Ruling

Category: **Interpretation and Application** **NOTICE***

Subject: **Acting jointly or in concert**

No: **2017 – 01**

Issue: The issue is whether two shareholders (A and B), who are parties to a shareholders' agreement, are "acting jointly or in concert" in respect of the related shares.

Background: Each of A and B beneficially owns 50 percent of all of the issued and outstanding shares of C. A and B have entered into a shareholders' agreement to provide for the management of C with respect to certain issues, and to establish their respective rights and obligations in that regard.

The shareholders' agreement provides that A and B will act together to cause C to use all commercially reasonable efforts to conduct its business in a way as to achieve certain tax efficiencies (the Tax Clause). However, in all other matters, the shareholders' agreement provides that when taking any action or decision under that agreement, A and B will have no duty to consider the interests of the other shareholder, and may act exclusively in their own interests. In addition, the shareholders' agreement does not grant any decisional authority to any party, in the form of veto rights or otherwise.

The statutes governing federally regulated financial institutions (FRFIs) provide that if two or more persons have agreed, under any agreement, commitment or understanding, whether formal or informal, to act jointly or in concert in respect of shares or ownership interests of an entity, these persons are, for purposes of the FRFI ownership rules, deemed to be a single person who is acquiring beneficial ownership of those shares or ownership interests (the Acting in Concert Rule).[1]

Where persons are deemed to be a single person under the Acting in Concert Rule, the Superintendent may designate any of them as related parties of the particular FRFI.[2] In the case of the *Bank Act*, the Minister may, in certain cases and for purposes of the foreign bank rules, deem one or more of the above persons or the above entity to be entities associated with a foreign bank (the FB Acting in Concert Provisions).[3]

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[1] See subsections 9(1) of the *Bank Act* (BA), the *Trust and Loan Companies Act* (TLCA) and the *Insurance Companies* (ICA), and subsection 11(1) of the *Cooperative Credit Associations Act* (CCAA).

[2] See paragraph 486(3)(b) of the BA, paragraph 474(3)(b) of the TLCA, paragraph 518(4)(b) of the ICA, and subsection 410(2) of the CCAA.

[3] See subsection 507(3) of the BA.

Considerations:

The statutes governing FRFIs (the FRFI Statutes) do not provide exhaustive guidance on the factors that should or could be taken into account in determining whether A and B are "acting jointly or in concert" in respect of the shares of C.

Determining whether persons are acting jointly or in concert is largely a question of fact. However, based on the FRFI Statutes, OSFI observes that:

(a) the parties must be acting jointly or in concert in respect of shares or ownership interests of an entity; and

(b) in the case of the Acting in Concert Rule, the related "deemed agreement"[4] and "presumption exceptions"[5] provisions suggest that acting jointly or in concert involves an agreement, commitment or understanding by the parties, whether formal or not, to either relinquish decisional independence or grant decisional authority to one of the parties, in any material way,

   (i) regarding the exercise of voting rights attached to the applicable shares or ownership interests; or

   (ii) otherwise regarding the applicable shares or ownership interests (for example, where the parties agree that any of them may veto any proposal put before the board of directors of a FRFI).

While (b) above is specific to the Acting in Concert Rule, OSFI is of the view that a similar observation would be applicable to making a determination under the FB Acting in Concert Provisions.

As a result, the mere fact that A and B have entered into a shareholders' agreement is not conclusive of the issue; what matters is the materiality of the limitations the agreement imposes through the Tax Clause on their decisional independence in respect of the shares of C.

While the Tax Clause points towards A and B having relinquished some decisional independence in respect of the shares of C, the limited scope of the Tax Clause would not, on its own, be sufficient to conclude that A and B have relinquished material decisional independence.

Conclusion: OSFI concludes that A and B are not acting jointly or in concert in respect of the shares of C.

[4] See subsections 9(2) of the BA, the TLCA and the ICA, and subsection 11(2) of the CCAA.
[5] See subsections 9(3) of the BA, the TLCA and the ICA, and subsection 11(3) of the CCAA.

Table of Concordance:

Section Description	*Bank Act*	*Insurance Companies Act*	*Trust and Loan Companies Act*	*Cooperative Credit Associations Act*
Acting in concert	9	9	9	11
Designated related party	486(3)(b)	518(4)(b)	474(3)(b)	410(2)
Entity deemed to be associated with a foreign bank	507(3)	n/a	n/a	n/a

The table of concordance makes cross reference to similar provisions of other federal financial institutions legislation that may be of relevance to the reader.

* Rulings describe how OSFI has applied or interpreted provisions of the federal financial institutions legislation, regulations or guidelines to specific circumstances. They do not negate the need to obtain any necessary approval of the transaction under the relevant federal financial institutions legislation. Rulings are not necessarily binding on OSFI's consideration of subsequent transactions as these transactions may raise additional or different considerations. Legislative references in a Ruling are not meant to substitute provisions of the law; readers should refer to the relevant provisions of the legislation, regulation or guideline, including any amendments that came into effect subsequent to the Ruling's publication.