STAFF GRANTS NO-ACTION RELIEF FINDING THAT A STRATEGIC ALLIANCE WILL NOT CONSTITUTE A CHANGE OF CONTROL OF AN ADVISER FOR PURPOSES OF THE INVESTMENT COMPANY ACT OF 1940

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The Staff of the Division of Investment Management (the "Staff") of the Securities and Exchange Commission (the "Commission") recently took a significant no-action position in connection with a strategic alliance involving a 45% equity investment in a registered investment adviser by a bank holding company, agreeing that such investment would not cause a change of control resulting in an "assignment" under the Investment Company Act of 1940, as amended (the "1940 Act") of the adviser's advisory agreements with registered investment companies.[1] *American Century Companies, Inc./J.P. Morgan & Co. Incorporated, December 23, 1997.*

On October 9, 1997, J.P. Morgan & Co. Incorporated ("JPM"), a bank holding company whose businesses include asset management, entered into an agreement providing for the creation of a strategic alliance with American Century Companies, Inc. ("ACC"), a holding company owning a registered investment adviser and other operating subsidiaries, through which the two organizations will seek to leverage their complementary asset management capabilities (the "Alliance"). In connection with the Alliance, JPM will make a substantial equity investment in ACC by purchasing from ACC shares of its Class A common stock representing approximately 45% of its total outstanding equity. Due to ACC's dual class voting structure, however, ownership of such Class A common stock will entitle JPM to a maximum of 10.83% of the voting power of ACC. In addition, a stockholders agreement among JPM, ACC and its other principal stockholders (the "Stockholders Agreement") will provide JPM with certain minority stockholder protection rights, and JPM will receive an option (the "Option"), exercisable three years after its initial investment, to increase its equity interest in ACC to 50% (and its voting power to 12.04%). Upon consummation of the Alliance, the aggregate equity interests of the founders and current controlling stockholders of ACC (who are not selling any stock in connection with the Alliance), James Stowers, Jr., his children, grandchildren and their spouses (the "Stowers Family"), will remain at 48.28% through ownership of ACC's Class B common

1. In response to the adviser's request for a no-action position with respect to the recommendation of enforcement action under Section 205(a)(2) of the Investment Advisers Act of 1940, as amended, the Staff declined to take a position, noting that, because such section only requires advisory agreements to include a provision requiring client consent to assignments (which provision the adviser represented was included in its agreements), while an assignment without consent would be a breach of contract, it would not be a violation of the Act and therefore a no-action position was not necessary.

stock, and the Stowers Family's aggregate voting power will be at a level at least equal to its current 69.75% (due to the greater voting rights of ACC's Class B common stock as compared to its Class A common stock). In the event the Option is exercised, the Stowers Family's aggregate equity interest would decline to 43.28% and its aggregate voting power would decline to no less than 68.79%

Pursuant to the Stockholders Agreement, following consummation of the Alliance, the Stowers Family will be entitled to designate eight of ACC's ten directors, at least six of whom will be drawn from members of the Stowers Family and ACC's management. JPM will be entitled to designate two of ACC's directors, will have the right to replace certain members of ACC's management in the event that ACC's total assets under management decline by 25% or more during a single calendar year or upon certain extraordinary turnover in ACC's senior management, and will have certain consent rights with respect to significant actions altering the structure or business of ACC. In addition, the Stockholders Agreement will provide for a "steering committee" to act as a liaison between ACC and JPM comprised of an equal number of representatives from each company; however, such committee will have no legal authority to direct ACC's management or operations.

Section 15(a)(4) of the 1940 Act requires advisory agreements with registered investment companies to provide for automatic termination in the event of their "assignment," and Section 2(a)(4) defines "assignment" to include a transfer of a "controlling block" of voting securities of an adviser. Although "controlling block" is not defined under the 1940 Act, "control" is defined in Section 2(a)(9) as "the power to exercise a controlling influence over the management or policies of a company," and such section contains a presumption of control applicable when a person beneficially owns more than 25% of the "voting securities" of an adviser, as well as a presumption that control does not exist where a person owns 25% or less of such voting securities. Section 2(a)(42) of the 1940 Act defines "voting security" as a security presently entitling the holder thereof to vote for the election of directors and a "specified percentage of the outstanding voting securities" of an adviser as such amount of outstanding voting securities as entitles the holder thereof to cast the specified percentage of the aggregate votes which all holders of voting securities are entitled to cast. The presumptions set forth in Section 2(a)(9) continue until a determination to the contrary is made by the Commission (either upon its own motion or application by an interested person). The presumption of an absence of control can be rebutted where, notwithstanding the fact that a person owns 25% or less of the voting securities of an adviser, such person nonetheless has the power to exercise a controlling influence over the management or policies of the adviser (other than solely as a result of an official position with the adviser).

Based upon the foregoing, ACC argued that the Alliance will not result in a change of control for several reasons. First, ACC argued that JPM will not acquire a controlling block of voting securities within the meaning of the foregoing definitions, in that JPM will possess a maximum of 10.83% of the combined voting power of Class A and Class B common stock upon consummation of the Alliance, and therefore should be deemed to hold only 10.83% of the

voting securities of ACC. ACC noted in this regard that, even assuming that JPM is deemed to hold 20% of the voting securities of ACC due to its right to designate two out of ten directors, such percentage would nonetheless be insufficient to raise a presumption of control. Second, ACC argued that the current controlling stockholders of ACC will not lose their controlling block of voting securities as a result of the Alliance. ACC noted in this regard that, while previous Staff interpretations have found a change of control where an adviser's largest existing stockholder, or existing stockholders as a group, lose 25% or more of the voting power of the adviser as a result of a transaction, after giving effect to the Alliance, the Stowers Family will retain its 69.75% pre-Alliance voting power. Third, ACC argued that the Stowers Family will retain control by virtue of its contractual right to appoint eight out of ACC's ten directors following consummation of the Alliance. Finally, ACC argued that the various minority stockholder protection rights granted to JPM in connection with the Alliance, while providing JPM with representation on a "steering committee" and the ability to replace management in extraordinary circumstances and consent to significant actions altering the structure or business of ACC, are not intended to, and will not, give JPM the right to direct the day-to-day management or policies of ACC.

The Staff granted the requested no-action position, agreeing that JPM's investment in ACC in connection with the Alliance will presumptively not be an acquisition of a controlling block of voting securities. Moreover, the Staff agreed that, based upon the facts and representations provided by ACC, the Alliance will not result in an assignment of ACC's advisory agreements with registered investment companies within the meaning of Section 2(a)(4) of the 1940 Act. In this regard, the Staff noted that the Stowers Family currently controls ACC and will continue to control it following consummation of the Alliance, the Alliance is structured so as to preserve that control and none of the minority stockholder protection rights described above will give JPM a controlling influence over the management or policies of ACC. The Staff noted further, however, that if in the future JPM were to in fact exercise a controlling influence over the management or policies of ACC, the Staff would not be precluded from recommending to the Commission the institution of a proceeding designed to rebut the presumption that JPM does not control ACC. The Staff finally noted that, having stated its general views on the subject, in the future it will no longer respond to letters relating to the effect of proposed transactions on existing advisory agreements with registered investment companies unless they presented novel or unusual issues.

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Should you have any questions, please do not hesitate to contact Thomas H. Bell (212-455-2533), James J. Burns (212-455-7083), Sarah E. Cogan (212-455-3575), Robert M. Kaner (212 455 3275), Gary S. Schpero (212-455-3665) and Michael Wolitzer (212-455-7440) of Simpson Thacher & Bartlett.

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