

(K) The removal or selection of any independent accountant, auditor, investment adviser, or investment banker employed by the second company; or

(L) The second company's ability to significantly alter accounting methods and policies, or its regulatory, tax, or liability status (*e.g.*, converting from a stock corporation to a limited liability company); and

(ii) A limiting contractual right does not include a contractual right that would not allow the first company to significantly restrict, directly or indirectly, the discretion of the second company over operational and policy decisions of the second company. Examples of contractual rights that are not limiting contractual rights may include:

(A) A right that allows the first company to restrict or to exert significant influence over decisions relating to the second company's ability to issue securities senior to securities owned by the first company;

(B) A requirement that the first company receive financial reports or other information of the type ordinarily available to common stockholders;

(C) A requirement that the second company maintain its corporate existence;

(D) A requirement that the second company consult with the first company on a reasonable periodic basis;

(E) A requirement that the second company provide notices of the occurrence of material events affecting the second company;

(F) A requirement that the second company comply with applicable statutory and regulatory requirements;

(G) A market standard requirement that the first company receive similar contractual rights as those held by other investors in the second company;

(H) A requirement that the first company be able to purchase additional securities issued by the second company in order to maintain the first company's percentage ownership in the second company;

(I) A requirement that the second company ensure that any security holder who intends to sell its securities of the second company provide other security holders of the second company or the second company itself the oppor-

tunity to purchase the securities before the securities can be sold to a third party; or

(J) A requirement that the second company take reasonable steps to ensure the preservation of tax status or tax benefits, such as status of the second company as a Subchapter S corporation or the protection of the value of net operating loss carry-forwards.

(6) *Second company* means the company whose potential control by a first company is the subject of determination by the Board under this subpart.

(7) *Senior management official* means any person who participates or has the authority to participate (other than in the capacity as a director) in major policymaking functions of a company.

(f) *Reservation of authority*. Nothing in this subpart shall limit the authority of the Board to take any supervisory or enforcement action otherwise permitted by law, including an action to address unsafe or unsound practices or conditions, or violations of law.

**§ 238.22 Rebuttable presumptions of control of a company.**

(a) *General*. (1) In any proceeding under § 238.21(b) or (c) of this part, a first company is presumed to control a second company in the situations described in paragraphs (b) through (h) of this section. The Board also may find that a first company controls a second company based on other facts and circumstances.

(2) For purposes of the presumptions in this section, any company that is a subsidiary of the first company and also a subsidiary of the second company is considered to be a subsidiary of the first company and not a subsidiary of the second company.

(b) *Management contract or similar agreement*. The first company enters into any agreement, understanding, or management contract (other than to serve as investment adviser) with the second company, under which the first company directs or exercises significant influence or discretion over the general management, overall operations, or core business or policy decisions of the second company. Examples of such agreements include where the first company is a managing member,

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trustee, or general partner of the second company, or exercises similar powers and functions.

(c) *Ownership or control of 5 percent or more of voting securities.* The first company controls 5 percent or more of the outstanding securities of any class of voting securities of the second company, and:

(1)(i) Director representatives of the first company or any of its subsidiaries comprise 25 percent or more of the board of directors of the second company or any of its subsidiaries; or

(ii) Director representatives of the first company or any of its subsidiaries are able to make or block the making of major operational or policy decisions of the second company or any of its subsidiaries;

(2) Two or more employees or directors of the first company or any of its subsidiaries serve as senior management officials of the second company or any of its subsidiaries;

(3) An employee or director of the first company or any of its subsidiaries serves as the chief executive officer, or serves in a similar capacity, of the second company or any of its subsidiaries;

(4) The first company or any of its subsidiaries enters into transactions or has business relationships with the second company or any of its subsidiaries that generate in the aggregate 10 percent or more of the total annual revenues or expenses of the second company, each on a consolidated basis; or

(5) The first company or any of its subsidiaries has any limiting contractual right with respect to the second company or any of its subsidiaries, unless such limiting contractual right is part of an agreement to merge with or make a controlling investment in the second company that is reasonably expected to close within one year and such limiting contractual right is designed to ensure that the second company continues to operate in the ordinary course until the merger or investment is consummated or such limiting contractual right requires the second company to take an action necessary for the merger or investment to be consummated.

(d) *Ownership or control of 10 percent or more of voting securities.* The first company controls 10 percent or more of

the outstanding securities of any class of voting securities of the second company, and:

(1) The first company or any of its subsidiaries propose a number of director representatives to the board of directors of the second company or any of its subsidiaries in opposition to nominees proposed by the management or board of directors of the second company or any of its subsidiaries that, together with any director representatives of the first company or any of its subsidiaries on the board of directors of the second company or any of its subsidiaries, would comprise 25 percent or more of the board of directors of the second company or any of its subsidiaries;

(2) Director representatives of the first company and its subsidiaries comprise more than 25 percent of any committee of the board of directors of the second company or any of its subsidiaries that can take action that binds the second company or any of its subsidiaries; or

(3) The first company or any of its subsidiaries enters into transactions or has business relationships with the second company or any of its subsidiaries that:

(i) Are not on market terms; or

(ii) Generate in the aggregate 5 percent or more of the total annual revenues or expenses of the second company, each on a consolidated basis.

(e) *Ownership or control of 15 percent or more of voting securities.* The first company controls 15 percent or more of the outstanding securities of any class of voting securities of the second company, and:

(1) A director representative of the first company or of any of its subsidiaries serves as the chair of the board of directors of the second company or any of its subsidiaries;

(2) One or more employees or directors of the first company or any of its subsidiaries serves as a senior management official of the second company or any of its subsidiaries; or

(3) The first company or any of its subsidiaries enters into transactions or has business relationships with the second company or any of its subsidiaries

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that generate in the aggregate 2 percent or more of the total annual revenues or expenses of the second company, each on a consolidated basis.

(f) *Accounting consolidation.* The first company consolidates the second company on its financial statements prepared under U.S. generally accepted accounting principles.

(g) *Control of an investment fund.* (1) The first company serves as an investment adviser to the second company, the second company is an investment fund, and the first company, directly or indirectly, or acting through one or more other persons, controls 5 percent or more of the outstanding securities of any class of voting securities of the second company.

(2) The presumption of control in paragraph (g)(1) of this section does not apply if the first company organized and sponsored the second company within the preceding 12 months.

(h) *Divestiture of control.* (1) The first company controlled the second company under § 238.2(e)(1) or (2) of this part at any time during the prior two years and the first company controls 15 percent or more of the outstanding securities of any class of voting securities of the second company.

(2) Notwithstanding paragraph (h)(1) of this section, a first company will not be presumed to control a second company under this paragraph if 50 percent or more of the outstanding securities of each class of voting securities of the second company is controlled by a person that is not a senior management official or director of the first company, or by a company that is not an affiliate of the first company.

(i) *Securities held in a fiduciary capacity.* For purposes of the presumptions of control in this section, the first company does not control securities of the second company that the first company holds in a fiduciary capacity, except that if the second company is a depository institution or a depository institution holding company, this paragraph (i) only applies to securities held in a fiduciary capacity without sole discretionary authority to exercise the voting rights of the securities.

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### § 238.23 Rebuttable presumption of noncontrol of a company.

(a) In any proceeding under § 238.21(b) or (c) of this part, a first company is presumed not to control a second company if:

(1) The first company controls less than 10 percent of the outstanding securities of each class of voting securities of the second company; and

(2) The first company is not presumed to control the second company under § 238.22 of this part.

(b) In any proceeding under this subpart, or judicial proceeding under the Home Owners' Loan Act, other than a proceeding in which the Board has made a preliminary determination that a first company has the power to exercise a controlling influence over the management or policies of a second company, a first company may not be held to have had control over a second company at any given time, unless the first company, at the time in question, controlled 5 percent or more of the outstanding securities of any class of voting securities of the second company, or had already been found to have control on the basis of the existence of a controlling influence relationship.

### Subpart D—Change in Bank Control

#### § 238.31 Transactions requiring prior notice.

(a) *Prior notice requirement.* Any person acting directly or indirectly, or through or in concert with one or more persons, shall give the Board 60 days' written notice, as specified in § 238.33 of this subpart, before acquiring control of a savings and loan holding company, unless the acquisition is exempt under § 238.32.

(b) *Definitions.* For purposes of this subpart:

(1) *Acquisition* includes a purchase, assignment, transfer, or pledge of voting securities, or an increase in percentage ownership of a savings and loan holding company resulting from a redemption of voting securities.

(2) *Acting in concert* includes knowing participation in a joint activity or parallel action towards a common goal of acquiring control of a savings and loan