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January 9, 2024

Office of the Attorney General
California Department of Justice
Attn: Public Inquiry Unit
P.O. Box 944255
Sacramento, CA 94244-2550

RE: OpenAI, Inc.

Dear Attorney General Bonta:

I write to raise questions about the activities of the California-registered 501(c)(3) nonprofit organization, OpenAI, Inc., and urge you to investigate whether you should seek its dissolution.

OpenAI, Inc. was registered as a nonprofit with the State of California with the express purpose of “engag[ing] in research activities that advance digital intelligence in the way that is most likely to benefit humanity as a whole, unconstrained by a need to generate financial return.”¹ Recent events raise concerns that OpenAI, Inc. may have failed to carry out its non-profit purposes and is instead acting under the effective control of its for-profit subsidiary affiliate. I urge you to investigate whether OpenAI, Inc. is not acting to carry out its purpose and, if appropriate, to seek its dissolution, divestment of its assets, and reinvestment of those assets to charitable purpose. In addition, news reports have suggested that OpenAI, Inc. may attempt to voluntarily dissolve or to convert to a for-profit corporation. If it does so, I ask that you fully enforce California law requiring that its assets remain perpetually dedicated to charitable enterprise.

The Attorney General plays a critical role in ensuring that nonprofits act consistently with their state-recognized purposes: California law recognizes that the

¹ See Founding Document, OpenAI, Inc., available at <https://rct.doj.ca.gov/Verification/Web/Search.aspx>

“primary responsibility ... for protection of assets held by ... public benefit corporations[] resides in the Attorney General.” Cal. Gov. Code § 12598(a). Consequently, “[t]he Attorney General has broad powers under common law and California statutory law to carry out” enforcement responsibilities. *Id.* Those powers are codified, among other places, at California Corporations Code sections 6510 and 6511, which authorize your office to bring an action for involuntary dissolution of a nonprofit. Grounds for seeking dissolution include the failure of the nonprofit to carry out its purposes, Cal Corp. Code § 6510(b)(6), and persistent and pervasive mismanagement, *id.* at § 6510, subd. (b)(5).

For-profit control of the purported nonprofit is inconsistent with the nonprofit’s state-recognized purpose.

We urge your office to investigate whether the nonprofit OpenAI, Inc., is still operating consistent with its purpose and mandate, or whether it is now under the effective control of the for-profit venture Open AI Global, LLC—over which the nonprofit claims operational control—and primarily pursuing a for-profit mission.

In November 2023, in an unusually high-profile corporate governance dispute, the nonprofit OpenAI, Inc. dismissed Sam Altman, OpenAI, Inc. board member and CEO. In its statement announcing his dismissal, the nonprofit board stated: “Mr. Altman’s departure follows a deliberative review process by the board, which concluded that he was not consistently candid in his communications with the board, hindering its ability to exercise its responsibilities. The board no longer has confidence in his ability to continue leading OpenAI.”² Within four days, this decision had been reversed; Sam Altman resumed his role as CEO and board members who had reportedly voted for his dismissal departed the board.³

Although there has been a great deal of reporting around this episode, the exact motivation for the board’s initial reaction remains unclear. In bringing Altman back, a new board chair, Bret Taylor, announced that OpenAI would convene a committee of the board to review the transition events, and on December 8, Taylor announced that OpenAI had retained outside counsel to perform that review.⁴

What seems more clear is that, after the dismissal, there was effectively a fight between the non-profit entity and the for-profit entity and its stakeholders (or at least the forces in the OpenAI ecosystem prioritizing profit-making), and the for-profit won—even though the law and the governance structure of the entities require that

² “OpenAI Announces Leadership Transition,” OpenAI (Nov. 17, 2023), <https://openai.com/blog/openai-announces-leadership-transition>

³ “Sam Altman Returns as CEO, OpenAI Has a New Initial Board,” OpenAI (Nov. 29, 2023), <https://openai.com/blog/sam-altman-returns-as-ceo-openai-has-a-new-initial-board>

⁴ *Id.* (Dec. 8, 2023 update).

the non-profit be superior. Indicators that raise questions as to whether the non-profit acquiesced to the profit motive include:

- The non-profit's decision to dismiss Altman was reportedly overturned due to the pressure of the for-profit, including investors in the for-profit.⁵ Profit-motivated actors who pushed for the decision included Microsoft, OpenAI's primary investor, which offered to hire Altman and everyone working for OpenAI.⁶ Also relevant is the mass resignation threat by OpenAI employees, who assuredly appreciated Altman's leadership but also had a material interest in a planned sale of employee shares in the for-profit venture that was jeopardized by Altman's departure.⁷
- As part of Altman's restoration, the non-profit board members who sought to dismiss him were themselves dismissed.⁸
- OpenAI's primary investor, Microsoft, was given a new "observer" seat on the board. This seat may be on the for-profit's board, although this is not clear from OpenAI's announcement; but in any case, it seems designed to give the large for-profit corporation Microsoft more influence over the overall enterprise.⁹ (If Microsoft, the for-profit's primary investor, has a seat on the board of the non-profit, the argument is even stronger.)
- Helen Toner, one of the non-profit board members who departed, stated that "our decision [to dismiss Altman] was about the board's ability to effectively supervise the company, which was our role and responsibility."¹⁰ She is exactly right that this is the board's role and responsibility. That the board seems to have been replaced precisely for trying to exercise its core duties suggests that the nonprofit is the subordinate partner.

The closest observers of the tumult at OpenAI tell a consistent story about why Altman was brought back—for-profit interests overtook the nonprofit. "[I]t was a bargaining sort of negotiation between OpenAI's small board of directors versus Sam

⁵ See Rohan Goswami and Jordan Novet, "OpenAI investors push to bring Altman back as CEO one day after he was ousted by board," CNBC (Nov. 18, 2023), <https://www.cnbc.com/2023/11/18/openai-investors-push-to-bring-altman-back-as-ceo-after-fired-by-board.html>

⁶ Ashley Capoot, "Microsoft Exec says OpenAI Employees Can Join with Same Compensation," CNBC (Nov. 21, 2023), <https://www.cnbc.com/2023/11/21/microsoft-exec-says-openai-employees-can-join-with-same-compensation.html>

⁷ See "OpenAI's \$86 billion share sale in jeopardy after Altman firing- The Information," Reuters (Nov. 18, 2023), <https://finance.yahoo.com/news/openais-86-billion-share-sale-190733334.html>

⁸ See "Sam Altman Returns as CEO, OpenAI Has a New Initial Board," OpenAI (Nov. 29, 2023), <https://openai.com/blog/sam-altman-returns-as-ceo-openai-has-a-new-initial-board>

⁹ *Id.*; Hayden Field and Kif Leswing, "Microsoft Secures Nonvoting Board Seat at OpenAI," CNBC (Nov. 29, 2023), <https://www.cnbc.com/2023/11/29/microsoft-secures-non-voting-board-seat-at-openai.html>

¹⁰ Helen Toner, (Nov. 29, 2023), <https://twitter.com/hlntnr/status/1730034020140912901>

Altman and his sort of allies, as well as Microsoft,” said *New York Times* reporter Mike Isaac, summarizing the consensus view.¹¹

Bloomberg financial commentator Matt Levine concludes that events established that “Microsoft can tell OpenAI’s board what to do even without having a board seat.”¹²

We readily acknowledge that it is not completely clear what OpenAI’s new organizational structure and arrangement is—a lack of clarity that is exacerbated by the fact that OpenAI frequently does not distinguish in its public statements between the non-profit and for-profit entities. But the publicly available facts at a minimum raise profound questions about whether the non-profit entity operates independently and controls the for-profit, or whether the for-profit entity is now effectively controlling the nonprofit (or, relatedly, if the nonprofit now sees profit-making as its primary purpose). We urge you to investigate this question. If the for-profit exerts effective control over the nonprofit, it follows that the nonprofit is no longer serving its public, nonprofit purpose, and should be dissolved.

In the event of dissolution—whether voluntary or involuntary—all charitable assets must be disgorged, with OpenAI Inc.’s assets transferred to another charitable enterprise.

State and federal law are clear that charitable assets must be permanently dedicated to a charitable purpose.¹³ The California Supreme Court has explicitly held that all assets held by a corporation organized for charitable purposes are deemed to be held in trust for that declared purpose, “as effectively as though the assets had been accepted from a [donor] who had expressly provided in the instrument evidencing the gift that it was to be held in trust solely for such charitable purposes.”¹⁴ Accordingly, in the event of dissolution, your office must require disgorgement of all of OpenAI, Inc.’s assets.

¹¹ Geoff Bennett and Kyle Midura, “Why OpenAI Reversed Course and Brought Sam Altman Back as CEO,” PBS (Nov. 22, 2023), <https://www.pbs.org/newshour/show/why-openai-reversed-course-and-brought-sam-altman-back-as-ceo>

¹² See Matt Levine, “OpenAI is Still an \$86 Billion Nonprofit,” *Bloomberg* (Nov. 27, 2023), <https://www.bloomberg.com/opinion/articles/2023-11-27/openai-is-still-an-86-billion-nonprofit>

¹³ See *Pac. Home v. Los Angeles Cnty.*, 264 P.2d 539, 543 (Cal. 1953); IRS, “Charity – Required Provisions for Organizing Documents,” <https://www.irs.gov/charities-non-profits/charitable-organizations/charity-required-provisions-for-organizing-documents> (“[A]n organization’s assets must be permanently dedicated to an exempt purpose. This means that if an organization dissolves, its assets must be distributed for an exempt purpose described in section 501(c)(3), or to the federal government or to a state or local government for a public purpose.”).

¹⁴ *Pac. Home*, 264 P.2d at 543.

The conversion of charitable healthcare organizations to for-profit entities provides a blueprint: When Blue Cross of California transferred its assets to a for-profit subsidiary, the State intervened to protect the interest of Californians and required distribution of all non-profit assets—over \$3.2 billion—to charitable grant-making healthcare foundations.¹⁵

If your investigation shows that dissolution of OpenAI, Inc. is called for, or if OpenAI chooses to undergo a voluntary conversion,¹⁶ the same process should be followed, beginning with a full assessment of OpenAI, Inc.’s considerable assets. Those assets include those publicly reported by the non-profit—approximately \$18.5 million according to the most recent public information.¹⁷

Much more consequential is OpenAI’s ownership and control of its associated for-profit entity, Open AI Global, LLC, and its right to future profits and technology from the company. Exactly how to value this bundle of property rights is unclear and we encourage your office to explore these issues now.

At the time of the organizational tumult, Open AI Global, LLC was valued at \$86 billion in connection with a sale of employee stock.¹⁸ Recent reporting suggests that it may now have a valuation upwards of \$100 billion.¹⁹ OpenAI’s organizational chart indicates that it has an ownership stake in the for-profit, but it is not clear to us exactly what that share is. Whatever the face value of its percentage stake in the for-profit, the valuation of the nonprofit should almost certainly be much higher. We think these factors, among others, are relevant:

¹⁵ Community Catalyst, “Conversion and Preservation of Charitable assets of Blue Cross and Blue Shield Plans: How States Have Protected or Failed to Protect the Public Interest” (March 2004), https://www.communitycatalyst.org/wp-content/uploads/2022/11/conversion_and_preservation_of_charitable_assets_of_blue_cross_and_blue_shield_plans_mar04.pdf

¹⁶ See Kenji Kawase et al., “Alibaba backtracks and Altman speaks,” Financial Times (Dec. 7, 2023), <https://www.ft.com/content/53fb7e5a-3a33-4066-9d9b-6ebdce46d4aa> (quoting Mr. Altman as stating that the OpenAI corporate structure “clearly has some bugs in it, and our new board is thinking really carefully about what the best corporate structure for our mission should be” and concluding that a “key takeaway” is that OpenAI is “rethinking its hybrid of profit-and-non-profit corporate structure”); Jordan Novet, “OpenAI’s nonprofit arm showed revenue of \$45,000 last year, even though company is worth billions,” CNBC (Dec. 12, 2023), <https://www.cnbc.com/2023/12/12/openai-nonprofit-arm-45000-in-2022-revenue-company-worth-billions.html> (“The chaos has called into question whether OpenAI can or should continue under the umbrella of a nonprofit.”).

¹⁷ OpenAI Form 990, (2022), <https://www.scribd.com/document/690933649/OpenAI-Form-990-2022>

¹⁸ Rohan Goswami and Hayden Field, “OpenAI Tender Offer is on Track for January Despite Leadership Fracas, Sources Say,” CNBC (Nov. 30, 2023), <https://www.cnbc.com/2023/11/30/openai-tender-offer-on-track-despite-leadership-fracas-sources.html>

¹⁹ Gillian Tan, et al., “OpenAI Is in Talks to Raise New Funding at Valuation of \$100 Billion or More,” Bloomberg (Dec. 22, 2023), <https://www.bloomberg.com/news/articles/2023-12-22/openai-in-talks-to-raise-new-funding-at-100-billion-valuation>

- Whatever its ownership stake, the non-profit entity by design has complete control over the for-profit. (According to OpenAI: “the for-profit subsidiary is fully controlled by the OpenAI Nonprofit. We enacted this by having the Nonprofit wholly own and control a manager entity (OpenAI GP LLC) that has the power to control and govern the for-profit subsidiary.”²⁰) Thus, in a conversion, the non-profit should be entitled, at minimum, to the valuation of a control premium—an amount based on the overall value of the corporation, not the non-profit’s ownership stake.
- The control premium in this instance should be valued above the standard measures in for-profit acquisitions; here the change in control involves not just the power of the new control agents to make different management decisions but the ability to re-orient the business enterprise to the pursuit of profit. In the current arrangement, investors are literally warned to treat their investments as if they were donations. The operating agreement of the for-profit declares that “The Company exists to advance OpenAI, Inc.’s mission of ensuring that safe artificial general intelligence is developed and benefits all of humanity. The Company’s duty to this mission and the principles advanced in the OpenAI, Inc. Charter take precedence over any obligation to generate a profit.”²¹ After conversion, this restriction would no longer be in place (or, if it remained, could be revised at any time, and it would be reasonable to expect for-profit investors to do so). This change may dramatically increase the valuation of the for-profit company.
- The current valuation of the for-profit reflects that it is a capped-profit entity. Profits for first-round investors were capped at 100 times the initial investment and OpenAI indicated that the cap would be lower in future rounds.²² We believe the non-profit effectively has a right to all profits above the capped profit returns to investors, and that these potential profits are not reflected fully in the present valuation.

²⁰ “Our Structure,” OpenAI (June 28, 2023), <https://openai.com/our-structure>

²¹ “Our Structure,” OpenAI (June 28, 2023), <https://openai.com/our-structure>

²² OpenAI, OpenAI LP (Mar. 11, 2019), <https://openai.com/blog/openai-lp> (“As mentioned above, economic returns for investors and employees are capped (with the cap negotiated in advance on a per-limited partner basis). Any excess returns go to OpenAI Nonprofit. Our goal is to ensure that most of the value (monetary or otherwise) we create if successful benefits everyone, so we think this is an important first step. Returns for our first round of investors are capped at 100x their investment (commensurate with the risks in front of us), and we expect this multiple to be lower for future rounds as we make further progress.”).

Under California law, in the event of a non-profit's dissolution or conversion, it must distribute its assets "to another charity with the same or similar purposes."²³ In the event of dissolution or conversion, payment from Open AI Global, LLC investors—equivalent to the value of OpenAI—should be used to endow one or more charitable foundations to advance artificial intelligence ethics and safety.

Thank you for considering this request.

Sincerely,

A handwritten signature in blue ink that reads "Robert Weissman". The signature is written in a cursive style with a long horizontal flourish at the end.

Robert Weissman
President, Public Citizen
1600 20th St. NW
Washington, D.C. 20009

²³ Office of the Attorney General, California Department of Justice, Nonprofit Transactions Requiring Notice or Attorney General Approval, https://oag.ca.gov/sites/all/files/agweb/pdfs/charities/publications/charities_nonprofit_transactions.pdf