

affiliate, the acceptance of securities issued by an affiliate as collateral security for a loan or extension of credit to any person or company, and the issuance of a guarantee, acceptance, or letter of credit on behalf of an affiliate.

Second, section 23A requires that all covered transactions between a member bank and its affiliates be on terms and conditions that are consistent with safe and sound banking practices and prohibits a member bank from purchasing low-quality assets from an affiliate. Finally, section 23A requires that a member bank's extensions of credit to affiliates and guarantees on behalf of affiliates be appropriately secured by a statutorily defined amount of collateral.

Section 23B of the FRA protects member banks by requiring that transactions between the bank (and its subsidiaries) and its affiliates occur on market terms—on terms and under circumstances that are substantially the same, or at least as favorable to the bank, as those prevailing at the time for comparable transactions with unaffiliated companies. Section 23B applies to covered transactions under section 23A, as well as other transactions, such as the sale of securities or other assets to an affiliate and the payment of money or the furnishing of services to an affiliate. Section 23B also prohibits certain purchases and acquisitions of securities by a member bank or its subsidiary subject to certain conditions, and prohibits certain advertisements or agreements that state or suggest that the member bank is responsible for the obligations of its affiliates.

In addition to the section 23A and 23B restrictions, section 11(a)(1) of the HOLA imposes two prohibitions on savings associations. First, a savings association may not make a loan or other extension of credit to any affiliate unless that affiliate is engaged only in activities that a bank holding company may conduct. In addition, no savings association may purchase or invest in securities issued by an affiliate, other than with respect to shares of a subsidiary. Section 11(a)(4) of the HOLA authorizes OTS to impose such additional restrictions on any transaction between a savings association and any affiliate as it determines to be necessary to protect the safety and soundness of the association.

OTS issued comprehensive rules implementing section 11(a) of the HOLA in 1991.¹ These rules, which were codified at 12 CFR 563.41 and 563.42

(2002), defined and clarified the application of sections 23A and 23B to savings associations and their subsidiaries, implemented the two prohibitions imposed under section 11(a) of the HOLA, and imposed additional restrictions and safeguards, as authorized by section 11(a)(4) of the HOLA.

FRB has statutory authority to issue regulations to administer and carry out the purposes of sections 23A and 23B of the FRA.² Until recently, FRB had not promulgated comprehensive regulations on this subject. Instead, FRB relied on a series of regulatory interpretations and informal staff guidance.³ On December 12, 2002, FRB issued Regulation W, a comprehensive final rule implementing sections 23A and 23B of the FRA.⁴ Regulation W incorporated many existing FRB interpretations, superseded certain outdated interpretations, exempted specific types of transactions, and implemented revisions to sections 23A and 23B contained in the Gramm-Leach-Bliley Act (GLBA).⁵

Regulation W does not, by its terms, apply to savings associations. However, because sections 23A and 23B apply to every savings association in the same manner and to the same extent as if the savings association were a member bank, OTS issued an interim final rule revising its regulations on transactions with affiliates to reflect Regulation W. 67 FR 77909 (Dec. 20, 2002). The OTS interim final rule had three goals:

- To incorporate all applicable provisions and exceptions prescribed by FRB in Regulation W;
- To provide guidance concerning the relationship between the additional prohibitions under section 11(a)(1) of the HOLA and Regulation W; and
- To set out the additional restrictions OTS imposes under section 11(a)(4) of the HOLA.

The interim rule cross referenced the substantive provisions contained in Regulation W; interpreted Regulation W to the extent necessary to apply these restrictions to savings associations; incorporated the prohibitions in section 11(a)(1) of the HOLA; and imposed various additional restrictions on savings associations under section 11(a)(4) of the HOLA.⁶ The interim rule became effective April 1, 2003.

² 12 U.S.C. 371c(f), 371c-1(e).

³ FRB codified some of these interpretations at 12 CFR 250.240 through 250.250 (2002).

⁴ 67 FR 76560 (Dec. 12, 2002), codified at 12 CFR part 223 (2003).

⁵ Pub. L. No. 106–102, 113 Stat. 1338 (1999).

⁶ The interim final rule implemented only section 11(a) of the HOLA. It did not contain every statutory or regulatory restriction on transactions between savings associations and their affiliates.

The comment period on the interim rule closed on February 18, 2003. OTS received comments from a savings association and from a representative of a savings association. Both commenters generally supported the interim rule.

II. Discussion of Comments

A. Affiliates

Regulation W defines the term “affiliate” to include parent companies (any company that controls the member bank); companies under common control with the member bank; companies under other types of common control; companies with interlocking directors, trustees or general partners; companies that are sponsored and advised on a contractual basis by the member bank or an affiliate; investment companies for which a member bank or any affiliate is an investment advisor; depository institution subsidiaries of a member bank; financial subsidiaries; companies held under merchant banking or insurance company investment authority; partnerships for which the member bank or an affiliate serves as general partner; subsidiaries of affiliates, and other companies that FRB deems to be an affiliate of the member bank. 12 CFR 223.2(a). This definition specifically excludes certain companies, including most subsidiaries of member banks. 12 CFR 223.2(b).

Commenters raised various issues regarding the scope of the definition of affiliate. These matters are discussed below.

1. Control

One of the fundamental concepts underlying the definition of affiliate is the concept of control. Regulation W states that control by a company or shareholder over another company means that:

- The company or shareholder, directly or indirectly, or acting through one or more other persons, owns, controls, or has the power to vote 25 percent or more of any class of voting securities of the other company.
- The company or shareholder controls in any manner the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of the other company.
- The Board determines, after notice and opportunity for hearing, that the company or shareholder, directly or

For example, the rule did not address additional restrictions on transactions with affiliates that OTS may require as prompt corrective action under section 38(f)(2)(B) of the Federal Deposit Insurance Act (FDIA). 12 U.S.C. 1831o(f)(2)(B).

¹ 56 FR 34005 (July 25, 1991).