining whether Corporation A must file as an acquiring person:

(a) the Corporation A/Stockholder X (Corp. B) portion would not meet the size-of-transaction threshold (see section 1 below);

(b) the Corporation A/Stockholder Y (Corp. B) portion would not meet the size-of-transaction or size-of-persons thresholds (see section 1 below); and

(c) the Corporation A/Corporation C portion would not meet the size-of-persons threshold (see section 2 below).

Therefore, Corporation A would not file as an acquiring person in connection with the acquisition of voting securities of Corporation B and of Corporation C. As noted above, however, Corporation A would file as an acquired person in connection with issuance of Corporation A common stock to Stockholder X in consideration for voting securities of Corporation B and Corporation C. In addition, we note that in yet another related transaction not otherwise addressed in this letter, Corporation A likely will be filing as an acquiring person in connection with the acquisition of the voting securities of a corporation that is otherwise unrelated to Corporation A and wholly unrelated to Corporation B, Corporation C, Stockholder X and Stockholder Y.

Because, when determined on a "post-exercise" basis, Corporation B and Corporation C will have different UPEs, the following factual discussion relating to the acquisition of the voting securities of Corporation B and of Corporation C is organized on that basis, rather than on the basis of an acquisition of voting securities from Stockholder X and Stockholder Y. This discussion is followed by a factual discussion relating to the acquisitions by Stockholder X and by Stockholder Y of voting securities of Corporation A and, finally, by our conclusions regarding HSR filing requirements in connection with the transaction.

1. <u>Acquisition by Corporation A of Voting Securities of Corporation B</u>

Corporation A, a publicly traded company, will acquire all of the outstanding voting securities of Corporation B from the stockholders of Corporation B. The consideration for the voting securities of Corporation B will consist of 1,454,544 shares of Corporation A common stock, plus certain contingent rights to receive Corporation A common stock (the "Contingent Rights"). The Contingent Rights are convertible into Corporation A common stock if and when certain events occur following the consummation of the transaction, but will not presently entitle the holders thereof to vote for directors of any entity.

a. <u>*Size of Persons*</u>

Corporation A is its own "ultimate parent entity" and has total assets in excess of $100 million. Corporation B does not have annual net sales or total assets of $10 million or more. However, Stockholder X and Stockholder Y, both natural persons, currently each own 50% of the outstanding common stock of Corporation B. Stockholder X has total assets or annual net sales in excess of $10 million. Stockholder Y does not.

b. *Size of Transaction*

Although Corporation A will acquire 100% of the voting securities of Corporation B, Corporation B has total assets and annual net sales of less than $25 million.

The number of shares of Corporation A common stock to be issued in exchange for the Corporation B common stock at closing (1,454,544 shares) was set based on a Corporation A common stock price of $5.50 per share, for a total value of $8,000,000. However, the current market price of Corporation A common stock is approximately $9.00 per share, for a total value of $13,090,896. Because a firm closing date has not been set, we are unable to determine at this time the "market price" of the ACG common stock and, therefore, the total value of the voting securities to be acquired. The total value of the Corporation A common stock to be issued in exchange for Corporation B common stock at closing would be above $15,000,000 if the "market price" of Corporation A common stock, as determined under 16 CFR 801.10, was greater than 10 5/16 per share.[1]

2. Acquisition by Corporation A of Voting Securities of Corporation C

Corporation A will also acquire all of the outstanding voting securities of Corporation C from the stockholders of Corporation C. The consideration for the voting securities of Corporation C will consist of 3,090,909 shares of Corporation A common stock, plus certain Contingent Rights (discussed above).

a. *Size of Persons*

Again, Corporation A is its own "ultimate parent entity" and has total assets in excess of $100 million. Corporation C does not have annual net sales or total assets in of $10 million or more. However, Stockholder X and Stockholder Y, in addition to being stockholders of Corporation B, currently each own 50% of the outstanding common stock of Corporation C. Again, Stockholder X has total assets or annual net sales in excess of $10 million, while Stockholder Y does not.

The only other outstanding "voting securities" of Corporation C are "convertible voting securities" consisting of options and warrants to acquire common stock of Corporation C, which do not presently entitle the holders thereof to vote for directors of any entity. These options and warrants are held by several natural persons other than Stockholder X and Stockholder Y, and become exercisable upon a change of control of Corporation C. It is currently anticipated that some or all of such options and warrants will be exercised in conjunction with the consummation of the transaction. If all such options and warrants were exercised, the common stock of Corporation A to be paid in exchange for the common stock of Corporation C at closing would be paid in the following proportions: Stockholder X – 30.43%; Stockholder Y – 30.43%; and Others – 39.14%.

[1] At a "market price" of 10 5/16 per share, the total value of the Corporation A common stock to be issued at closing in exchange for Corporation B common stock would be $14,999,985.

Of course, even if less than all such options and warrants were exercised, the exercise of any such option or warrant would reduce the holdings of each of Stockholder X and Stockholder Y below 50%.

*b.* *Size of Transaction*

Although Corporation A will acquire 100% of the voting securities of Corporation C, Corporation C has total assets and annual net sales of less than $25 million.

The number of shares of Corporation A common stock to be issued in exchange for the Corporation C common stock at closing (3,090,909 shares) was set based on a Corporation A common stock price of $5.50 per share, for a total value of $17,000,000. However, the current market price of Corporation A common stock is approximately $9.00 per share, for a total value of $27,818,181. The total value of the Corporation A common stock to be issued in exchange for Corporation C common stock at closing will be above $15,000,000 unless the "market price" of Corporation A common stock, as determined under 16 CFR 801.10, drops below $4 7/8 per share.[2]

3. **Acquisition by Stockholder X of Voting Securities of Corporation A**

At the closing of the related transactions, Stockholder X will receive a minimum of 3,233,290 and a maximum of 5,656,362 shares of common stock of Corporation A upon the closing of the transaction, as follows:

- 727,272 shares in exchange for 50% of the common stock of Corporation B;
- 940,563 to 1,545,454 shares in exchange for 30.43% to 50.00% of the common stock of Corporation C;[3]
- 1,565,455 shares in redemption of an existing note from Corporation A; and
- up to 1,818,181 shares in conversion of loans that may be made by Stockholder X to Corporation B and/or Corporation C prior to the closing of the transaction.[4]

As additional consideration for the voting stock of Corporation B and Corporation C, Stockholder X also will receive Contingent Rights that will be convertible into Corporation A common stock if and

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[2] At a "market price" of 4 13/16 per share, the total value of the Corporation A common stock to be issued at closing in exchange for Corporation C common stock would be $14,874,999.

[3] The number of shares that will be issued to Stockholder X in exchange for common stock of Corporation C will depend upon the extent to which third-party warrants and options for the purchase of Corporation C common stock are exercised prior to or contemporaneously with the consummation of the transaction.

[4] These 1,818,181 shares represent the aggregate number of shares that may be issued to Stockholder X and Stockholder Y upon conversion of loans in an aggregate amount up to $10,000,000 that may be made by Stockholder X and/or Stockholder Y, at a conversion rate of 1 share for each $5.50. Stockholder X has previously loaned approximately $3.85 million, which will be converted into approximately 700,000 shares. It is currently anticipated that additional loans by Stockholder X, if any, will not exceed $1 million.

when certain events occur following the consummation of the transaction. However, the Contingent Rights will not presently entitle the holders thereof to vote for directors of any entity.

*a.* *Size of Persons*

Corporation A is its own ultimate parent entity and has total assets in excess of $100 million. Stockholder X is a natural person and, therefore, is its own ultimate parent entity. Stockholder X has total assets in excess of $10 million.

*b.* *Size of Transaction*

The number of shares to be received by Stockholder X was set based on an exchange, redemption or conversion ratio (as applicable) of one share of Corporation A common stock for each $5.50 of value exchanged, redeemed or converted. At a current approximate market price of $9.00 per share, the aggregate value of 3,233,290 shares of Corporation A common stock is $29,099,610, and the aggregate value of 5,656,362 shares of Corporation A common stock is $50,907,258.

*c.* *Non-Investment Purpose*

Stockholder X will serve on the board of directors of Corporation A following the consummation of the transaction.

**4. Acquisition by Stockholder Y of Voting Securities of Corporation A**

At the closing of the related transactions, Stockholder Y will receive a minimum of 1,667,835 and a maximum of 4,090,907 shares of common stock of Corporation A upon the closing of the transaction, as follows:

- 727,272 shares in exchange for 50% of the common stock of Corporation B;
- 940,563 to 1,545,454 shares in exchange for 30.43% to 50.00% of the common stock of Corporation C;[5]
- up to 1,818,181 shares in conversion of loans that may be made by Stockholder Y to Corporation B and/or Corporation C prior to the closing of the transaction.[6]

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[5] The number of shares that will be issued to Stockholder Y in exchange for common stock of Corporation C will depend upon the extent to which the third-party warrants and options for the purchase of Corporation C common stock are exercised prior to or contemporaneously with the consummation of the transaction.

[6] These 1,818,181 shares represent the aggregate number of shares that may be issued to Stockholder X and Stockholder Y upon conversion of loans in an aggregate amount up to $10,000,000 that may be made by Stockholder X and/or Stockholder Y, at a conversion rate of 1 share for each $5.50. Stockholder Y has previously loaned approximately $250,000, which will be converted into approximately 45,454 shares. It is currently anticipated that Stockholder Y will not make a significant amount of additional loans.

As additional consideration for the voting stock of Corporation B and Corporation C, Stockholder Y also will receive Contingent Rights that will be convertible into Corporation A common stock if and when certain events occur following the consummation of the transaction. However, the Contingent Rights will not presently entitle the holders thereof to vote for directors of any entity.

*a.* *Size of Persons*

Corporation A is its own ultimate parent entity and has total assets in excess of $100 million. Stockholder Y is a natural person and, therefore, is its own ultimate parent entity. Stockholder Y does not have total assets or annual net sales in excess of $10 million.

*b.* *Size of Transaction*

The number of shares to be received by Stockholder Y was set based on an exchange or conversion ratio (as applicable) of one share of Corporation A common stock for each $5.50 of value exchanged or converted. At a current approximate market price of $9.00 per share, the aggregate value of 1,667,835 shares of Corporation A common stock is $15,010,515, and the aggregate value of 4,090,907 shares of Corporation A common stock is $36,818,163.

*c.* *Non-Investment Purpose*

Stockholder Y may serve as an executive officer of Corporation A following the consummation of the transaction.

5. **Conclusions Regarding Filing Requirements**

Based upon the above facts and upon our understanding of the FTC's position on the option/warrant issue discussed at the beginning of this letter, we have concluded the following:

A. In connection with the acquisition by Corporation A of 100% of the outstanding voting securities of Corporation B, Corporation A will not file as an acquiring person unless the aggregate "market price" for the Corporation A common stock to be issued at the closing of the transaction in exchange for Corporation B common stock is equal to or exceeds $15 million, because Corporation B does not have annual net sales or total assets of $25 million or more. If the aggregate market price of such common stock does exceed $15 million, then Corporation A must file only once as an acquiring person in connection with the acquisition by Corporation A of the voting securities of Corporation B, with Stockholder X as the acquired person, on the basis of the following:

   (a) Corporation A is its own "ultimate parent entity" and has total assets in excess of $100 million; and

(b) Corporation B has two "ultimate parent entities" (Stockholder X and Stockholder Y) but only Stockholder X has annual net sales or total assets of $10 million or more.

B. In connection with the acquisition by Corporation A of 100% of the outstanding voting securities of Corporation C, Corporation A will not file as an acquiring person, on the basis that Corporation C is its own "ultimate parent entity" and does not have annual net sales or total assets of $10 million or more. The conclusion that Corporation C is its own "ultimate parent entity" is based on the following:

(a) Stockholder X and Stockholder Y each currently holds 50% of the outstanding voting securities of Corporation C (other than "convertible voting securities");

(b) Corporation C currently has outstanding convertible voting securities (options and warrants) held by third parties, some (or all) of which will be exercised immediately before or contemporaneously with the consummation of the transaction;

(c) because of such exercise, no person will hold 50% or more of the outstanding voting securities of the corporation being acquired (or, in the case of a contemporaneous exercise, no person will receive 50% or more of the consideration being paid in respect of the voting securities of the corporation being acquired); and

(d) no person has, and no person will at closing have, the contractual power to presently designate 50% or more of the directors of the corporation.

C. In connection with the acquisition of voting securities of Corporation A by Stockholder X, Stockholder X will file as an acquiring person, with Corporation A as the acquired person, based on the following:

(a) Corporation A is its own "ultimate parent entity" and has total assets in excess of $100 million;

(b) Stockholder X is its own "ultimate parent entity" and has total assets in excess of $10 million;

(c) The value of the voting securities being acquired will (likely) exceed $15 million; and

(d) Stockholder X will serve on the board of directors of Corporation A and therefore would not been deemed to be acquiring the voting securities of Corporation A "solely for investment purposes."

D. In connection with the acquisition of voting securities of Corporation A by Stockholder Y, Stockholder Y will not file as an acquiring person because Stockholder Y does not have annual net sales or total assets of $10 million or more.

Mr. James Ferkingstad
July 13, 1999
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E. The acquisitions by Stockholder X and by Stockholder Y of the Contingent Rights and of other convertible voting securities that may be issued in related transactions are not themselves subject to the reporting requirements of HSR Act. However, the subsequent conversions of these convertible voting securities into Corporation A common stock will be subject to the HSR Act, and may require additional filings if the relevant notification thresholds are met.

Although not addressed in this letter, we again note that Corporation A likely will be required to file as an acquiring person in a related transaction that involves the acquisition by Corporation A of the voting securities of a corporation that is otherwise unrelated to Corporation A and wholly unrelated to Corporation B, Corporation C, Stockholder X and Stockholder Y.

If our understanding of the option/warrant issue that we discussed on June 28th is incorrect, or if you otherwise disagree with any of our conclusions regarding HSR filing requirements in connection with the transaction discussed in this letter, I ask that you contact me at [redacted] or [redacted] at your earliest convenience.

Thank you again for your assistance.

Very truly yours,

[redacted]

cc: [redacted]

To Writer 7/22 2:30pm Agree
Assuming conversion occurs prior merger Discussed w/ DS.
JHF