

Treatment of ESOP Committee Under OTS Acquisition of Control Regulations

Summary Conclusion: Under the facts presented, an employee stock ownership plan committee ("Committee") was not presumed to act in concert with the employee stock ownership plan ("Plan") under 12 C.F.R. § 574.4(d)(6). OTS did not consider the Committee to have acquired indirectly the Plan's shares of the holding company's stock. The Committee does not have to file under the OTS Acquisition of Control Regulations if a new person joins the Committee, even if that person is a director of the savings bank or holding company.

Date: September 6, 2001

Subjects: Savings and Loan Holding Companies/Change in Control

P-2001-9



Office of Thrift Supervision
Department of the Treasury

P-2001-9

1700 G Street, N.W., Washington, DC 20552 • (202) 906-6000

September 6, 2001

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Re: Treatment of ESOP Committee Under OTS
Acquisition of Control Regulations

Dear []:

This is in response to your letter of June 1, 2001, in which you request our interpretation of certain provisions of the OTS Acquisition of Control Regulations (Control Regulations) as they relate to the [] (Plan) of [] (Holding Company), the savings and loan holding company of [] (Savings Bank), and the Plan's committee (Committee).

In summary, based on the facts you have represented, we have concluded that: (i) the Committee would not be presumed to act in concert with the Plan under 12 C.F.R. § 574.4(d)(6); (ii) we would not consider the Committee to have acquired indirectly the Plan's shares of the Holding Company's common stock, and (iii) the Committee would not have to file under the Control Regulations if a new person joined the Committee, even if that person is a director of the Savings Bank or Holding Company.

Background

The Holding Company owns all of the common stock of the Savings Bank. The Plan is a tax qualified employee stock ownership plan as defined at 12 C.F.R. § 563b.2(a)(40). The Plan currently holds [] shares of the Holding Company's stock, out of [] total outstanding shares. As of [], the record date for the Holding Company's 2001 annual meeting, [] shares were allocated to Plan participants' accounts.

Allocated shares are voted directly by Plan participants. The remaining shares ([] shares, or []% of the outstanding shares) are voted as directed by the Plan committee (Committee), a group of five directors of the Holding Company. The Plan is otherwise administered by [] (Plan Trustee), a trust company

that is not affiliated with the Holding Company.¹ You represent that your ERISA counsel has determined that the Committee is acting in a fiduciary capacity to the Plan.

Because you were not certain how materials previously published regarding the Control Regulations would relate to the Committee, on [], you filed a change of control notice under the Change in Bank Control Act, 12 U.S.C. § 1817(j), and the Control Regulations, on behalf of the five members of the Committee regarding the Committee's control of the Plan's shares. By letter dated [], the OTS []Regional Office took no objection to the control notice.

In your letter, you seek written advice from this office regarding three issues: (i) are the members of the Committee presumed under the Control Regulations to act in concert with the Plan, with the result that the Committee members' and the Plan's holdings of the Holding Company's common stock must be aggregated under the Control Regulations; (ii) even if the Committee members and the Plan are not considered to be acting in concert, must the Plan's holdings of the Holding Company's common stock be attributed to the members of the Committee, based on the Committee's authority regarding the Plan; and (iii) if a new person joins the Committee, will the Committee need to file a new change of control notice?

Discussion

The Control Regulations explicitly address your first question. Section 574.4(d)(6) provides that a person or company is presumed (subject to rebuttal) to act in concert with any trust for which such person or company acts as trustee. Section 574.4(d)(6), however, explicitly provides that a tax qualified employee stock benefit plan (as described in the OTS Conversion Regulations) is not presumed to be acting in concert with its trustee or a person acting in a similar fiduciary capacity solely for the purposes of determining whether to combine the holdings of the plan and its fiduciary.

Although the Committee is not acting as trustee for the Plan, based on your description, it appears that the Committee is acting in a similar fiduciary capacity with respect to the Plan, which you have represented is a tax qualified employee stock benefit plan. Also, in our view, it would be anomalous to apply the exception from the presumption to trustees, but not to apply the presumption to the Committee, which acts in a much more limited fashion. Accordingly, based on your representations, the exemption from the section 574.4(d)(6) presumption would apply to the Committee.

With respect to your second question, whether the Committee members would be considered under the Control Regulations to control "indirectly" the Holding Company stock held in the Plan, for purposes of aggregating share ownership of the Committee members and the Plan, OTS addressed a similar issue in a 1992 interpretive letter (Letter).² The Letter concluded that:

¹ For example, the Plan Trustee has dispositive power over the unallocated Plan shares.
² Op. Sr. Dep. C.C. (Jul. 30, 1992) (No. 92/CS-10).

[i]n those situations where section 574.4(d)(6) specifically provides that action in concert is *not* presumed, we would not take the position that the trustee of a tax-qualified ESOP has indirectly acquired shares held by the ESOP, and therefore we would not aggregate the shares held by each for purposes of determining control under the [Control Regulations].

As discussed above, section 574.4(d)(6) specifically provides that action in concert is not presumed in this situation. The quoted language, however, refers specifically to trustees, and does not address persons who act in a similar, but more limited fiduciary capacity. Given that the exception in section 574.4(d)(6) specifically mentions persons acting in a fiduciary capacity similar to that of a trustee, and the Letter referred only to a trustee merely because the party addressed in the Letter happened to be a trustee, it is our view that the Letter should be read as applying to persons acting in a fiduciary capacity similar to a trustee, as well as to trustees.³

Finally, you have asked whether an additional filing would be required under the Control Regulations if one or more new persons join the Committee. We assume that you are asking this question more specifically with respect to a potential director of the Savings Bank or Holding Company serving on the Committee. Given the Plan's holdings of more than [] percent of the Holding Company's common stock, the Committee would be required to submit a filing under the Control Regulations if: (i) the Committee and the Plan were considered to be acting in concert; (ii) the Committee were deemed to have acquired the Holding Company stock held by the Plan; or (iii) the Committee members were presumed to act in concert with each other, and together held more than ten percent of the Holding Company's common stock.

In the above discussion, we have concluded that neither of the first two circumstances exists in this case. As to the third, OTS' predecessor, the Federal Home Loan Bank Board, consistently took the position that directors of a savings association are not considered to be acting in concert solely because of their director positions.⁴ Given that the Committee members' have assumed their roles as a result of their positions as directors of the Holding Company or the Savings Bank, we generally would not consider the Committee members to be acting in concert. Accordingly, based on the facts you have represented, no filing under the Control Regulations would be required if one or more additional members of the board of the Savings Bank or the Holding Company joined the Committee.

In reaching the foregoing conclusions, we have relied on factual representations contained in the materials submitted to us by you on behalf of the Holding Company and the Savings Bank. Our positions depend on the accuracy and completeness of those

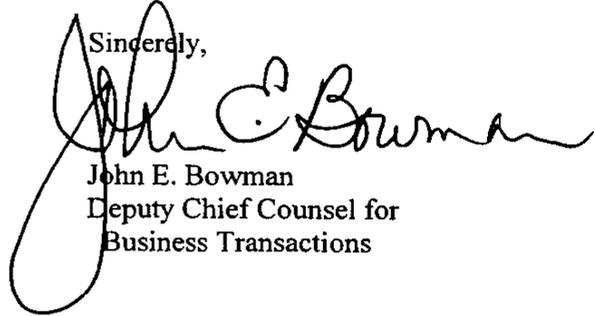
³ Our conclusion is subject to the same qualifications that we identified in the Letter.

⁴ See, e.g., 50 Fed. Reg. 48702 (Nov. 26, 1985); 51 Fed. Reg. 40136 (Nov. 5, 1986). However, in the event directors attempt to direct the policies of an institution for their personal benefit, a group may be deemed to be formed, which would require a filing under the Control Regulations. See 50 Fed. Reg. 48702.

representations. Any material change in facts or circumstances could result in different conclusions from those expressed herein.

If you have any questions regarding the above matter, please contact David A. Permut, Counsel (Banking and Finance) at (202) 906-7505.

Sincerely,



John E. Bowman
Deputy Chief Counsel for
Business Transactions

Cc: Regional Director
Regional Counsel

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