

## OFFICE OF THRIFT SUPERVISION

### Approval of Rebuttals of Control and Concerted Action

**Order No.: 2008-27**

**Date: July 17, 2008**

**Docket No.: H-1072, 8534**

Carl C. Icahn and related entities (Rebuttal Entities), New York, New York, (listed in Attachment I) (collectively, the Icahn Group) have filed a Rebuttal of Control, pursuant to 12 C.F.R. § 574.4(e) regarding Guaranty Financial Group, Inc., Austin, Texas (Holding Company), and Guaranty Bank, Austin, Texas (Savings Bank). In addition, the Icahn Group has filed a rebuttal of concerted action, pursuant to 12 C.F.R. § 574.4(e), to rebut the presumption that the Icahn Group is acting in concert with certain limited partners of certain Rebuttal Entities.

#### **The Proposed Transaction**

The Icahn Group seeks to acquire up to 24.9 percent of the Holding Company's common stock, which would result in the Icahn Group becoming one of the two largest shareholders of the Holding Company. The Rebuttal of Control asserts that the Icahn Group will not directly or indirectly acquire control of the Holding Company as a result of the Icahn Group acquiring securities and that it is acquiring the securities solely for investment purposes. In support of the Rebuttal of Control, the Icahn Group has submitted a draft Rebuttal of Control Agreement. In addition, the Icahn Group has filed a concerted action rebuttal pursuant to 12 C.F.R. § 574.4(e), as described above.

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

The Control Regulations state that an acquiror is deemed, subject to rebuttal, to have acquired control of a savings association<sup>1</sup> 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>2</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

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<sup>1</sup> The definition of "savings association" includes savings and loan holding companies. See 12 C.F.R. § 574.2(p) (2008).

<sup>2</sup> 12 C.F.R. § 574.4(b)(1)(i) and 574.4(c) (2008).

exist after the proposed acquisition. In addition, such parties must file a rebuttal of control agreement.

The Office of Thrift Supervision (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. 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 Icahn Group has filed a written submission setting forth facts and circumstances in support of its contention that no control relationship exists between the Icahn Group and the Holding Company. The Icahn Group represents that it will acquire the Holding Company's shares for investment purposes only, and not for the purpose, or with the effect, of changing or influencing control of the Holding Company, the Holding Company's board of directors, management or policies. The Icahn Group would not acquire more than 24.9 percent of any class of the Holding Company's voting securities.

The standard rebuttal agreement, set forth at 12 C.F.R. § 574.100, provides that a rebutting party will not engage in any intercompany transactions with the entity for which it is rebutting control, or any of that entity's affiliates, or be a party to any agreements with that entity or its affiliates. The Icahn Group has requested that OTS accept a rebuttal agreement that provides that the Holding Company and/or Savings Bank (or affiliates) could engage in transactions and agreements with companies in which the Icahn Group owns less than 10 percent of any class of outstanding voting shares. Further, the modified rebuttal agreement provides that an existing agreement between a company, which company would be deemed to be under the control of Mr. Icahn and certain Rebuttal Entities, and the Savings Bank would not be subject to the Rebuttal of Control Agreement. In addition, the Icahn Group would enter into an agreement with the Holding Company under which the Holding Company would agree not to do business with companies in which the Icahn Group owns or controls more than ten percent of any class of voting securities. OTS concludes, based on the representations made in the Rebuttal of Control, and review of existing agreements, that any proposed transactions and agreements do not provide the Icahn Group with the ability to influence or control the Holding Company, and therefore, do not contravene the purposes of a rebuttal of control. On the basis of the facts presented, OTS concludes that the Rebuttal of Control meets the applicable approval standards.

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

The Control Regulations state, *inter alia*, that a company controlling or controlled by another company will be presumed to be acting in concert.<sup>3</sup>

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<sup>3</sup> 12 C.F.R. § 574.4(d)(4) (2008).

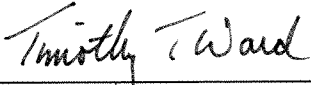
Section 574.4(e)(2) requires parties seeking to rebut concerted action to file a submission setting forth facts and circumstances supporting the parties' contention that no action in concert exists. The Icahn Group has filed such a submission with respect to certain limited partners (Outside Investors) in two of the Icahn Entities. The Outside Investors, individually, have acquired a greater than 25 percent limited partnership interest in certain limited partnerships included in the Icahn Group.<sup>4</sup> Based on OTS's review of the Outside Investors' investments in those entities, the inability generally to vote the limited partnership interests, and the Outside Investors' reliance on the Icahn Group to manage the investments of the certain limited partnerships, OTS concludes that the Icahn Group would not be acting in concert with the Outside Investors to control the Holding Company.

On the basis of the facts presented, OTS concludes that the Concerted Action Rebuttal meets the applicable approval standards.

### **Conclusion**

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

By order of the Director of the Office of Thrift Supervision, or his designee,  
effective July 17, 2008.

  
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Timothy T. Ward  
Deputy Director  
Examinations, Supervision and  
Consumer Protection

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<sup>4</sup> An acquiror is deemed to have acquired control of a company if the acquirer directly or indirectly has contributed more than 25 percent of the capital of the company. See 12 C.F.R. § 574.4(a)(2)(vi) (2008).

Attachment I

**Rebuttal Entities**

Barberry Corp.  
Koala Holding GP Corp.  
Koala Holding LP  
Hopper Investments LLC  
High River Limited Partnership  
Starfire Holding Corp.  
Buffalo Investors Corp.  
Highcrest Investors Corp.  
ACF Industries Holding Corp.  
Unicorn Associates Corp.  
Amos Corp.  
Arrowhead Holding Corp.  
CCI Funding Corp.  
Odysseus Holding Corp.  
CCI Offshore Corp.  
CCI Onshore Corp.  
Beckton Corp.  
Icahn Enterprises G.P. Inc.  
Icahn Enterprises L.P.  
Icahn Enterprises Holdings L.P.  
IPH GP LLC  
Icahn Capital LP  
ICM GP Corp.  
Icahn Onshore LP  
Icahn Offshore LP  
CCI Administrative GP  
Icahn Partners LP  
Icahn Partners Master Fund LP  
Icahn Partners Master Fund II LP  
Icahn Partners Master Fund III LP