

series of transactions designed to channel funds to an affiliate engaged in non-bank holding company activities, or is otherwise designed to circumvent the loan prohibition.

C. Other Matters

OTS also wishes to clarify other guidance contained in its 1991 rulemaking. In the preamble to the 1991 final rule, OTS considered whether, for the purposes of calculating a savings association's aggregate amount of covered transactions with a particular affiliate, the savings association must include covered transactions with subsidiaries of the affiliate. To prevent savings associations from circumventing the 10 percent limit imposed under section 23A, OTS concluded that attribution of transactions was appropriate and necessary. Accordingly, OTS stated that, when computing the aggregate amount of transactions with a particular affiliate, a savings association must aggregate the amount of its covered transactions with all subsidiaries directly or indirectly controlled by the affiliate. OTS did not, however, require a savings association to attribute transactions to any holding company that controls the savings association or to attribute transactions by a parent downward to any subsidiary.²⁴

FRB has not issued similar guidance regarding the attribution of transactions. To the contrary, the preamble to final Regulation W states that the 10 percent limit would prohibit a bank from engaging in a covered transaction with an affiliate only when the aggregate amount of covered transactions between the bank and that affiliate would exceed 10 percent of the bank's capital. 67 FR 76560, at 76572. Nothing in section 11 of the HOLA requires the attribution of transactions among affiliates.²⁵ OTS may impose additional restrictions on savings associations if it determines that a restriction is necessary to protect the safety and soundness of savings associations. However, there is no reason to impose additional burdens on savings associations, particularly in light of other safeguards in sections 23A and 23B, including the overall 20 percent quantitative limits, qualitative restrictions, and other supervisory tools available to OTS.²⁶

Finally, in addition to the changes discussed above, OTS has made technical and clarifying changes to the interim rule. For example, the final rule clarifies that a savings association must comply with sections 23A and 23B of the FRA and Regulation W "as if it were a member bank," and indicates that most references to the FRB or appropriate bank federal banking agency in Regulation W should be read to refer only to OTS.²⁷ The latter change clarifies that OTS, rather than the FRB, has the responsibility for administering and enforcing transaction with affiliates restrictions with respect to savings associations. See 12 U.S.C. 1468(c).

The final rule also clarifies Regulation W's definition of "well capitalized." The sole use of this definition is in 12 CFR 223.41(d)(7), which states that a holding company and all of its subsidiary depository institutions must be "well capitalized" in order for a member bank to qualify for the internal corporate reorganization transaction exception. Section 223.3(kk) states that well capitalized has the same meaning as in 12 CFR 225.2, which prescribes various capital ratios and other capital-related requirements for bank holding companies, insured depository institutions, and uninsured depository institutions.

This requirement is not meaningful for many savings and loan holding companies. Although the activities of holding companies regulated by the FRB have expanded since GLBA, some savings and loan holding companies currently engage in a much broader range of activities. Because the universe of thrift holding companies is so diverse, the adequacy of holding company capital cannot be determined on the basis of a one-size-fits-all numeric formula or standard. Instead, OTS has found that specified capital ratios can be simultaneously too lax to support the activities of some holding companies and too restrictive for others. To recognize the diversity of the holding company universe, OTS does not impose a single consolidated or unconsolidated numerical capital requirement or ratio applicable to all

letters on transactions with affiliates. The inquirers observed that some of this guidance may be invalid based on the interpretations announced in final Regulation W. OTS will continue to handle these inquiries on a case-by-case basis and will examine whether other appropriate action is necessary. In the interim, savings associations that continue to rely on these prior opinions should carefully review whether the opinions have been affected by Regulation W or this final rule, and should consult with OTS if they have any questions.

²⁷ The references to the FRB at 12 CFR 223.2(a)(9)(iv), 223.3(h), 223.14(c)(4), 223.43, and 223.55 are unchanged.

holding companies. Rather, its analysis of the capital adequacy of savings and loan holding companies is a case-by-case process that reflects the overall risk profile of the organization.

To require savings associations and their holding companies to engage in a burdensome exercise merely to comply with specifications designed to address a more homogenous universe of holding companies, would serve no purpose. Rather, such a requirement would unduly obstruct some savings associations' ability to take advantage of the corporate reorganization exception, contrary to the stated intent of the FRB.²⁸ In addition, other savings and loan holding companies associations might attempt to claim the exception, even though their capital would be less than the amount OTS believed necessary to support their higher risk. Accordingly, to apply the internal corporate reorganization exception to savings associations in the same manner and to the same extent as to member banks OTS has clarified the "well capitalized" definition in light of the purposes of the exemption.

The stated purpose of the well capitalized requirement is to "prevent banking companies from abusing their banking units in reorganization transactions" by ensuring that holding companies engaging in such transactions are appropriately capitalized and remain appropriately capitalized following the transaction. In light of the diverse activities engaged in by savings and loan holding companies, OTS believes that its case-by-case capital analysis best serves this goal. Accordingly, the final rule clarifies that for a savings and loan holding company, well-capitalized means that a holding company significantly exceeds OTS expectations for the amount of capital needed to adequately support the holding company's risk profile, as determined by OTS on a case-by-case basis. OTS emphasizes that this clarification does not substitute a relaxed standard for savings associations that avail themselves of the corporate reorganization exception. Rather, the clarification is intended to apply Regulation W meaningfully to savings associations while simultaneously recognizing the differences between bank and savings and loan holding companies and the

²⁸ 67 FR 76560, at 76562 fn. 13 ("An insured savings association * * * may take advantage of Regulation W's exemptions as if it were a member bank.")

²⁹ 67 FR 76560, at 76590.

²⁴ 56 FR 34005, at 34008.

²⁵ For purposes of determining whether an institution has reached the 10 and 20 percent quantitative limits on covered transactions, however, the covered transactions of a depository institution and its non-affiliate subsidiaries are combined.

²⁶ OTS has received a few inquiries concerning the continuing validity of previously issued opinion