

**DEPARTMENT OF BUSINESS OVERSIGHT***Ensuring a Fair and Secure Financial Services Marketplace for all Californians*

**Jan Lynn Owen**  
**Commissioner of Business Oversight**

October 20, 2015

Re: Rebuttal of Presumption of Control by \_\_\_\_\_ and \_\_\_\_\_ with respect to \_\_\_\_\_

Dear \_\_\_\_\_:

Thank you for your letter, dated August 26, 2015, rebutting the presumption that \_\_\_\_\_ acquired control of \_\_\_\_\_ when it acquired 10 percent or more of \_\_\_\_\_'s outstanding voting securities. Your letter responds to the Department of Business Oversight's (Department) letter, dated June 30, 2015, requesting that \_\_\_\_\_ explain why it did not obtain the approval of the Commissioner of Business Oversight (Commissioner) before acquiring their more than 10 percent beneficial interest in \_\_\_\_\_'s outstanding voting securities.

**MONEY TRANSMISSION ACT**

Financial Code section 2035 provides that no person shall directly or indirectly acquire control of a licensee under the Money Transmission Act (MTA) unless the Commissioner has first approved the acquisition of control. Financial Code section 2003(h) provides that "control" for purposes of the MTA shall have the meaning set forth in Financial Code section 1250. Financial Code section 1250(b), in pertinent part, provides that a person who "directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing, 10 percent or more of the then outstanding voting securities issued by another person is presumed to control such other person." The presumption contained in the cited portion of California Financial Code section 1250(b) is rebuttable.

**BACKGROUND**

\_\_\_\_\_ is registered as an investment adviser with the U.S. Securities & Exchange Commission (SEC). \_\_\_\_\_ is registered under the Investment Company Act of 1940 as a diversified, open-end management investment company. \_\_\_\_\_ is an advisory client of \_\_\_\_\_. Your letter acknowledges that as of July 31, 2015, \_\_\_\_\_ beneficially owned 6,174,400 shares, or 15.7 percent, of \_\_\_\_\_'s voting securities of which 4,114,773 shares, 10.46 percent of the outstanding, was owned by \_\_\_\_\_.

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Your letter argues that \_\_\_\_\_ does not control \_\_\_\_\_ because: (i) the shares that it beneficially owns were acquired in the ordinary course of business with the expectation of resale and not for the purpose of exercising a controlling influence over the management or policies of \_\_\_\_\_; (ii) the shares are only beneficially owned by \_\_\_\_\_ on behalf of more than thirty advisory clients rather than as its own proprietary investments; (iii) it is eligible to disclose its holdings in \_\_\_\_\_ on SEC Schedule 13G, which is only available to persons that acquire securities in the ordinary course of their business and not for the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with or a participant in any transaction having such purpose or effect; and (iv) there is no material relationship or basis for affiliation between \_\_\_\_\_ and \_\_\_\_\_.

Your letter argues that \_\_\_\_\_ does not control \_\_\_\_\_ because: (i) the economic ownership of \_\_\_\_\_ is held by more than 119,000 institutions and individuals; (ii) it acquired its shares in \_\_\_\_\_ in the ordinary course of business with the expectation of resale and for the purpose of exercising a controlling influence over the management or policies of \_\_\_\_\_; (iii) it is eligible to disclose its holdings in \_\_\_\_\_ on SEC Schedule 13G, which is only available to persons that acquire securities in the ordinary course of their business and not for the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with or a participant in any transaction having such purpose or effect; and (iv) there is no material relationship or basis for affiliation between \_\_\_\_\_ and \_\_\_\_\_.

Your letter also represents that \_\_\_\_\_ and \_\_\_\_\_ have not and will not directly or indirectly individually or in the aggregate:

- a. Take any action to cause \_\_\_\_\_ or any of its subsidiaries to become a subsidiary of them;
- b. Seek or accept representation on \_\_\_\_\_ 's board of directors, unless agreed to by the California Department of Business Oversight or its staff, and permitted by applicable law;
- c. Have or seek to have any representative of either of them serve as an officer, agent or employee of \_\_\_\_\_;
- d. Propose a director or a slate of directors in opposition to any nominee or slate of nominees proposed by the management of board of directors of \_\_\_\_\_;
- e. Exercise or attempt to exercise a controlling influence over the management or policies of \_\_\_\_\_;

- f. Attempt to influence the dividend policies; pricing of services; personnel decisions; operations activities (including the location of any offices or branches or their hours of operation, etc.); or any similar activities or decisions of \_\_\_\_\_;
- g. Enter into any agreement with \_\_\_\_\_ that substantially limits the discretion of \_\_\_\_\_'s management over major policies and decisions, including, but not limited to, policies or decisions about employing and compensating executive officers; engaging in new business lines; raising additional debt or equity capital; merging or consolidating with another firm; or acquiring, selling, leasing, transferring, or disposing of material assets, subsidiaries or other entities;
- h. Solicit or participate in soliciting proxies with respect to any matter presented to the shareholders of \_\_\_\_\_; or
- i. Dispose or threaten to dispose (explicitly or implicitly) of equity interests of \_\_\_\_\_ in any manner as a condition or inducement of specific action or non-action by \_\_\_\_\_.

Finally, you point out that \_\_\_\_\_ was not a party to the agreement and plan of merger pursuant to which \_\_\_\_\_ acquired \_\_\_\_\_ or otherwise treated as a controlling person of \_\_\_\_\_ by \_\_\_\_\_ in connection with \_\_\_\_\_'s acquisition of \_\_\_\_\_.

### **CONCLUSION**

The Department's long standing position is that it is the power to control, not the intention to control, that governs whether prior approval of the Department is required for an acquisition of control.

However, based on the percentage of stock held by \_\_\_\_\_ compared to the percentage of stock held by other entities, it appears that \_\_\_\_\_ does not have the power to direct the management and policies of \_\_\_\_\_. Therefore, \_\_\_\_\_ has not acquired control of \_\_\_\_\_ as the term "control" is defined by Financial Code section 1250 subdivision b. Accordingly, the Commissioner finds that \_\_\_\_\_ has rebutted the presumption of control with regard to its holdings of \_\_\_\_\_'s stock.

The Commissioner's determination applies to the present set of circumstances. Please be advised that, among other circumstances, should \_\_\_\_\_ or any of its affiliates acquire any additional shares of \_\_\_\_\_'s stock, acquire the shares of any person that controls \_\_\_\_\_, enter into any agreement regarding the voting of such shares,

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take any other action that may be construed to be exercising control over \_\_\_\_\_ or any person that controls \_\_\_\_\_, or deviate in any way from the representations contained in your letter, the actions may be considered to involve the acquisition of control of \_\_\_\_\_.

Please contact the undersigned at 213.897.2172 if you have any questions.

Sincerely,

Jan Lynn Owen  
Commissioner of Business Oversight

By

Wallace M. Wong  
Senior Counsel

WMW:jg

cc: Robert Venchiarutti, Department of Business Oversight, San Francisco