

## OFFICE OF THRIFT SUPERVISION

### Acceptance of Rebuttal of Concerted Action

**Order No.:** 2008-18  
**Date:** June 13, 2008  
**Docket No.:** H-4316; 17338

The Goldman Sachs Group, Inc. (GS Group) has filed a Rebuttal of Concerted Action, pursuant to 12 C.F.R. § 574.4(e), in order to rebut a presumption of action in concert with directors of the GS Group who are not officers or employees of the GS Group and are not officers, directors or employees of any subsidiary of the GS Group (collectively, Outside Directors), with respect to First Marblehead Corporation, Boston, Massachusetts (Holding Company) and its wholly owned subsidiary savings association, Union Federal Savings Bank, North Providence, Rhode Island.

#### The Proposed Transaction

Certain private equity investment funds and investment vehicles that subsidiaries of the GS Group have organized and now manage have purchased equity securities of the Holding Company, and propose to purchase equity securities of the Holding Company in the future. The GS Group has represented that the Outside Directors did not own any equity securities of the Holding Company as of May 19, 2008, the date on which the Rebuttal of Concerted Action was filed with OTS. The GS Group has filed a Rebuttal of Concerted Action with respect to the Outside Directors in order to ensure that any equity securities of the Holding Company that Outside Directors might acquire in the future are not aggregated with equity securities of the Holding Company held by the GS Group or related entities under the OTS Acquisition of Control Regulations, 12 C.F.R. Part 574 (Control Regulations).

#### Rebuttal of Concerted Action Submission

The Control Regulations state that a company is presumed to be acting in concert with a management official of such company with respect to an acquisition of stock of a savings association if, among other things, both the company and the individual own stock of the savings association.<sup>1</sup> Accordingly, if any of the Outside Directors were to

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<sup>1</sup> 12 C.F.R. § 574.4(d)(1)(i) (2008). The Control Regulations define the term “savings association” to include a savings and loan holding company. See 12 C.F.R. § 574.2(p) (2008).

acquire equity securities of the Holding Company, they would be subject to a presumption of concerted action with the GS Group.<sup>2</sup>

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 that such person or company does not and shall not, without having made the necessary filings and obtained approval or clearance thereof under the Control Regulations, have any agreements or understandings, written or tacit, with respect to the exercise of control, directly or indirectly, over the management or policies of the savings association, including agreements relating to voting, acquisition or disposition of the savings association's stock.

OTS may reject any rebuttal of concerted action 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 applicant's representations, based on past activities of the acquiror, or other concerns, OTS may conclude that the acquiror has not clearly and convincingly rebutted concerted action.

The GS Group has executed an affidavit as prescribed by Section 574.4(e)(2). Also, the GS Group has filed a written submission setting forth facts and circumstances that support its contention that no action in concert with the Outside Directors exists. The filing states that the Outside Directors are provided with general information regarding the activities of GS Group's Principal Investments Area (PIA) and investments made in connection with those activities (which includes the investment in the Holding Company) in connection with the board of directors' overall supervision of the business activities of the GS Group and its subsidiaries. However, in the absence of a development that has or may have a material effect on the GS Group or its business and affairs, the Outside Directors would not receive detailed information regarding individual PIA investments of the size of the proposed investment in the Holding Company. The filing asserts, in particular, that the GS Group does not intend to provide any material information regarding the investment in the Holding Company to the Outside Directors. Moreover, the filing states that if a development arose that would require directors to be provided with material information regarding the investment in Holding Company securities, the GS Group would require that any Outside Director who may have acquired direct or indirect control or ownership of any Holding Company shares: (i) disclose the ownership or control to the GS Group; (ii) be excluded from receipt of material information

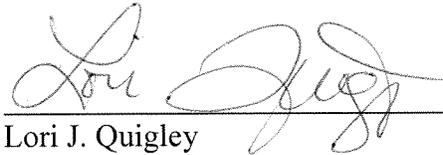
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<sup>2</sup> The GS Group is presumed to act in concert with entities it controls. See 12 C.F.R. § 574.4(d)(4)(2008). Accordingly, unless any presumption of concerted action between the Outside Directors and the GS Group is rebutted, the Outside Directors also would be presumed to act in concert with the entities that the GS Group controls. See 12 C.F.R. § 574.4(d)(7) (2008). The Outside Directors do not hold any positions with any entity directly or indirectly controlled by the GS Group. Under the circumstances, the successful rebuttal of concerted action between the Outside Directors and the GS Group causes the presumption at § 574.4(d)(7) between the Outside Directors and GS Group-controlled entities to become inapplicable.

regarding the Holding Company investment; and (iii) be recused from any discussions of the Holding Company.

Based on the foregoing analysis, and in reliance on the undertakings set forth in the preceding paragraph, OTS concludes that the Rebuttal of Concerted Action meets the applicable approval standards, and the Rebuttal of Concerted Action is hereby accepted.

By order of the Director of the Office of Thrift Supervision, or his designee,  
effective June 13, 2008.



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Lori J. Quigley  
Managing Director  
Examination and Supervision - Operations