

## OFFICE OF THRIFT SUPERVISION

### Approval of Rebuttals of Control and Concerted Action

**Order No.:** 2003-49

**Date:** September 26, 2003

**Docket No.:** H-3131

Legg Mason, Inc., Baltimore, Maryland (Acquiror) has filed a Rebuttal of Control, pursuant to 12 C.F.R. § 574.4(e). In addition, the Acquiror and several of its investment adviser subsidiaries, listed in Attachment 1 (collectively, Rebutting Subsidiaries), have filed Rebuttals of Concerted Action (Concerted Action Rebuttals), pursuant to 12 C.F.R. § 574.4(e), seeking to rebut the presumption of concerted action under 12 C.F.R. § 574.4(d) with the Acquiror and each other.

#### **Background**

The Acquiror, a savings and loan holding company and corporate parent of the Rebutting Subsidiaries, investment advisers registered with the Securities and Exchange Commission, requests that the Office of Thrift Supervision (OTS) accept its Rebuttal of Control. The Rebuttal of Control asserts that the Acquiror will not directly or indirectly acquire control of a savings and loan holding company or savings association (collectively, Savings Associations) through the Rebutting Subsidiaries as a result of the Rebutting Subsidiaries, in the ordinary course of their businesses, acquiring securities on behalf of their clients solely for investment purposes.

With certain exceptions, the Acquiror and the Rebutting Subsidiaries have filed Concerted Action Rebuttals with respect to the other Rebutting Subsidiaries and the Acquiror. Some of the Rebutting Subsidiaries, due to their relationships, have not rebutted concerted action with each other. The Concerted Action Rebuttals contemplate the existence of the following groups among the Rebutting Subsidiaries: (1) Legg Mason Capital Management, Inc., Legg Mason Focus Capital, Inc., Legg Mason Funds Management, Inc., and LMM, LLC; (2) Legg Mason Wood Walker, Incorporated, LM Falcon Investment Strategies, Inc., and Peregrine Investments, LLC; (3) Berkshire Asset Management, Inc. and Bingham Legg Advisers LLC; (4) Western Asset Management Company and Western Asset Management Company Limited; and (5) Legg Mason Investments (Europe) Limited and Legg Mason Investment Funds Limited (collectively, the Subgroups).

#### **Rebuttal of Control Submission**

The Control Regulations state that an acquiror is deemed, subject to rebuttal, to have acquired control of a savings association if the acquiror, directly or indirectly, or through one or more subsidiaries or transactions or acting in concert with one or more persons or companies, acquires more than 10 percent of any class of voting stock of a

savings association and is subject to any control factor, as described in 12 C.F.R. § 574.4(c).<sup>1</sup>

Parties attempting to rebut control are required to file a submission setting forth facts and circumstances supporting their contention that no control relationship would exist after the proposed acquisition.<sup>2</sup> In addition, such parties must file a rebuttal of control agreement.

OTS may reject any control rebuttal that is inconsistent with the facts and circumstances known to it, or which does not clearly and convincingly rebut the presumption of control.<sup>3</sup> If OTS concludes that it would be injudicious to rely on an acquiror's representations, based on past activities of the acquiror, or other concerns, OTS may conclude that the acquiror has not clearly and convincingly rebutted a determination of control. In addition, an acquiror that is in conclusive control of a Savings Association may not rebut control.

The Acquiror has filed a written submission setting forth facts and circumstances in support of the Acquiror's contention that no control relationship would exist if the Acquiror, as a result of the Rebutting Subsidiaries' business, indirectly acquires more than 10 percent, but less than 25 percent of a class of a Savings Association's equity securities. The Acquiror represents that the Rebutting Subsidiaries acquire shares on behalf of their clients for investment purposes only, in the ordinary course of business, and that the Acquiror would not seek to exert control over a Savings Association's board of directors, management or policies. Also, the written submission states that the Acquiror would not exercise any influence over the voting and investment decisions of the Rebutting Subsidiaries.

The Acquiror has submitted a rebuttal of control agreement that includes several material differences from the standard rebuttal agreement set forth at 12 C.F.R. § 574.100. First, the agreement does not relate specifically to one Savings Association, but is intended to address acquisitions of stock of any Savings Association. Because the Acquiror has outlined circumstances that would apply to acquisitions of rebuttable control of any Savings Association, OTS does not object to this revision. Second, the agreement provides that the Acquiror will not seek or accept any representation on the board of directors of a Savings Association. In light of the general applicability of the agreement to all Savings Associations, and the fact that the Rebutting Subsidiaries are not signatories to the Rebuttal of Control, OTS considers this limitation appropriate.

Third, the agreement states that the Acquiror will be permitted to engage in intercompany transactions, at arms-length, with a Savings Association or its affiliates, in which the Savings Association or affiliate provides banking or other financial services

<sup>1</sup> 12 C.F.R. § 574.4(b)(1)(i) and 574.4(c). The definition of "savings association" includes holding companies. See 12 C.F.R. § 574.2(p).

<sup>2</sup> 12 C.F.R. § 574.4(e)(1).

<sup>3</sup> 12 C.F.R. § 574.4(e)(3).

that the Savings Association generally provides in the ordinary course of business. The standard rebuttal agreement does not permit transactions between an acquiror and a savings association for which the acquiror proposes to rebut control. OTS has no objection to this modification, which enables the Acquiror to obtain customary banking services without regard to the holdings of the Rebutting Subsidiaries.

Fourth, the agreement specifically provides that the Acquiror has agreed not to take any action causing a Savings Association or its subsidiaries to become subsidiaries of the Acquiror or dispose or threaten to dispose of shares, of a Savings Association in any manner as a condition of specific action or non-action by the Savings Association. OTS has no objection to this modification, which helps ensure compliance with the OTS Acquisition of Control Regulations.

Fifth, the Acquiror has undertaken to provide OTS, on a quarterly basis, a report disclosing the Acquiror's aggregate stockholdings and each Rebutting Subsidiary's stockholdings of any Savings Association, along with a certification certifying the Acquiror's absence of control, effectiveness of the current informational barriers between itself and the Rebutting Subsidiaries and the lack of concerted action among the Rebutting Subsidiaries, and the Acquiror's compliance with the rebuttal of control agreement. OTS has no objection to this modification, which helps ensure that the applicability of the Rebuttal of Control to all Savings Associations does not result in concerns regarding compliance with the OTS Acquisition of Control Regulations.

Finally, the rebuttal agreement provides that the Acquiror's and the Rebutting Subsidiaries' aggregate shareholdings of any class of a Savings Association's equity security be less than 25 percent. This provision helps ensure that the Acquiror does not acquire conclusive control of any Savings Association, and is therefore appropriate.

#### **Rebuttal of Concerted Action Submission**

The Control Regulations state that a company controlling or controlled by another company and companies under common control are presumed to be acting in concert.<sup>4</sup> The Rebutting Subsidiaries are all controlled by the Acquiror, and are, under the Control Regulations, presumed to be acting in concert with the Acquiror and each other. At times, the Rebutting Subsidiaries will own shares of Savings Associations so that, unless concerted action is successfully rebutted by such entities, acquisition of the shares will be attributed to the other Rebutting Subsidiaries and to the Acquiror.

Section 574.4(e)(2) requires parties seeking to rebut concerted action to file a submission setting forth facts and circumstances supporting the parties' contention that no action in concert exists, as well as an affidavit executed by each person or company presumed to be acting in concert stating that the parties do not have any agreements or

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<sup>4</sup> 12 C.F.R. § 574.4(d)(4).

understandings, written or tacit, with respect to the exercise of control over the management or policies of the savings association.

Each of the Rebutting Subsidiaries, and the Acquiror, has executed the requisite affidavit. In addition, the Acquiror and the Rebutting Subsidiaries have filed a written submission setting forth facts and circumstances to support their contention that no action in concert exists.

With respect to concerted action between the Acquiror and the Rebutting Subsidiaries, the filings emphasize the Acquiror's policy of acquiring previously existing companies, without making significant changes to an acquired company's policies and personnel. Although the Acquiror's senior officers constitute a majority of the board members of each Rebutting Subsidiary, the Concerted Action Rebuttals state that the boards provide only general business guidance, do not participate in day-to-day operations, and do not participate in the investment process.

With respect to concerted action among the Rebutting Subsidiaries, the filings state that (with the exception of within the Subgroups) the Rebutting Subsidiaries have independent investment strategies and services, do not share investment personnel or coordinate investment activities, and do not combine their respective voting powers toward any common purpose.

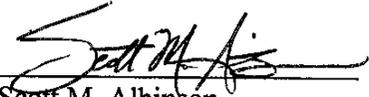
In addition, the rebuttals state that each Rebutting Subsidiary has adopted written policies and procedures formalizing informational barriers with the Acquiror and the other Rebutting Subsidiaries (with the exception of within the Subgroups). The informational barriers are intended to ensure that each Rebutting Subsidiary independently and exclusively maintains and exercises authority to vote, acquire and dispose of securities for discretionary accounts, does not consult or agree with its affiliates regarding voting, acquisition or disposition of securities, and does not attempt to influence voting or investment decisions made by affiliates.

Prior to acquiring more than ten percent of any class of voting stock of a Savings Association, any individual Rebutting Subsidiary, or in the case of a Subgroup, the Subgroup, must submit and receive OTS approval of the relevant filing under OTS Acquisition of Control Regulations.

### **Conclusion**

Based on the foregoing analysis, the Rebuttal of Control and Concerted Action Rebuttals are hereby accepted.

By order of the Director of the Office of Thrift Supervision, or his designee,  
effective September 26, 2003.



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Scott M. Albinson  
Managing Director  
Office of Supervision

Attachment 1

Rebutting Investment Adviser Subsidiaries of Legg Mason, Inc.

Barrett Associates, Inc.  
Bartlett & Co.  
Batterymarch Financial Management, Inc.  
Berkshire Asset Management, Inc.  
Bingham Legg Advisers LLC  
Brandywine Asset Management, LLC  
Legg Mason Capital Management, Inc.  
Legg Mason Focus Capital, Inc.  
Legg Mason Funds Management, Inc.  
Legg Mason Investments (Europe) Limited  
Legg Mason Investment Funds Limited  
Legg Mason Real Estate Services, Inc.  
Legg Mason Trust, fsb  
Legg Mason Wood Walker, Incorporated  
LM Falcon Investment Strategies, Inc.  
LMM, LLC  
Peregrine Investments, LLC  
Perigee Investment Counsel Inc.  
Private Capital Management, L.P.  
Royce & Associates, LLC  
Western Asset Management Company  
Western Asset Management Company Limited