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February 28, 2020

Office of the Commissioner of Financial Regulation
Attn. A. Thomas Koehler, Assist. Dir. of Enforcement
500 North Calvert Street, Suite 402
Baltimore, Maryland 21202

Re: Enforcement Unit Case No. CFR-FY2020-30

To Commissioner Salazar and the Enforcement Unit:

This firm represents Driver Opportunity Partners I LP (the "Fund"), Driver Management Company LLC ("Manager"), and J. Abbott Cooper, an individual ("Cooper") (the Fund, Manager, and Cooper collectively, "Respondents" or "Driver") in connection with the subpoenas issued by this office pursuant to the referenced case (the "Inquiry"). The Inquiry relates to Driver's acquisition of an equity position in First United Corporation ("First United"; common stock "FUNC"), the parent bank holding company for First United Bank and Trust of Oakland, Maryland (the "Bank").

By letter dated January 21, 2020, the Office of the Commissioner of Financial Regulation ("Commissioner") advised Driver of the Inquiry and identified the goal of determining the facts surrounding Driver's purchase of a greater than five percent (5%) interest in First United. Specifically, the Commissioner stated an interest in learning whether Driver intended to make a "stock acquisition" in First United, as that term is defined by Md. Code Ann., Fin. Inst. (the "Financial Institutions Code"), §3-314(a)(3).

Driver welcomes the opportunity to submit this response to the Commissioner's Inquiry. For the reasons set out below, we believe it is abundantly clear that Driver did not intend to make, and has not made, a "stock acquisition" in First United, and that no further action by the Commissioner is warranted with respect to Driver. We appreciate the Commissioner's considered evaluation of the enclosed materials, and we remain available to discuss any questions that arise, at a mutually convenient time.

* * *

SECTION I – FACTUAL OVERVIEW & CHRONOLOGY

A. Identity of Investor

The Fund is the only Respondent with any holdings in FUNC. As disclosed in Driver's August 28, 2019, Schedule 13D, filed with the Securities & Exchange Commission on September 5, 2019, the entirety of the Fund's interest is 360,637 shares (totaling 5.08% of FUNC's outstanding shares), acquired primarily in August 2019. *See* **Ex. A.**, Sept. 5, 2019, Schedule 13D at Schedule I. Manager is the general partner of the Fund, and Cooper is the managing member of Manager. *See id.* at 9. Neither Manager nor Cooper holds any shares in FUNC.

The Fund itself began operations as of July 1, 2019. Prior to that time, Manager was the investment advisor with respect to a separately managed account (the "Managed Account"). Manager had sole investment and voting power over the Managed Account and together with Cooper, pursuant to 17 CFR § 240.13d-3, was the beneficial owner of all securities purchased and held by the Managed Account. In March 2019, Manager caused the Managed Account to begin purchasing shares of FUNC and, during that month, the Managed Account accumulated a total of 6,500 shares of FUNC (or approximately 0.09% of the then outstanding shares of FUNC). *See* **Ex. B.**, Mar. 31, 2019 account statement (redacted excerpt). By August 1, 2019, the total investment in FUNC held by any Manager client reached 104,000 shares (or approximately 1.46% of the then outstanding shares of FUNC) at which time the securities held in the Managed Account were contributed into the Fund in exchange for partnership interests therein. *See* Ex. A. at Schedule I.

B. Activities of the Fund

The business of the Fund is to invest in the U.S. banking sector, based on publicly available information, and to maximize returns for investors in the Fund. The Fund's investment strategy is consistent with the approach of its general partner, Manager: to identify undervalued banks and seek to unlock value through active engagement with senior leadership and boards of directors. The Fund is not privy to any material non-public information; it maintains no special status; and, like any other shareholder, it exercises no more control over First United than is afforded by its voting rights. The standing it maintains for communicating with company management and directors is likewise no different from any other FUNC shareholder and has not changed since the Fund acquired its first shares in July 2019.

The Fund's 5% interest does not confer any special rights or control, and its relative ownership does not enable it to determine or even materially influence the outcome of any matter put to the vote of FUNC shareholders. First United's directors are elected by a majority of the votes cast at its annual meeting.[1] By way of illustration, 4,623,806 shares of FUNC were voted at First United's

[1] While First United has disclosed that its board approved a plurality voting standard for its 2020 annual meeting of shareholders in the event of a contested election, First United has not disclosed any board resolution or amendment to its bylaws or other organizational document evidencing such approval.

2019 annual meeting of shareholders.[2] Even if Driver had owned its current 360,637 shares of FUNC at that time, it would have had no impact on the outcome of the election of directors. Other matters requiring shareholder approval have an even higher standard. For instance, any amendment to First United's charter requires the affirmative vote of two thirds of all shares.[3]

When the Fund acquired shares on August 26, increasing its stake from 4.970% to 5.005%, the only "benefit" it obtained was the requirement under applicable federal law that it file a Schedule 13D (as amended, the "13D").[4] Insofar as federal law is instructive, it is well settled that control of a bank holding company requires far more than a 5% voting interest, except in extraordinary scenarios (not present here) such as where a 5% shareholder also controls 50% or more of the board of directors or more than one-third of the total equity of a bank holding company. We discuss guiding federal principles below, in **Section II**.

Here, the Fund believes that shareholder value in FUNC would be improved through a sale, and the Fund has not been shy about making its view known. *See, e.g.*, **Ex. C.**, Aug. 20 Presentation at 3 ("A sale today would unlock FUNC's significant franchise value and be in the best interest of all shareholders") (also attached as Ex. 99.3 to Ex. A.). Surely if the Fund exercised actual control over FUNC, it would simply compel the company to sell and the Fund would collect its profits. If Driver held a sufficient degree of power to effectively influence FUNC's board and management, it would have persuaded those individuals to consider and execute such a sale. Neither, of course, has occurred. Instead, because the Fund holds only a minority interest, its only influence with respect to FUNC's management and policy is its limited voting power and its ability to persuade First United's board, management, and other shareholders of the strength of its arguments—again, same as that of any other minority shareholder.

We understand the Commissioner's Inquiry to relate in part to the Fund's "intent"—whether its purchase decisions were geared toward acquiring, directly or indirectly, a controlling position with respect to FUNC's management and policy. As the Fund was not formed until April 16, 2019 (and did not start trading in securities until July 24, 2019), it does not possess any documentation that might show its "intent" prior to that date. What it does possess are multiple examples of efforts the Fund has pursued since formation, as a minority shareholder, to encourage the company to be more responsive to shareholder priorities—none of which have yielded the desired result. The fact that the Fund has not been successful in persuading the company to sell is itself evidence that

[2] Driver has obtained a record of certain shareholders (including numerous public pension funds) voting against First United's candidates for director at First United's 2019 annual meeting of shareholders, many of whom owned significantly more shares at that time than Driver. Driver is unaware as to whether the Commissioner has launched or concluded any investigation into the purchase of FUNC shares by those shareholders.

[3] Md. Code Ann., Corporations & Associations § 2-604.

[4] Once it had filed the 13D, Driver became liable under federal securities laws for any false or misleading statements contained therein, including as to the absence of any contracts, arrangements, understandings or relationships with other persons in relation to shares of FUNC.

whatever influence the Fund may possess, it certainly falls short of control. Following is a chronology of the Fund's activities since inception.

On July 24, 2019, Cooper, as managing member of Manager, sent a letter to First United's CEO Carissa Rodeheaver ("Rodeheaver") requesting a meeting with the FUNC Board. *See* **Ex. D.**, July 24 Letter. At the time, the Fund held no position (it purchased its first shares that day, totaling 0.02% of the outstanding shares of FUNC), but Driver (through the Managed Account) was the beneficial owner of shares representing approximately 1.5% of FUNC's outstanding shares. *See* Ex. A. at Schedule I. In the July 24 Letter, Manager restated Driver's position (discussed below, **Section I.C.**) that FUNC would be worth more in a sale than as a going concern, and requested a meeting with the board of directors to present that view.

On August 8, 2019, Rodeheaver e-mailed Cooper to reject Driver's request from July 24, but indicated that she, not Driver, would raise the issue at the board's next regularly scheduled board meeting at the end of August. *See* **Ex. E.**, Aug. 8 e-mail. Rodeheaver thereafter requested that Cooper provide Driver's analysis so that she (Rodeheaver) could present to the FUNC board along with the July 24 Letter. Cooper again requested an opportunity to provide commentary, rather than just written analysis, ultimately settling on providing a synopsis to Rodeheaver for her to convey to the board. *See id.*

On August 20, 2019, Cooper sent Rodeheaver the August 20 Presentation (Ex. C.). Later that day, Cooper spoke with Rodeheaver and CFO Tonya K. Sturm ("Sturm") by telephone for the purpose of providing commentary regarding the contents of the presentation.

On August 21, 2019, Cooper e-mailed Rodeheaver to express frustration at the apparent lack of concern evidenced by Rodeheaver on their call the day before, and what he saw as Rodeheaver's fundamental misperception of FUNC's historical performance, current condition and future prospects. *See* **Ex. F.**, Aug. 21 e-mail.

On September 2, 2019, Rodeheaver e-mailed Cooper to advise that in response to the August 20 Presentation, the FUNC board would require multiple meetings to consider the matter, and had "decided to conduct additional analyses regarding its current strategy and any potential alternatives to that strategy." *See* **Ex. G.**, Sept. 2 e-mail.

On September 4, 2019, Cooper sent a letter to Rodeheaver outlining the difficulty that FUNC would face in delivering the type of shareholder value that might be obtained in a sale through a standalone strategy, and attaching a list of questions regarding the "additional analyses" referenced in Rodeheaver's September 2 e-mail. *See* **Ex. H.**, Sept. 4 Letter. Rodeheaver did not respond.

On September 5, 2019, Driver filed its initial Schedule 13D. Ex. A.

Also on September 5, 2019, FUNC filed a Current Report on Form 8-K inaccurately asserting that Driver had "announced its intention to launch a distracting and costly public campaign" and that "[n]o action on the part of [FUNC's] shareholders is required at this time." *See* **Ex. I.**, Sept. 5 FUNC 8-K. In response to these statements, Cooper sent Rodeheaver an e-mail requesting that

she correct or otherwise clarify the company's allegation that Driver had announced an "intention to launch a distracting and costly public campaign" and questioning the purpose of and motivation behind the statement that "[n]o action on the part of [FUNC's] shareholders is required at this time." *See* **Ex. J.**, Sept. 5 e-mail.

On September 6, 2019, Driver filed an amendment to the Schedule 13D to eliminate any confusion caused by FUNC's inaccurate allegation that Driver had, in its September 5 filing, "announced its intention to launch" any type of "campaign." *See* **Ex. K.**, Sept. 6 Schedule 13D.

On September 9, 2019, Cooper again asked Rodeheaver to clarify the statements made in FUNC's September 5 8-K. **Ex. L.** Rodeheaver's response offered to schedule a call to discuss the issues raised by Driver.

Cooper and Rodeheaver corresponded repeatedly on September 12 and 13. Rodeheaver declined to respond substantively to the issues originally raised September 4 or otherwise to discuss First United's strategy. *See* **Ex. M.**, Sept. 12 e-mails; **Ex. N.**, Sept. 13 Letter (questioning the sincerity of First United's publicly stated desire for "constructive dialogue" with shareholders).

Unable to gain any traction with current management or the board, Driver released a presentation highlighting its concerns about governance issues relating to First United's board, including excessive tenure, risk oversight, entrenchment and conflicts of interest. In a press release accompanying the presentation, Driver raised the possibility of nominating candidates for director at First United's next annual meeting if the board failed to take steps to increase shareholder value. *See* **Ex. O.**, Sept. 26 Presentation and Press Release.

On October 2, 2019, Cooper sent a letter to First United's lead director John McCullough, expressing concern that Rodeheaver may be intentionally avoiding discussions with representatives of other financial institutions that might have an interest in acquiring First United, and requesting that McCullough form a committee of independent directors. *See* **Ex. P.**, Oct. 2 Letter. The following day, Cooper requested a list of current First United shareholders from Strum. *See* **Ex. Q.**, Oct. 3 e-mail. Both requests were rejected. *See* **Ex. R.**, Oct. 10 Letter; *See* **Ex. S.**, Oct. 11 Letter.

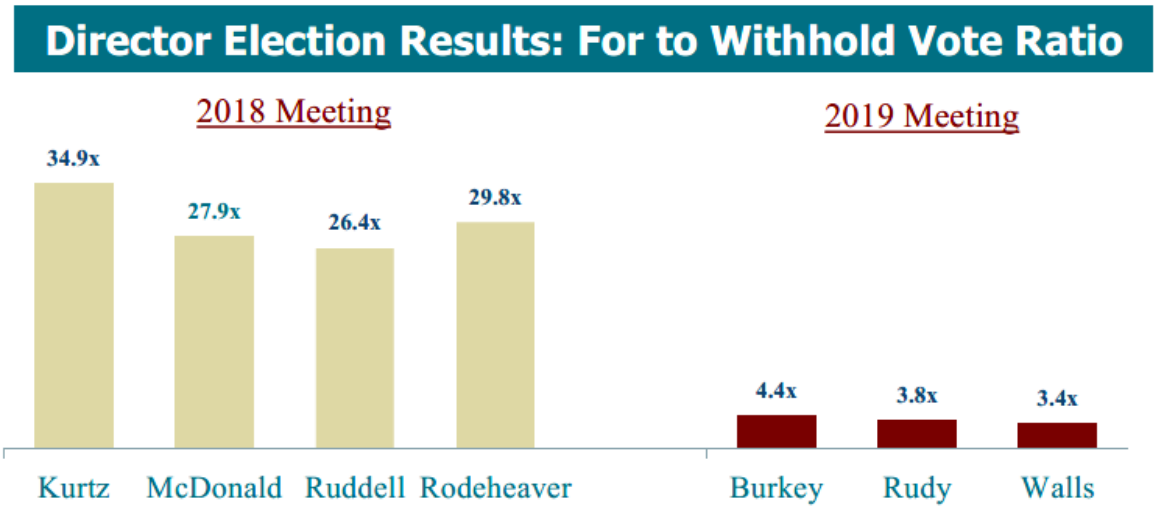
Several additional exchanges occurred between Driver and First United representatives in the latter half of October, none of which led to a meeting. *See* **Ex. T.** (compilation).

Driver was not alone among First United's investors asking the company to respond to shareholder priorities. In October 2019, shareholder Rangeley Capital also appealed to First United to explore a sale. *See* **Ex. U.**, "Rangeley Capital Calls on First United's Board of Directors to Immediately Explore a Sale," Business Wire (Oct. 1, 2019). At the time, Rangeley Capital owned more than 1% of outstanding shares of First United—a larger ownership interest than the Fund held at any time prior to August 1, 2019. *See* **Ex. V.**, McCarthy, "First United in Maryland faces more pressure to sell," American Banker (Oct. 1, 2019); *compare* Ex. A. at Schedule I. Rodeheaver did not respond to this inquiry. *See id.* There is no indication that the Commissioner has conducted an inquiry into the investment activity of Rangeley Capital.

Lacking any power to appoint directors or compel First United to take any particular action, Driver provided notice on October 31, 2019, that it intended to nominate three directors for election to the board during the 2020 annual meeting. Those independent nominees were (and remain) unaffiliated with Driver and were included solely based on their independence and experience. They include Michael Driscoll, Lisa Narrell-Mead and Ethan Elzen. *See* **Ex. T.**, Oct. 31 e-mail. Driver thereafter submitted a formal notice of nomination on December 3, 2019. **Ex. W.** None of the three independent director candidates nominated by Driver are directors, officers, or employees of Driver or any of its affiliates, nor have any of these individuals received (nor will they receive) any compensation from Driver.

Other shareholders unaffiliated with Driver similarly expressed to First United management the same concerns raised by Driver about FUNC's lack of responsiveness to shareholder priorities and value. See **Ex. X.**, "Concerned Shareholder of First United Corporation Urges the Board of Directors to Initiate a Sale Process," Business Wire (Nov. 8, 2019) (complaint by Johnny Guerry, a holder of 22,500 shares in First United). There is no indication that the Commissioner has conducted an inquiry into the investment activity of Mr. Guerry or his former asset management firm, Clover Partners LP.

In summation, Driver has repeatedly appealed, in its capacity as an ordinary shareholder, to First United management and to members of the First United board, without any change in the Bank's strategic plans. Driver's communications are generally available in the public record, but we cannot know how many other shareholders have lodged similar complaints privately with First United. What we do know is that 2019 saw a dramatic increase in the number of shareholders who expressly refused to support reelection of existing directors who were on the ballot:



Ex. C., at 10.

Nothing about Driver's participation as an engaged shareholder differentiates it from any other minority shareholder in terms of control. Nonetheless, in furtherance of responsiveness and transparency, we have included copies of additional exchanges between Driver and First United

from November 2019 through February 2020, compiled here as **Ex. Y.** (compilation). While the particulars of each exchange vary, the common theme is an effort by First United to avoid accountability to its shareholders generally, and to vilify Driver specifically. In our view, none of the foregoing is relevant to the central question of the Inquiry, namely, whether engagement by a 5% minority shareholder represents the sort of "power to direct management or policy" contemplated by Section 3-314 of the Financial Institutions Code as warranting advance review by the Commissioner. Plainly, it does not.

C. Chronology of Pre-Fund Activity

As noted above, the Fund is the only Respondent that now holds or ever directly held any equity position in FUNC. Insofar as the Commissioner is nonetheless interested in Driver's activities before creation of the Fund, we have included this chronology, as well as documentation of communications with the company.

Prior to creation of the Fund, Manager exercised discretionary investment authority with respect to the Managed Account, which held small positions in FUNC beginning in March 2019. *See* Ex. B. At the time, Manager had one member (Cooper) and no additional staff. Manager did not prepare prospectuses or evaluation models; it did not maintain an investment committee with records of proposed purchases or sales and statements of investing strategies. Cooper did not send e-mails to himself debating the merits of one or another investment opportunity.

Rather, based on his personal experience in the industry and familiarity interpreting publicly disclosed information in the banking sector, Cooper identified investments that he believed represented good value propositions for Manager's clients, and he caused Manager to make such investments for those clients. Manager's sole involvement—Driver's sole involvement—in the acquisition of FUNC stock is in this capacity.

In March 2019, Manager acquired 6,500 shares (representing approximately 0.09% of outstanding shares) of FUNC on behalf of its clients. Subsequent purchases between April and June brought its clients' aggregate position to 104,000 shares (representing approximately 1.46% of outstanding shares) prior to the Fund's commencement of operation. During this period—subsequent to its clients' investment in FUNC—Manager (through Cooper) attempted to engage First United management in response to Manager's observations concerning the value of FUNC.

On March 15, 2019, Manager sent a letter to Rodeheaver, expressing Cooper's view that First United would fetch a higher price in a sale than it could reasonably expect to obtain in the public markets, and he requested that First United retain a qualified investment bank to solicit acquisition proposals from other banks. *See* **Ex. Z.**, Mar. 15, 2019 Letter. Cooper invited Rodeheaver to engage in a dialogue if she disagreed with his conclusions.

On March 26, 2019, Driver filed exempt solicitation materials stating Driver's belief that First United would be worth more in a sale than as an independent banking organization, and expressing concern regarding First United's corporate governance and lack of alignment with shareholder interests. **Ex. AA.** Driver accurately noted in the filing that First United's directors, nominees

and executive officers as a group owned barely more than 4% of the outstanding shares of FUNC, and that Rodeheaver individually owned fewer than 10,000 shares, half of which were pledged to secure a loan. *Id.*

On March 28, 2019, Driver filed exempt solicitation materials noting that a FUNC shareholder had submitted a proposal to shareholders at the 2006 annual meeting requesting that the First United board of directors seek to improve shareholder value by sale or merger, and that the board recommended voting against that proposal. **Ex. BB.** Driver also compared FUNC's total shareholder return for the preceding three-year period (negative 2.11%) to selected indices and publicly traded banks, and examined total compensation paid to FUNC directors who had been continuously on the board since before the 2006 annual meeting. *Id.*

On April 2, 2019, Driver filed exempt solicitation materials showing that potential buyers traded at a significant premium to FUNC on a price-to-book-value multiple basis, and that such potential buyers would have an interest in acquiring FUNC. **Ex. CC.**

On April 10, 2019, Cooper met with Rodeheaver and Strum in New York City. During the meeting, Cooper observed that Rodeheaver's compensation arrangements created incentives to keep First United independent rather than seeking to maximize shareholder value, thereby creating a conflict of interest.

On May 31, 2019, Cooper spoke by telephone to Rodeheaver and Strum, again stating his view that First United would be worth significantly more in a sale than as a stand-alone institution, and again asking Rodeheaver to present a compelling case otherwise for shareholders to consider. Rodeheaver declined to state whether First United had taken any steps to engage an investment banking firm or other advisor.

SECTION II – APPLICABLE LAW

A. Driver's Acquisition of FUNC Shares Did Not Constitute a "Stock Acquisition" Within the Meaning of Section 3-314 of the Financial Institutions Code.

Section 3-314 purports to require a prior application to the Commissioner by any person who intends to make a "stock acquisition." A "stock acquisition" is defined as:

> (i) "[a]n acquisition of the outstanding voting stock of a commercial bank or bank holding company in this State, if the acquisition will affect the power to direct or to cause the direction of the management or policy of any banking institution or bank holding company," or
>
> (ii) "[a]n acquisition of any voting stock of a commercial bank, if the acquisition will give any one person control of 25 percent or more of the voting stock of the commercial bank."

As discussed above, the Fund made its initial investment in FUNC on July 24, 2019, totaling 0.02% of the outstanding shares of FUNC. On August 1, 2019, the securities held in the Managed Account (including shares representing 1.46% of outstanding FUNC shares) be contributed to the Fund. During the course of August 2019, the Fund made approximately 14 separate purchases of additional shares of FUNC, including a purchase on August 26 that increased the Fund's stake in FUNC from 4.970% to 5.005%, thus triggering the 13D filing requirement. Throughout this period and beyond, Driver had no ability to exert any meaningful influence with respect to the management or policy of First United or the Bank, as amply demonstrated by Driver's inability to persuade the First United board of directors or management to adopt or even to realistically consider Driver's recommendations throughout that time period.

Driver can only be charged with having undertaken a "stock acquisition" for purposes of Section 3-314 to the extent that one or more of its "acquisitions" of shares of FUNC could have been characterized as an acquisition that "will affect the power to direct or cause the direction of the management or policy" of either First United or the Bank. As discussed in more detail below, such a conclusion would plainly have been unfounded.

1. Direction of Management or Policy under the Financial Institutions Code

Neither Section 3-314 itself nor any regulation of the Commissioner or other guidance purports to define when a particular acquisition of shares "will affect the power to direct or to cause the direction of the management or policy of any banking institution or bank holding company."[5] However, the plain language, structure and legislative history of Section 3-314, as well as other provisions of Maryland law, strongly support the conclusion that Driver's acquisition of shares of FUNC in 2019 did not meet this standard.

Section 3-314 itself implicitly provides that the relevant degree of control or influence intended to be covered by sub-section (a)(3)(i) must be something approximating the degree of control or influence that would typically be associated with the ownership of 25% of a company's voting shares. This is because sub-section (a)(3)(ii), which pertains to the acquisition of a direct interest in a bank, expressly provides that the quantitative threshold for a "stock acquisition" in that context is 25% of the bank's voting stock. Given the parallel structure of these two sub-sections, a natural reading will harmonize them as describing comparable levels of control. It would be logically inconsistent, for example, to interpret the reference to "affect[ing]" the power to direct management or policy of a bank or bank holding company in sub-section (a)(3)(i) as applying in a literal or *de minimis* sense. Every individual voting share of a company, by definition, "affects" the power to direct or cause the direction of the company's management or policy, so long as the voting share affords the holder a right to vote on the composition of the company's board or management or on significant policy decisions. Thus, if sub-section (a)(3)(i) were interpreted in

[5] The only court decision we are aware of that even references Section 3-314—an unreported decision from more than 20 years ago by the U.S. District Court for the District of Maryland—noted that the statute had not been the subject of any reported decision and did not articulate any test for how sub-section (a)(3)(i) should be interpreted. *See Mason-Dixon Bancshares, Inc. v. Anthony Investments, Inc.*, No. Civ. A. CCB–96–3836, 1997 WL 33482710 (D. Md. Mar. 3, 1997).

its most literal sense, every acquisition of stock in a Maryland bank holding company would be regarded as a "stock acquisition." Such a narrow interpretation would be nonsensical when set beside a parallel provision triggered solely by ownership of 25% of the voting stock of a bank. Accordingly, sub-section (a)(3)(i) must be regarded as pertaining to acquisitions of stock that provide a degree of control or influence over the management or policy of a Maryland bank or bank holding company satisfying some baseline materiality threshold.

The legislative history of Section 3-314 instructs that the purpose of the statute is and always has been to bring Maryland law in line with federal law in addressing changes in control of a bank or bank holding company. As originally proposed in March 1979, Senate Bill 970 contemplated that the officers of a company would notify the State Bank Commissioner within 60 days of a change of control or a transfer of 25% of the company's voting stock. *See* **Ex. DD.**, Fiscal Note (Mar. 6, 1979). In its review of the bill, the Maryland Department of Licensing & Regulation (as it was then known) explained that the purpose was to give the Bank Commissioner the same authority as the federal regulators, and proposed an amendment shifting reporting responsibility from company management to the purchaser. *See* **Ex. EE.**, DLR Mem. (Mar. 9, 1979). The Department explicitly supported the bill, as amended, and characterized it as requiring prior approval for a "***purchaser of control*** or 25% of bank stock." *Id.* (emphasis added). In the first round of amendments, the legislature thereafter clarified that the law should apply only to those purchases "**WHICH WILL GIVE THE PURCHASER CONTROL**". *See* **Ex. FF.**, Amendments to Senate Bill No. 970 (adopted Mar. 12, 1979) (emphasis in original). And the final bill, as adopted, retained the express language that it applied to transactions in the outstanding voting stock "which will result in a change in the control of a banking institution or bank holding company" or will give the purchaser control of 25% or more of the voting stock of a state bank or trust company. *See* **Ex. GG.**, Approved Bill, at 957 (codified at Article 11 § 108(G)). When the Financial Institutions Code was reorganized in 1980 to include a definition of "stock acquisition" in Section 3-314 with reference to "affecting" the power to direct management, the editors were clear that "[t]his section is new language derived ***without substantive change*** from the first paragraph of Art. 11, § 108G(a) and from Art. 11, § 108G(b) and (c)." *See* **Ex. HH.**, 1980 Maryland Session Laws Chap. 33, § 3-314, at 201-02 (emphasis added). Thus, it is abundantly clear that in adopting the statute to conform to federal practice, Maryland always intended "stock acquisitions" in Section 3-314 to refer only to changes in control of a bank or bank holding company, and not to non-controlling investments involving some unspecified intent to "affect" management decisions.

While neither the statutory text nor legislative history of Section 3-314 provides any direct guidance on what specific threshold should apply for establishing "control" (other than the 25% of bank voting stock referenced in sub-section (a)(3)(ii)), other provisions of Maryland law—including other provisions of the Financial Institutions Code—provide instructive guidance. Section 9-216 of the Financial Institutions Code, for example, which governs changes of control over savings associations, requires the prior approval of the Commissioner before any person may acquire control of a state savings association (i.e., another form of state-chartered depository institution and the closest analog to a state-chartered bank). "Control" is defined in that statute both qualitatively (as "the ability of a person to direct the management or policies of an association") and quantitatively (as "the ownership of more than 10 percent of the outstanding

shares of any class of securities of an association"). In other words, in the context of savings associations, the Financial Institutions Code provides expressly that the degree of influence over "management or policy" warranting prior approval by the Commissioner is presumed to attach at ownership of 10% of an association's voting stock. The Maryland Corporations Code adopts a substantially identical standard, defining "control" as "the power to direct or cause the direction of the management and policies of a person" and establishing a "presumption" of control where one person owns at least 10% of a corporation's voting shares. Thus, to the extent Maryland law provides any instructive guidance regarding when a shareholder might be regarded as having the power to exert a meaningful degree of influence over the management or policy of a bank holding company that would trigger a supervisory concern regarding potential control, that guidance suggests that the relevant threshold would be at least 10% or more of the company's voting stock.[6]

Finally, we note that the public record contains myriad historical examples of situations where other investors have taken minority positions in Maryland bank holding companies (including in First United itself), sometimes well in excess of 5%, and there is no evidence that the Commissioner has regarded these investments as stock acquisitions requiring prior approval under Section 3-314. Driver has not yet exercised its right, pursuant to the Maryland Public Information Act, to seek additional information regarding the Commissioner's prior application (and non-application) of Section 3-314 to these other scenarios, nor with respect to what communications may have led to the present Inquiry. However, the absence of a substantial public record related to such investments suggests that, in the ordinary course of business, these types of 5%-10% minority investments in Maryland bank holding companies rightly have been regarded by the Commissioner as not giving rise to the degree of control necessary to trigger an application requirement under Section 3-314.

2. Direction of Management or Policy under Federal Law

Not only does Maryland law support the conclusion that Driver's ownership interest in First United did not materially "affect the power to direct or to cause the direction of the management or policy" of either First United or the Bank, but applicable federal law compels the same conclusion. Before turning specifically to the applicable federal standards, however, we emphasize that these federal standards are not merely "instructive" other authority as it relates to the present Inquiry. On the contrary, multiple Maryland Attorney General's opinions issued to the Maryland Bank Commissioner (as predecessor to the Commissioner) looked expressly to federal law and to the Bank Holding Company Act of 1956, as amended (the "BHC Act"), in particular, to interpret various aspects of Section 3-314. In a 1980 Opinion, for example, the Attorney General sought to

[6] This 10% threshold is far from coincidental. As discussed below in **Section II.A.2**, under applicable federal law, control over publicly traded bank holding companies is likewise presumed at 10% for purposes of the Change in Bank Control Act. Moreover, for purposes of the federal Bank Holding Company Act, there is a general presumption of non-control for investors holding less than 10% of a bank holding company's voting shares, except in extraordinary situations (not relevant to Driver and First United) where the investor has other significant control relationships outside of its equity investment. We are not aware of any Maryland statute, regulation, or administrative guidance establishing a presumption of control at 5% of a bank holding company's voting shares or otherwise suggesting that such an investment requires the approval of the Commissioner.

interpret the meaning of the phrase "in this State" for purposes of Section 3-314(a)(3)(i) and looked, in the first instance, to the BHC Act for guidance. Finding no relevant language in the federal statute, the Attorney General then turned instead to a review of state law.[7] In this case, by contrast, the relevant "federal statute"—namely, the BHC Act—provides extensive guidance, including decades of interpretations and an entire federal regulatory framework that delineates with precision when one company has a "controlling influence" over the management and policies of a bank holding company. In a subsequent 1983 Opinion, the Attorney General noted specifically in reviewing the relevant legislative history that "[t]he Revisor's Note to § 3-314 indicates that the purpose for enacting Chapter 294, Laws of Maryland 1979, which added the statutory reference to a bank holding company, ***'was to conform the requirements as to stock acquisitions to the federal law.'***"[8]

Accordingly, while the federal framework for evaluating "control" issues in relation to bank holding companies may not be entirely dispositive with respect to Section 3-314, that framework provides highly relevant, persuasive authority for how the Maryland statute should be interpreted. Given (i) the extensive overlap between the federal controlling influence standard and the standard articulated in Section 3-314(a)(3)(i) and (ii) the evidence set forth above regarding the extent to which Section 3-314 was intended to incorporate and conform to the BHC Act, we believe it is incumbent on the Commissioner to give due consideration to whether Driver would be regarded as controlling First United under applicable federal law.[9] As set forth below, it is clear that Driver could not be regarded as controlling First United under any relevant federal standard.

The BHC Act, as implemented by the Federal Reserve Board ("FRB" or "Fed") in Regulation Y, defines control as (i) the ownership, control, or power to vote 25% or more of the outstanding voting shares of any company; (ii) control in any manner over the election of a majority of the directors of a company; or (iii) the power to exercise, directly or indirectly, a "controlling influence" over the management or policies of a company.[10] Thus, the BHC Act standard mirrors the standard in Section 3-314 in that it captures explicitly an investor that owns 25% or more of the voting shares of a banking organization while also establishing that an investor holding a lesser voting interest may be deemed to control the banking organization if it has the requisite degree of

[7] 65 Md. Op. Atty. Gen. 40, 1980 WL 118079 (discussing the reliance Section 3-314 places on certain BHC Act definitions and noting that "[t]he federal statute contains no guidance . . . regarding the meaning of the qualifying phrase . . . 'in this State,'" before turning in the alternative to state law).

[8] 68 Md. Op. Atty. Gen. 75 n. 12, 1983 WL 179176 (emphasis added).

[9] Driver has received no indication, formally or informally, from the Federal Reserve Board that there is any suggestion it might be viewed as seeking to exert a controlling influence over First United for purposes of the BHC Act or other federal law. Indeed, as demonstrated below, there is no basis of support for such a conclusion. Given that the BHC Act, as interpreted and applied by the Federal Reserve Board, provides an extensive framework for evaluating control issues in relation to all bank holding companies, we urge the Commissioner to consider the potential detrimental impact on Maryland banking institutions (and their shareholders) that may result from applying Section 3-314 in a manner that is materially inconsistent with uniform federal standards.

[10] 12 C.F.R. § 225.2(e)(1).

"influence" over management or policy. The courts and the Fed have taken that view that this standard does not require actual or operational control, but can be satisfied by lower levels of control, including "where a company is not able to determine the outcome of a significant matter under consideration." Controlling influence under the BHC Act "requires only 'the mere potential for manipulation of a bank.'"[11]

From the moment of its initial acquisition of shares of FUNC, Driver has steadfastly conducted its activities in a manner consistent with avoiding any potential risk that it might be viewed as exerting or attempting to exert a controlling influence over First United for purposes of the BHC Act.[12] Fortunately, the Fed's standard for making controlling influence determinations—itself long shrouded in relative obscurity, having developed over decades of informal guidance—was very recently articulated and confirmed in objective terms in a final regulation. On April 23, 2019, the Fed issued a notice of proposed rulemaking ("NPR") to "simplify and increase the transparency" of the Fed's controlling influence rules. Fed Chairman Jerome Powell announced in connection with issuance of the NPR that "[p]roviding all stakeholders with clearer rules of the road for control determinations will responsibly reduce regulatory burden . . . . As a result, it will be easier for banks, particularly community banks, to raise capital to support lending and investment."[13] Driver acted at all times throughout 2019 in a manner consistent with avoiding controlling influence, as set forth in the NPR. The Fed on January 30, 2020, adopted the rule with only minor adjustments (not relevant here) as a final regulation. Since publication of the Final Control Rule, Driver has continued to conduct its relationship with First United in a manner fully consistent with what is permissible for a non-controlling investor.

Under the Final Control Rule, an investor holding less than 10% of a bank holding company's voting stock is entitled to a presumption that it lacks the ability to exercise a controlling influence over the company's management and policies, *unless* one or more of the following additional factors is present: (i) the investor's director representatives constitute 25% or more of the company's board of directors; (ii) the investor has other significant business relationships with the bank holding company (*e.g.*, as a client or lender); (iii) the investor and the bank holding company have an interlocking CEO or more than one other senior executive interlock; (iv) the investor has

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[11] FRB, *Final Rule on Control and Divestiture Proceedings*, n. 20 (*Federal Register* publication pending) (*hereinafter* "Final Control Rule"), citing *Interamericas Investments, Ltd. v. Bd. of Governors of the Fed. Reserve Sys.*, 111 F.3d 376, 383 (5th Cir. 1997).

[12] Given the dearth of publicly available guidance from the Commissioner regarding the applicable control standard for purposes of Section 3-314 (as compared to the Fed's extensive guidance on controlling influence under the BHC Act), the substantial overlap in language between Section 3-314 and the Fed's controlling influence rules, and the readily apparent intent underlying Section 3-314 to track the federal standard, one questions what other parameters Driver or another similarly situated investor might reasonably have applied.

[13] FRB Press Release, *Federal Reserve Board invites public comment on proposal to simplify and increase the transparency of rules for determining control of a banking organization* (Apr. 23, 2019). Plainly, the federal objective articulated by Chairman Powell and the benefits to community banks intended to be served by the Fed's regulation would be substantially undermined by a patchwork of state laws purporting to apply alternative control standards and attendant state-level application requirements.

contractual covenants or veto rights that significantly restrict the discretion of company management over policy and operations; or (v) the investor owns or controls one-third or more of the total equity of the company.[14] None of these aggravating factors exists with respect to Driver, and, therefore, Driver is entitled under federal law to a presumption that it does not have a controlling influence over the management or policies of First United.

Driver's public advocacy in favor of a sale, its efforts to communicate with the First United board and management, and its recent nomination of directors are expressly permissible for a non-controlling investor and do not in any way undermine or limit the presumption of non-control discussed above. Indeed, the Fed has explicitly addressed the nomination of alternative director candidates and instructed that merely nominating directors (regardless of number) in opposition to director nominees proposed by the management or board of a bank holding company is insufficient to negate the presumption of non-control for a less than 10% investor.[15] The Fed has also consistently noted that its supervisory interests as a prudential bank regulator and, therefore, its approach to control issues must not undermine the legitimate rights of a minority shareholder in a bank holding company to advocate its position.[16]

The federal standards for evaluating potential control by a shareholder with less than 5% of the outstanding voting stock of a bank holding company leave virtually no basis to find an ability to exercise a controlling influence, except in the following extraordinary circumstances: (i) the investor's director representatives constitute 50% or more of the company's board of directors; (ii) the investor is party to a "management agreement" with the company, whereby it has the contractual power to direct the company's management and operations; or (iii) the investor owns or controls one-third or more of the total equity of the company. None of these conditions was

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[14] *See* Final Control Rule at 54-55 (pre-publication draft pending *Federal Register* publication), to be codified at 12 C.F.R. § 225.33(a).

[15] In the event that (i) Driver were to maintain a greater than 5% voting interest in First United, (ii) its independent director nominees were at some point to be elected by a full vote of First United shareholders, and (iii) those independent director nominees were to constitute 25% or more of the First United board, a question would at that point arise as to whether such independent directors should be "attributed" to Driver for control purposes. The Fed's regulation, in this regard, defines a "director representative" as "any individual that represents the interests of a first company through service on the board of directors of a second company." Because Driver's nominees are entirely independent of Driver—neither directors, officers, employees, or agents of Driver and not being compensated by Driver in any way—we are confident that the Fed would conclude these individuals should not be regarded as director representative of Driver. Regardless, however, consideration of this issue is premature; on its face, the Fed's control framework expressly permits a 5%-9.9% investor to solicit proxies for director representatives without giving rise to a controlling influence issue.

[16] *See, e.g.*, Final Control Rule at 38 ("[A] noncontrolling investor generally may act as a shareholder and engage with the target company and other shareholders on issues through proxy solicitations."); FRB, *2008 Policy Statement on Equity Investments in Banks and Bank Holding Companies* at 11 ("The [FRB] believes that a noncontrolling minority investor, like any other shareholder, generally may communicate with banking organization management about, and advocate with banking organization management for changes in, any of the banking organization's policies and operations. For example, an investor may, directly or through a representative on a banking organization's board of directors, advocate for changes … ***or attempt to convince banking organization management to merge the banking organization with another firm or sell the banking organization to a potential acquirer***") (emphasis added).

ever present in the case of Driver's relationship to First United and, therefore, there is even less of a basis upon which to conclude that any of Driver's share purchases prior to August 26, 2019, *i.e.*, when Driver crossed the 5% ownership threshold, could have given rise to a controlling influence over First United's management or policies.[17] Insofar as "controlling influence over management or policies" within the meaning of the BHC Act informs the understanding of "the power to direct or to cause the direction of the management or policy" within the meaning of Section 3-314, there is—at an absolute minimum—no basis to conclude that Driver reached the requisite threshold to warrant regulatory scrutiny at any time prior to August 26, 2019.[18]

Even under the federal Change in Bank Control Act ("CIBC Act"), which imposes a lower statutory threshold for "control" (owing in part to the fact that the CIBC Act, unlike the BHC Act, imposes no substantive obligations or commitments on a controlling shareholder), Driver could not be viewed as holding a sufficient degree of influence over FUNC to amount to a control relationship. Like the BHC Act (and, for that matter, Section 3-314), the standard quantitative control threshold in the CIBC Act is 25% of a bank or bank holding company's voting securities. However, the CIBC Act also establishes a "rebuttable presumption" of control at 10% in situations where either (i) the target is publicly traded or (ii) the acquirer will be the largest single shareholder following the acquisition. In other words, the CIBC Act is yet another prudential bank control framework, the parameters of which demonstrate that Driver is plainly outside the scope of investors that might reasonably be regarded as exerting influence over the management or policy of First United or the Bank.

In conclusion, applying a uniform federal standard highly analogous to Section 3-314, there is no plausible argument that Driver has the ability to exert a controlling influence over First United's management or policy. The primary federal regulator charged with making this determination for all bank holding companies has issued a final rule leading unequivocally to this conclusion. A contrary conclusion on the part of the Commissioner would be inconsistent with an extensive federal framework that one might reasonably understand was intended to occupy the field of control determinations as it relates to bank holding companies. At a minimum, such a conclusion would be highly disruptive and harmful not only for investors like Driver, but for Maryland banking organizations seeking to raise capital. Moreover, as a practical matter, the federal standard reflects decades of consideration of hundreds if not thousands of minority investments in bank holding companies, and adopts a conservative approach to evaluating when an investor might rightly be regarded as having a degree of influence over bank management or policy so as to trigger a supervisory interest. And the Fed has repeatedly stated that its controlling influence standard, like Section 3-314, does not require actual or operational control, but may be triggered based on a

[17] In fact, an investor that holds less than 5% of a bank holding company's voting shares is entitled to a statutory presumption of non-control under the BHC Act. 12 U.S.C. § 1841(a)(3).

[18] Section 3-314 is not triggered by Driver's investment in First United at all, but insofar as there remains any dispute on that point, it relates only to those *de minimis* holdings acquired on or after August 26, when Driver's interest grew to exceed 5%. Thus, even interpreting all inferences and ambiguities against Driver, the present Inquiry reduces to a dispute over the last 7,500 shares (one tenth of one percent) purchased by Driver—2,500 on August 26 and 5,000 on August 30, 2019.

level of influence that falls well short of the ability to actually "direct" management or policy. Even so, Driver plainly does not have a controlling influence over FUNC as a matter of federal law. Section 3-314 employs substantially identical language as the federal statute, and reflects a similar supervisory and policy objective. What little evidence is available regarding the legislative intent behind Section 3-314 suggests that it was intended to "conform" to federal statutory control rules for stock purchases in bank holding companies. On that basis, we see no reason why Section 3-314 should be interpreted in a way that undermines, or even directly contradicts, the BHC Act definition of controlling influence.

B. Even if Driver had intended to make a stock acquisition or had otherwise applied to the Commissioner pursuant to Section 3-314(c)(1), there would have been no valid statutory basis to deny its ability to purchase FUNC shares.

As described above, Driver has not made a stock acquisition within the meaning of Section 3-314 and, moreover, it certainly did not "intend" to do so. However, for sake of completeness, we briefly address the statutory standards that would have applied had Driver, in an abundance of caution or otherwise, made such a filing.[19]

The Commissioner may deny an application filed under Section 3-314(c) only on two grounds: (1) the Commissioner determines that the stock acquisition would be anticompetitive; or (2) the Commissioner determines that the stock acquisition would be a threat to safety and soundness of a banking institution. In other words, the statute does not provide for denial of an application on the basis of favoring local or community ownership of banking institutions in the state (unless the impact would be anticompetitive). The statute also does not provide for denying an application that may present a business challenge to entrenched state banking interests. Applying the two statutory bases available, there would have been no reasonable basis for denying a stock acquisition application by Driver at any point in 2019.

With respect to competition, Maryland has 32 state-chartered banks with more than 370 branches. According to the Federal Deposit Insurance Corporation, when national and out-of-state banks are included, there are approximately 648 insured banks operating in the State with branches numbering in the thousands. First United controls a single community bank with a total of 24 branches, all or substantially all of which may well be retained by an acquirer in any potential sale that might one day occur. Maryland consumers would retain ample choices for banking relationships with local and community banks, regional banks, and large domestic banks, even if First United were to be purchased by or merged with another institution. That said, there is no basis upon which Driver's purchase of shares on or after August 26, 2019 (when it crossed the 5% ownership threshold), was itself anticompetitive in nature in any event. Driver of course was not

[19] Driver recognizes the statement in Section 3-314(c)(3) that acquisitions involving any doubt regarding whether the applicable control standard is satisfied should be resolved in favor of "reporting" to the Commissioner. As described above, however, given (i) the lack of any suggestion under Maryland law that control could be triggered by anything less than ownership of 10% of a company's voting shares and (ii) the fact that Driver would be and remains entitled to express presumptions of non-control under substantially identical federal law, there was no "doubt" regarding its status at the time of any particular acquisition of FUNC shares in 2019.

itself a bank acquirer; and Driver had no ability at that time, and continues to have no ability today, to direct or cause the direction of any sale, merger, consolidation, or any other transaction that could be viewed as having an impact on the competition for banking business in the state.

With respect to the second basis for denial of an application under Section 3-314, Driver has never taken and will continue not to take any action that might threaten the safety and soundness of the Bank. Indeed, as a significant (albeit minority) shareholder, Driver's interests are fully aligned with ensuring the health and financial strength of First United's banking franchise. In its capacity as a shareholder, Driver has not advocated for any actions by First United other than a sale and certain changes to First United's corporate governance practices. On the contrary, if there is a potential threat to safety and soundness of the Bank, it is the entrenched incumbent First United board and management team, certain key members of which are hopelessly conflicted from acting in the best interests of the institution and which, as a group, have routinely failed to implement good governance practices broadly accepted elsewhere in the banking sector.

While we would not presume to address in full the analysis that the Commissioner might have undertaken should an application actually have been filed under Section 3-314, it is worth taking note of the lack of any underlying supervisory concern related to Driver's purchase of shares of FUNC. Given that the statue purports to supply a self-executing remedy that would neuter the voting rights of some portion of Driver's shares for a period of five year—a remedy that the District Court for the District of Maryland has characterized as "extreme"[20]—we believe that equitable principles and common sense require some preliminary assessment of this issue as part of the Inquiry.

Respectfully submitted,

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[20] *Mason-Dixon Bancshares* at 9.