Securities and Exchange Commission
PHILIPPINES

OFFICE OF THE GENERAL COUNSEL

24 July 2017

SEC-OGC Opinion No. 17-07
Re: Foreign Equity Limitation

GORRICETA AFRICA CAUTON & SAAVEDRA
15/F Strata 2000
F. Ortigas Jr. Road, Ortigas Center
Pasig City 1605

Attention: Atty. Mark S. Gorriceta
Atty. Michael Angelo A. Villamor
Atty. Kristine T. Torres
Atty. Ceasario Rex P. Kapunan

Gentlemen:

This refers to your letter dated 19 August 2016 requesting for confirmation on the applicable foreign equity limitation to your client, Audiowav Media, Inc. ("Audiowav"), taking into consideration its business model and commercial arrangements with third parties.

In your letter you mentioned that Audiowav is a domestic corporation that provides technology solutions by using its proprietary platform to assist businesses and companies in creating and designing their customized branding environment. In connection with this, you stated that Audiowav provides the following products/services:

(a) WavSight – Through WavSight, Audiowav offers digital media signages which give clients the ability to manage their digital screens from a central location. This includes the online WavSight device which contains a slideshow and compilation of a client's production in video format. There is an option to include as an add-on the placement and promotion of customized messages.

(b) WavSound – Through the WavSound, Audiowav offers music categorized into customized playlists inside a client's business establishment to cater to its customers' tastes and preferences and influence consumer behavior. This may include as an add-on the playing of customized messages.

(c) WavScents – Through WavScents, Audiowav offers a device which provides customized signature scents to establish brand association and recall

(d) WavControl – Through WavControl, Audiowav offers communication systems, industrial speakers and amplifiers for sale to its clients.

(e) WavSphere - WavSphere allows point-of-purchase advertising to be aired over Audiowav's proprietary platform. Audiowav uses its technology to air digital content and customized messages of certain advertisers chosen by the client.

In relation to the optional placement of customized messages, particularly with respect to the WavSight, WavSound and WavSphere products/services, you claimed that these are not created by Audiowav itself. Instead, Audiowav endorses the production of these customized messages to a corporation wholly owned by it (Partner Company), which transaction is allegedly carried out on an arm's length basis. The customized messages are then sent by the Partner Company to Audiowav by uploading the same to a server housed in a data facility located in Texas, U.S.A., which is owned by a separate entity (Server Owner). It is the Server Owner which then supposedly transmits the customized messages to the Audiowav-procured devices of its clients.

In your letter, you claimed that Audiowav is engaged in neither mass media nor advertising, hence should not be made subject to the foreign equity limitations on such activities.

We do not confirm your position.

I. Audiowav is engaged in mass media insofar as its WavSight, WavSound and WavSphere products/services are concerned

The activities involved in providing the WavSight, WavSound and WavSphere products/services are considered as mass media, hence the foreign equity imposed by the Constitution as to mass media will apply to Audiowav, i.e. it must be wholly-owned and managed by Filipino citizens.[1]

As opined by the Department of Justice, the term "mass media" in the Constitution refers to any medium of communication designed to reach the masses and that tends to set the standards, ideals and aims of the masses, the distinctive characteristic of which is the dissemination of information and ideas to the public, or a portion thereof.[2]

Audiowav is not merely a provider of technological solutions per se. Rather, through its proprietary technology, i.e. the WavSight, WavSound and WavSphere, Audiowav provides its clients with a digital platform to reach out to its target market and convey to them customized messages and point-of-purchase advertising through digital media signages and/or the audio playback thereof. These messages and advertising content, although not created by Audiowav itself, are disseminated by Audiowav through a digital platform which it provides to its clients, and which is specifically made accessible through compatible Audiowav devices, which are produced in conjunction with the said business model.

In SEC-OGC Opinion No. 14-06, the Commission recognized the internet and mobile technology as platforms for mass media.[3] In the same opinion, the Commission considered a corporation that provides an online platform as a "middleman" between parties as mass media, thus:

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[1] Section 11(1), Article XVI of the Constitution provides:

"SECTION 11. (1) The ownership and management of mass media shall be limited to citizens of the Philippines, or to corporations, cooperatives or associations, wholly-owned and managed by such citizens."

[2] DOJ Opinion No. 40, series of 1998.

[3] SEC-OGC Opinion No. 14-06 dated 08 May 2014.

> "Moreover, your letter states that Komli intends to provide a digital platform to third-party websites to sell and monetize online inventory. **Although Komli will not own or operate any online media outlet nor will affiliate with any internet service provider, online retailer or social networking site and will merely act as a middleman by bringing together the product manufacturers and third-party websites, it will provide an online platform intended to increase the sale of a particular product**. In SEC Opinion No. 12-16, this Commission opines that if the corporation is engaged in the operation of a voucher platform on the internet with the purpose of increasing the sale of a particular product or service, it, **in effect disseminates information to the general public through the internet and is considered a mass media entity** subject to the requirement of paragraph 1, Section 11, Article XVI of the 1987 Constitution and List A (1) of Executive Order No. 858." (Emphasis and underscoring supplied)

It should be clarified, however, that the foregoing Opinion did not conclude that the internet per se is mass media, rather, that the internet may be used as a digital platform or medium to disseminate information and ideas to the public, in which case, such activity will constitute a mass media undertaking. This is consistent with subsequent opinions of the Commission finding the following to be mass media activities: (a) SEC-OGC Opinion No. 15-10 dated 02 September 2015, with respect to the use of the internet for the marketing and operation of a voucher platform; and (b) SEC-OGC Opinion No. 16-21 dated 31 August 2016, on the subleasing of digital space in the internet to be used as a platform for online advertising. Thus, it is not the internet per se, but how the same is utilized, that determines whether a particular undertaking constitutes mass media.

In the case of Audiowav, the dissemination of information is made not only through the internet, but also through mobile technology such as the WavSight, WavSound and WavSphere devices and software, which were designed and intended to disseminate the aforementioned custom messages and advertising content for delivery to its clients and/or the latter's target audience.

In your letter, you cited SEC-OGC Opinion No. 04-27 where the Commission opined that a corporation that acts merely as a carrier for transmitting messages and does not create nor transmit the same does not constitute mass media. You thus argued that Audiowav is merely a carrier of customized messages and therefore is not a mass media company.

We disagree.

First, the activities performed by Audiowav and American Data Exchange Corporation (ADEC), i.e. the corporation in the aforementioned opinion, are far too dissimilar to be comparable as to qualify Audiowav to be a mere "carrier" of information. ADEC is an IT company engaged in data encoding, data processing, data conversion, transcription, call center and other customer relationship management services, while Audiowav is engaged in, among others, providing proprietary technology that serves as a platform for digital signages and audio playback of customized messages, and the airing of point-of-purchase advertising. By engaging in these activities, Audiowav cannot be considered as a "mere carrier" of information.

Second, the corporation need not be the creator of the message/information to be considered as a mass media entity. As opined by the Commission in SEC-OGC Opinion No. 16-21, **the mere act of subleasing digital space to clients who will in turn use the same for advertising, is "considered as providing a medium to disseminate the advertisements and messages, thus engaging in mass media."** (Emphasis supplied.)

This is consistent with the previous pronouncement of the Commission in SEC-OGC Opinion No. 16-17 dated 11 July 2016 wherein it stated that the leasing out or subleasing of physical spaces such as waiting sheds, billboards and other structures constitutes providing a medium for the dissemination or conveyance of messages to the public, hence is considered as mass media.

Your letter argued that Audiowav is not a mass media company insofar as DOJ Opinion No. 40 series of 1998 allegedly pronounced that the internet is not a form of mass media. DOJ Opinion No. 40, which you invoke is, to our view, not *apropos* because it involves an entity, what is called therein as an Internet access provider (IAP), which merely connects or offers to the owner of a computer the services of inter-connecting the latter's computer to a network of computers thereby giving him access to said services offered by the Internet, and does not appear to utilize the internet as a digital platform or medium to disseminate information and ideas to the public. As discussed above, it is not the internet per se, but how the same is used, that determines whether an entity may be considered mass media.

In the case of Audiowav, the services it offers to its clients do not simply consist in connecting one user to the internet or to a network of computers, but the provision of a proprietary technology through which information, in the form of messages and advertisements, are transmitted to its clients. Thus, Audiowav is, insofar as the WavSight, WavSound and WavSphere products/services are concerned, engaged in mass media and is therefore required under the Constitution to be wholly-owned by Filipinos.

In view of the foregoing, there is no longer any need to delve into the commercial agreements Audiowav maintains with the Partner Company and the Server Owner. As discussed above, Audiowav is, in and of itself, already considered to be a mass media entity.

With respect to the WavScent and WavControl products and services, these do not constitute activities of a mass media entity.

(i) The WavScent, through the deployment of a device releasing customized scents, merely provides an olfactory stimulation, which, although possibly resulting in brand association, does not amount to a dissemination of information or ideas sufficient to qualify the same as a mass media operation. At the most, the WavScent can only be considered as something akin to a personalized customer service being offered by Audiowav.

(ii) Similarly, WavControl products/services cannot be considered as a mass media operation of Audiowav inasmuch as it only involves the sale of merchandie such as speakers and other communication systems. It should be noted, however, that should Audiowav sell WavControl products/services in retail, it will be subject to the foreign equity limitation imposed under Section 5 of the Retail Trade Liberalization Act of 2000, i.e. that retail trade enterprises with a paid-up capital less than the Philippine Peso equivalent of Two Million Five Hundred Thousand US dollars (US$2,500,000.00) shall be exclusively owned by Filipino citizens and corporations wholly-owned by Filipino citizens.[4]

[4] SEC-OGC Opinion No. 14-06 dated 08 May 2014.

II. Audiowav is not engaged in advertising

Advertising is defined as "the business of conceptualizing, presenting or making available to the public, through any form of mass media, fact, data or information about the attributes, features, quality or availability of consumer products, services or credit."[5]

In previous opinions, the Commission distinguished an advertising agency from a mass media entity as follows:

> "xxx Advertising agencies do not actually disseminate the materials they prepare as they have to utilize or avail of the facilities of mass media, i.e., newspapers, radio, television, etc., for this purpose. Advertising agencies falling within this concept are not mass media, considering that they do not operate or control any medium of communication designed to reach or influence the masses, although the activities of such agencies, by their nature, are closely related to those of mass media.
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> However, where the advertising agency actually disseminates information, or operates, controls or otherwise engages in the business of mass media, a specific example of which is an outdoor advertising firm which sells billboard space to advertisers, then such advertising agencies would fall within the purview of the constitutional limitation."[6]

Moreover, in SEC-OGC Opinion No. 09-16, the Commission opined that, in view of the definition under the Consumer Act, a corporation is not considered to be engaged in advertising in cases where it does not conceptualize, design, prepare and produce for clients the commercial messages or advertisements posted online but merely allows the posting of the same on its website, generally free of charge.

In view of the foregoing definition and interpretation of advertising, as contrasted with mass media, we are of the opinion that Audiowav is not engaged in advertising.

In sum, it is our opinion that Audiowav, while not an advertising company, is an entity engaged in mass media, and is therefore required under the Constitution to be limited to Filipino citizens or to corporations, cooperatives or associations, wholly-owned and managed by Filipino citizens.

It shall be understood that the foregoing opinion is rendered based solely on the facts and circumstances disclosed and relevant solely to the particular issue raised therein. It shall not be used in the nature of a standing rule binding upon the Commission in other cases or upon the courts whether of similar or dissimilar circumstances.[7] If, upon further inquiry or investigation it will be disclosed that the facts relied upon are different, this opinion shall be rendered void.

Please be guided accordingly.

CAMILO S. CORREA
General Counsel

mdr/vjbg

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[5] Section 4(a), Republic Act No. 7394, otherwise known as the Consumer Act of the Philippines (Consumer Act).
[6] SEC Corporate Legal Department Opinion dated 02 September 1988, cited in SEC Opinion No. 12-16 dated 13 September 2012, SEC-OGC Opinion No. 14-06 dated 08 May 2014.
[7] SEC Memorandum Circular No. 15, series of 2003.