enterprise is exempt from meeting the definition contained in § 1942.304.

(3) Regional Commission Grant applicants must meet eligibility requirements of the Regional Commission and also of the Agency, in accordance with paragraph (a)(1) of this section, for the Agency to administer the Regional Commission Grant under this subpart.

(4) Television demonstration grants may be made to statewide, private, nonprofit, public television systems whose coverage is predominantly rural. An eligible applicant must be organized as a private, nonprofit, public television system, licensed by the Federal Communications Commission, and operated statewide and within a coverage area that is predominantly rural.

(b) * * *

(3) * * *

(iv) * * *

(G) The project will assist a small and emerging private business enterprise as described in § 1942.305 (a)(2) of this subpart—10 points.

* * * * *

Dated: December 13, 2002.

Thomas C. Dorr,

Under Secretary.

[FR Doc. 02–32050 Filed 12–19–02; 8:45 am]

BILLING CODE 3410–XV–U

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Parts 506, 559, 562, and 563

[No. 2002–64]

RIN 1550–AB55

Savings Associations—Transactions with Affiliates

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Interim final rule with request for comment.

SUMMARY: The Office of Thrift Supervision (OTS) is revising its regulations on transactions with affiliates. This interim final rule conforms OTS regulations to the Board of Governors of the Federal Reserve System (FRB) final rule implementing sections 23A and 23B of the Federal Reserve Act (FRA). The FRB rule (Regulation W) combines statutory restrictions on transactions with affiliates with new and existing interpretations and exemptions.

DATES: This interim final rule is effective April 1, 2003. Comments must be received on or before February 18, 2003.

ADDRESSES: *Mail:* Send comments to Regulation Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, Attention: No. 2002–64. Commenters should be aware that there have been unpredictable and lengthy delays in postal deliveries to the Washington, DC area in recent weeks and may prefer to make their comments via facsimile, e-mail, or hand delivery.

Delivery: Hand deliver comments to the Guard's Desk, East Lobby Entrance, 1700 G Street, NW., from 9 a.m. to 4 p.m. on business days, Attention: Regulation Comments, Chief Counsel's Office, No. 2002–64.

Facsimiles: Send facsimile transmissions to FAX Number (202) 906-6518, Attention: No. 2002–64.

E-Mail: Send e-mails to *regs.comments@ots.treas.gov*, Attention: No. 2002–64, and include your name and telephone number.

Availability of comments: OTS will post comments and the related index on the OTS Internet Site at *www.ots.treas.gov*. In addition, you may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment for access, call (202) 906–5922, send an e-mail to *public.info@ots.treas.gov*, or send a facsimile transmission to (202) 906–7755. (Please identify the materials you would like to inspect to assist us in serving you.) We schedule appointments on business days between 10 a.m. and 4 p.m. In most cases, appointments will be available the business day after the date we receive a request.

FOR FURTHER INFORMATION CONTACT: Karen A. Osterloh, Special Counsel, (202) 906–6639, Regulations and Legislation Division, Chief Counsel's Office, or Donna Deale, Manager, (202) 906–7488, Supervision Policy, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION:

I. Background

Section 11(a)(1) of the Home Owners' Loan Act (HOLA) (12 U.S.C. 1468(a)(1)) applies sections 23A and 23B of the FRA (12 U.S.C. 371c and 371c–1) to every savings association ''in the same manner and to the same extent'' as if the savings association were a member bank of the Federal Reserve System.

Section 23A of the FRA imposes three major limitations on a member bank's (and its subsidiaries') transactions with affiliates. First, section 23A limits the amount of ''covered transactions'' with any single affiliate to no more than 10 percent of the member bank's capital stock and surplus. Covered transactions with all affiliates are limited to no more than 20 percent of the member bank's capital stock and surplus. A covered transaction includes a loan or extension of credit to an affiliate, a purchase of or investment in securities issued by an affiliate, a purchase of assets from an 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 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.

In 1991, OTS issued comprehensive rules implementing section 11(a) of the HOLA.[1] These rules, which are currently codified at 12 CFR 563.41 and 563.42 (2002), define and clarify the application of sections 23A and 23B to savings associations and their subsidiaries, implement the two prohibitions imposed under section 11(a) of the HOLA, and impose additional restrictions and safeguards, as authorized by section 11(a)(4) of the HOLA. OTS has made only minor amendments to these rules since 1991.

The 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, the FRB had promulgated no comprehensive regulations on this subject. Instead, the FRB relied on a series of regulatory interpretations and informal staff guidance.[3] The FRB recently issued Regulation W, a comprehensive final rule implementing sections 23A and 23B of the FRA.[4] Regulation W incorporates many existing FRB interpretations, supersedes certain outdated interpretations, exempts specific types of transactions, and implements revisions to sections 23A and 23B contained in the Gramm-Leach-Bliley Act (GLBA).[5]

The FRB's final rule 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 is revising its regulations on transactions with affiliates to reflect Regulation W. Today's interim final rule has three goals:

- To incorporate all applicable provisions and exceptions prescribed by the 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.

[1] 56 FR 34005 (July 25, 1991).

[2] 12 U.S.C. 371c(f), 371c–1(e).

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

[4] 67 FR 76560 (Dec. 12, 2002), *to be codified* as 12 CFR part 223. In this rule, OTS cites to 12 CFR part 223 as it will be codified in the 2003 Code of Federal Regulations, rather than by citation to publication of the final rule in the **Federal Register**

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

II. General Approach

OTS is replacing its existing rules on transactions with affiliates at 12 CFR 563.41 and 563.42 (2002) with a new interim final rule, which will be codified at 12 CFR 563.41. The interim final rule cross references the substantive provisions contained in Regulation W; interprets Regulation W to the extent necessary to apply these restrictions to savings associations; incorporates the prohibitions in section 11(a)(1) of the HOLA; and imposes various additional restrictions on savings associations under section 11(a)(4) of the HOLA.

OTS considered, but is not adopting, an alternative presentation. Specifically, OTS reviewed whether its rule should restate, with appropriate revisions, all of Regulation W. While this alternative presentation would consolidate in one place all regulations under section 11(a) of the HOLA, OTS believes that this approach would be duplicative. Moreover, this approach would require OTS to revise its regulations every time that the FRB amends Regulation W. The approach in this interim final rule, on the other hand, will ensure that most amendments to Regulation W are automatically incorporated in OTS rules without further notice and comment rulemaking. OTS specifically seeks public comment on which approach is more suitable.

III. Interim Final Rule—12 CFR 563.41

A. Scope

The interim final rule at § 563.41(a) sets out the scope of the new rule. Specifically, it states that § 563.41 implements section 11(a) of the HOLA, which applies sections 23A and 23B of the FRA to every savings association in the same manner and to the same extent as if the association were a member bank; prohibits certain types of transactions with affiliates; and authorizes OTS to impose additional restrictions on savings association transactions with affiliates.

The interim final rule implements only section 11(a) of the HOLA. It does not contain every statutory or regulatory restriction on transactions between savings associations and their affiliates. For example, the rule does 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).

B. Sections 23A and 23B of the FRA/Regulation W

The interim final rule at § 563.41(b) states that a savings association must comply with sections 23A and 23B of the FRA and Regulation W. To clarify Regulation W for savings associations, OTS has prepared a chart briefly explaining how specific sections of Regulation W apply and explaining why other sections do not apply to savings associations. These provisions are described below.

1. Applying Regulation W to Savings Associations

Regulation W by its terms applies only to member banks and defines this term as ''any national bank, State bank, banking association, or trust company that is a member of the Federal Reserve System. For purposes of this definition, an operating subsidiary of a member bank is treated as part of the member bank.'' 12 CFR 223.3(w). To ensure that Regulation W applies to savings associations and their subsidiaries in the same manner and to the same extent as member banks, the interim final rule at § 563.41(b)(11) states that the term ''member bank'' as used in Regulation W includes a savings association.

Like the existing rule, the interim final rule defines ''savings association'' to include federal and state-chartered savings associations and most thrift subsidiaries.[6] Savings association also includes any savings bank or cooperative bank that is a savings association under section 10(l) of the HOLA.[7] This provision reflects the agency's long-standing interpretation that a savings bank or cooperative bank that elects to be treated as a savings association for the purposes of section 10(l) of the HOLA has also made an election to be treated as a savings association for the purposes of section 11 of the HOLA.[8] Accordingly, the interim final rule continues to include within the definition of savings association those state banks and cooperative banks that are subsidiaries of section 10(l) holding companies.

[6] *See* 12 CFR 563,41(b)(5)(2002), which incorporates the definition of savings association at 12 CFR 583.21(2002). Thrift subsidiaries are discussed below.

[7] Section 10(l) of the HOLA states: ''Notwithstanding any other provision of law, a savings bank (as defined in [12 U.S.C. 1813(g)]) and a cooperative bank that is an insured bank (as defined in [12 U.S.C. 1813(H)]) upon application shall be deemed to be a savings association for the purposes of [section 10 of the HOLA], if the Director [of OTS] determines that such bank is a qualified thrift lender * * *.'' 12 U.S.C. 1467A(l).

[8] *See* section 10(d) of the HOLA. 12 U.S.C. 1467a(d).

OTS has also revised the reference to ''operating subsidiaries.'' Under Regulation W, the definition of affiliate generally excludes any company that is a subsidiary of the member bank unless the subsidiary is: (1) A depository institution; (2) a financial subsidiary;[9] (3) a company that is directly controlled by one or more affiliates (other than depository institution affiliates) or by a shareholder that controls the member bank or a group of shareholders that together control the member bank; (4) an employee stock option plan, trust, or other similar organization that exists for the benefit of the shareholders, partners, members, or employees of the member bank; or (5) any other company that the FRB or appropriate banking agency determines to be an affiliate. 12 CFR 223.2(b)(1)(i)–(v). The FRB refers to all non-affiliate subsidiaries as ''operating subsidiaries.'' 12 CFR 223.3(aa). OTS believes that this term is unnecessary and confusing given the use of the term ''operating subsidiary'' in other OTS regulations. *See* 12 CFR part 559. Accordingly, the chart at § 563.41(b) of the interim final rule does not use the term ''operating subsidiary.'' Instead, where it is appropriate to refer to a subsidiary that is not an affiliate, the chart uses the phrase ''non-affiliate subsidiary.''

2. Affiliates

Under Regulation W, the term ''affiliate'' is defined 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 or trustees; companies that are sponsored and advised on a contractual basis by the member bank, its subsidiary, 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 the 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). The interim final rule adopts the FRB definition of affiliate except as described below.

[9] Financial subsidiaries are discussed in this preamble at section III.B.2.b.

a. 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 or other similar voting interest 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 indirectly, exercises a controlling influence over the management or policies of the other company. 12 CFR 223.3(g)(1).

Regulation W also includes specific provisions addressing ownership or control of shares as a fiduciary, shares by a subsidiary, convertible securities, and nonvoting equity securities. *See* 12 CFR 223.3(g)(2)–(5).

When OTS promulgated its transactions with affiliates regulation in 1991, it exercised its authority under section 11(a)(4) of the HOLA to expand the definition of control. Specifically, existing § 563.41(b)(3) states that a company or shareholder has control over another company if 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 or if the company or shareholder would be deemed to control another company under 12 CFR 574.4(a) or presumed to control the company under 12 CFR 574.4(b). As a related matter, OTS also applied its own concept of control to define a subsidiary of a savings association. Specifically, existing § 563.41(b)(4) defines subsidiary of a savings association as a company that is controlled by a savings association within the meaning of part 574.

This interim final rule at § 563.41(b)(6) continues to use the existing OTS definition of control.[10] OTS-regulated savings associations are accustomed to applying part 574 control concepts to transactions with affiliates and in numerous other contexts. *See* definitions of control used in 12 CFR part 559 (subordinate organizations) and 12 CFR part 563b (the mutual-to-stock conversions rule). While this definition is more expansive than the FRB's definition of control, its use is consistent with section 11(a)(4) of the HOLA, which permits OTS to impose additional restrictions on savings associations' transactions with affiliates. OTS specifically requests comment on whether these control rules continue to be appropriate or whether it should conform these rules more closely to Regulation W.

[10] OTS made one minor revision to its existing definition of control. Under OTS's current transactions with affiliates rules, no company is deemed to own or control a company by virtue of its ownership or control of shares in a fiduciary capacity, except under certain circumstances. OTS has updated this provision to more closely reflect the related FRB provision at 12 CFR 223.3(g)(2).

b. Financial Subsidiaries

Regulation W defines affiliate to include a financial subsidiary of a member bank. 12 CFR 223.2(a)(8). A financial subsidiary is defined as any subsidiary of a member bank that ''engages, directly or indirectly, in any activity that national banks are not permitted to engage in directly or that is conducted on terms and conditions that differ from those that govern the conduct of such activity by national banks.'' The definition excludes a subsidiary that ''a national bank is specifically authorized to own or control by the express terms of a Federal statute * * *.'' [11]

Approximately 100 thrifts have investments in subsidiaries called service corporations that engage in activities in which a national bank may not engage directly. Regulation W did not address whether these thrift subsidiaries would be considered to be financial subsidiaries. For the reasons stated below, OTS concludes that savings association subsidiaries are not financial subsidiaries under the definition in Regulation W.

OTS believes that service corporations would fall within the exception to the definition of financial subsidiary. As noted above, Regulation W states that a financial subsidiary does not include a subsidiary that a national bank is specifically authorized by the express terms of a Federal statute to own or control. This exception is based on the definition of a financial subsidiary of a national bank at 12 U.S.C. 24a, which also expressly provides that bank service companies are not financial

[11] 12 CFR 223.3(p).

subsidiaries under the exception.[12] To apply this exception to savings associations ''in the same manner and to the same extent'' as member banks, OTS believes that it is appropriate to exclude any subsidiary that a savings association is specifically authorized by Federal statute to own or control. Since federal savings associations are specifically authorized to invest in and control service corporations under section 5(c)(4)(B) of the HOLA, service corporations would be excluded.

OTS also believes that the statutory scheme underlying GLBA strongly indicates that Congress did not contemplate that a savings association would own or control a financial subsidiary as that term is defined in section 23A of the FRA. Section 121 of GLBA added the new provisions addressing financial subsidiaries. In addition to the changes to section 23A(e) of the FRA, section 121 added extensive provisions governing financial subsidiaries of national banks [13] and parallel provisions addressing financial subsidiaries of insured state banks.[14] However, no GLBA provision explicitly referred to a financial subsidiary of a savings association and no legislative history hinted that the GLBA's new financial subsidiary provisions would have any impact on thrift subsidiaries. Moreover, while section 121 included numerous statutory revisions reconciling the new financial subsidiary provisions with existing sections of the FDIA, the FRA, the Bank Holding Company Act, and the Revised Statutes, GLBA included no similar conforming revisions to the HOLA or the Savings and Loan Holding Company Act. GLBA's failure to reconcile conflicting provisions in these two acts strongly suggests that Congress did not intend to include thrift subsidiaries as financial subsidiaries.[15]

The text of section 23A(e) of FRA provides further evidence that Congress did not intend to include thrift subsidiaries as financial subsidiaries. Section 23A(e)(1) defined financial subsidiary as any company that is ''a subsidiary of a bank that would be a financial subsidiary of a national bank under [12 U.S.C. 24a].'' Congress could have used the phrase ''a subsidiary of an insured depository institution that would be a financial subsidiary of a national bank.''[16] The use of the phrase ''subsidiary of a bank that would be a financial subsidiary of a national bank,'' however, suggests that Congress intended a limited application of this definition only to subsidiaries of national and state banks.

OTS notes that a contrary interpretation would also fail to recognize that Congress specifically and comprehensively addressed the regulation of savings associations and their subsidiaries in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).[17] In FIRREA, Congress was aware that certain subsidiaries could engage in activities that were impermissible for a parent savings association under section 5(c)(4)(B) of HOLA, and that these activities were broader than the activities allowed for national banks and their subsidiaries. As a part of that legislation, Congress enacted various provisions specifically designed to address transactions by savings associations with their subsidiaries. Many of these restrictions serve similar purposes as the restrictions on transactions with financial subsidiaries addressed by section 23A(e) of the FRA.[18]

Finally, OTS believes that its interpretation is consistent with the purposes of sections 23A and 23B of the FRA. These two provisions were designed to limit the risks to an institution (and the Federal deposit insurance funds) from transactions between the institution and its affiliates, and to limit the ability of an institution to transfer to its affiliates the subsidy arising from the institution's access to the Federal safety net.[19] OTS has addressed these risks through its comprehensive regulation of the relationship between savings associations and their subsidiaries. Under this regulatory scheme, OTS has not experienced significant problems that would warrant the application of sections 23A and 23B to these subordinate organizations. In light of this successful record, there is no demonstrable need to apply affiliate restrictions to thrift subsidiaries by classifying them as financial subsidiaries.

Accordingly, the interim final rule at § 563.41(b) states that the Regulation W references to financial subsidiaries do not apply to savings associations and their subsidiaries. These references include 12 CFR 223.2(a)(8) and (b)(1)(ii) (affiliate includes a financial subsidiary); 12 CFR 223.3(p) (definition of financial subsidiary); and 12 CFR 223.32 (rules that apply to a financial subsidiary of a member bank).

c. Companies That Are Both Subsidiaries and Affiliates

Under Regulation W, subsidiaries of a member bank are generally not affiliates unless the subsidiary is: (1) A depository institution; (2) a financial subsidiary; (3) directly controlled by one or more affiliates (other than depository institution affiliates) of the member bank, by a shareholder that controls the member bank, or by a group of shareholders that together control the member bank; (4) an employee stock option plan (ESOP), trust, or similar organization that exists for the benefit of shareholders, partners, members, or employees of the member bank or its affiliates, or (5) determined by the FRB

[12] U.S.C. 24a(g)(3)(B) states that subsidiaries that a national bank may control under the Bank Service Company Act are excluded as finance subsidiaries.

[13] Section 121(a) of GLBA added 12 U.S.C. 24a, which specifically authorizes national banks to conduct activities through financial subsidiaries; regulates the activities that may be conducted by those financial subsidiaries; and imposes various restrictions on national banks that control financial subsidiaries.

[14] Section 121(d) of GLBA added section 46 to the FDIA to permit an insured state bank to control an interest in a subsidiary that engages in activities that would be permissible for a national bank to conduct through a financial subsidiary. Section 46 includes safety and soundness firewalls that generally require insured state banks to comply with the same conditions and restrictions that apply to a national bank under 12 U.S.C. 24a, including restrictions on transactions with financial subsidiaries.

[15] For example, GLBA made no conforming revisions to section 11 (a)(l)(B) of the HOLA, which prohibits thrifts from purchasing or investing in securities issued by an affiliate, other than with respect to shares of a subsidiary. Section 23A(e)(2) of the FRA specifically states that a financial subsidiary ''shall be deemed to be an affiliate of the bank'' and ''shall not be deemed to be a subsidiary of the bank.'' If a service corporation were a financial subsidiary and, thus, an affiliate and not a subsidiary, section 11 and section 23A(e)(2)—when read together—would prohibit a savings association from investing in the service corporation's securities. This would nullify a federal savings association's express authority to invest in service corporations under section 5(c)(4)(B) of the HOLA. Similar issues could be raised regarding section 11(a)(1)(A) of the HOLA, which prohibits thrifts from making any loan or extension of credit to an affiliate engaged in activities that are not permitted to bank holding companies.

[16] *Compare* 12 U.S.C. 24a(g)93) (the term ''financial subsidiary means any company that is controlled by one or more insured depository institutions * * *'').

[17] Pub. L. No. 101–73, 103 Stat. 183 (1989).

[18] For example, section 23A of the FRA restricts covered transactions with financial subsidiaries, including limits on loans, extensions of credit, and purchases of, or investments in, securities issued by affiliates. *See* 12 U.S.C. 371c(b)(7)(A) and (B), FIRREA also established prudential limits on these transactions. Section 5(t)(5) of the HOLA requires Federal and state chartered savings associations to deduct from capital all investments and extensions of credit to any subsidiary engaged in activities taht are not permissible for national banks. Other depository institutions are not subject to as extensive restrictions on their investments in subsidiaries that engage in activities that re impermissible to a national bank. By contrast, national banks must deduct equity and retained earnings in financial subsidiaries, but not debt investments. 12 U.S.C. 24a(c).

[19] 66 FR 24186 (May 11, 2000).

or appropriate federal banking agency to be an affiliate.[20]

Except for references to financial subsidiaries, the OTS interim final rule follows Regulation W. This will modify OTS's current treatment of thrift subsidiaries. In one respect, the interim final rule will add to the definition of affiliate a subsidiary that is an ESOP, trust, or similar organization that exists for the benefit of shareholders, partners, members, or employees of the member bank or its affiliates.

In another respect, the interim rule will delete from the OTS definition of affiliate ''any company that would be an affiliate under [12 CFR 563.41(b)(1)(2002)] but for the fact that it is a subsidiary of a savings association.''[21] By contrast, the corollary provision of Regulation W only includes as affiliates those companies that are directly controlled by one or more affiliates or by shareholders that control the institutions. The application of these two provisions leads to slightly different results. For example, a subsidiary that is sponsored and advised on a contractual basis by an affiliate of the savings association is both a subsidiary and an affiliate. Under the current OTS rule, the entity would appear to be an affiliate. Under Regulation W, the entity would be a subsidiary, but not an affiliate. While OTS may impose greater restrictions on transactions by savings associations, OTS believes that its current rule is overly broad, particularly in light of the authority discussed below which permits OTS (or the FRB) to deem any company (including a subsidiary) to be an affiliate on a case-by-case basis.

d. Companies Deemed To Be Affiliates

Section 223.2(a)(12) states that ''affiliate'' includes any company that the FRB or the appropriate federal banking agency determines by regulation or order to have a relationship with the member bank or any subsidiary or affiliate of the bank such that covered transactions by the bank with that company may be affected by the relationship to the detriment of the bank or its subsidiary.[22] OTS's existing rule at § 563.41(b)(1)(v)(A) is nearly identical to Regulation W. However, existing § 563.41(b)(1)(v)(B) adds that OTS may also deem a company to be an affiliate if it determines that the company presents a risk to the safety or soundness of the savings association. The OTS rule lists a number of factors for OTS consideration including the nature of the activities conducted by the company, the amount of transactions with the savings association or its subsidiaries, the financial condition of the company or its parent savings association, and other supervisory factors.

The interim final rule addresses OTS authority to make case-by-case determinations at § 563.41(b)(3). OTS has reworded the safety and soundness standard to more accurately reflect section 11(a)(4) of the HOLA and has deleted the list of supervisory factors as unnecessary. OTS, however, will continue to consider these and other factors when it makes its determination under the safety and soundness standard.[23]

3. Other Provisions of Regulation W

a. Capital Stock and Surplus

Regulation W's definition of the phrase ''capital stock and surplus'' uses capital terms such as Tier 1 and Tier 2 capital. By contrast, the existing OTS definition of the phrase ''capital stock and surplus'' cross-references the definition of unimpaired capital and unimpaired surplus under OTS's loans-to-one-borrower rule, which uses thrift-specific capital terms such as core and supplementary capital. To ensure that thrifts will be able to apply this definition, the interim rule continues to use the current OTS definition. For similar reasons, all citations to the Call Report will refer to the Thrift Financial Report.

b. U.S. Branches or Agencies of Foreign Banks

OTS does not regulate U.S. branches or agencies of foreign banks. Accordingly, § 563.41(b) of the interim final rule states that 12 CFR 223.61, which addresses these entities, does not apply.[24]

C. Additional Prohibitions and Restrictions under Section 11 of the HOLA

Section 11(a) of the HOLA imposes two prohibitions on savings associations in addition to those found in sections 23A and 23B of the FRA, and authorizes OTS to impose additional restrictions on a savings association's transactions with affiliates. Paragraph (c) of the interim final rule addresses these additional provisions.

1. Regulation W Definitions

The interim final rule applies Regulation W definitions to the additional section 11 prohibitions and restrictions, except as described in the chart at § 563.41(b) of the interim rule.

2. Loans and Extensions of Credit

Section 11(a)(1)(A) of the HOLA states that ''no loan or other extension of credit may be made to any affiliate unless that affiliate is engaged only in activities described at section 10(c)(2)(F)(i) of [the HOLA].'' Section 10(c)(2)(F)(i) of the HOLA refers to activities ''which the [FRB], by regulation, has determined to be permissible for bank holding companies under [12 U.S.C. 1843(c)], unless the Director, by regulation, prohibits or limits any such activities for savings and loan holding companies.''[25] Thus, under section 11(a)(1)(A), a savings association may not make a loan or other extension of credit to an affiliate engaged in non-bank holding company activities. OTS restates this restriction at § 563.41(c)(1) of the interim final rule.[26]

For the purposes of this prohibition, the current rule states that a loan or other extension of credit includes a purchase of assets from an affiliate that is subject to the affiliate's agreement to repurchase. As a result, the existing rule

[20] 12 CFR 223.2(b)(1)–(v).

[21] *See* 12 CFR 563.41(b)(2)(i)(2002).

[22] The FRB may make other determinations under Regulation W that may affect institutions regulated by OTS. For example, a savings association may request the FRB to grant an exemption from the requirements of section 23A or 23B of the FRA (12 CFR 223.43 and 223.55). The FRB generally seeks OTS concurrence before it takes an action that impacts an OTS-regulated institution. Thus, the interim final rule does not require an institution to notify OTS before it makes a request for exemption. To expedite these requests, however, OTS-regulated institutions should contact OTS when they file an exemption request.

[23] Currently, OTS may also, on a case-by-case basis, elect to treat a company that is both an affiliate and a subsidiary as a subsidiary. *See* 12 CFR 563.41(b)(2)(ii)(2002) (last phrase). OTS has never exercised this authority and not included this provision in the interim final rule.

[24] OTS has made one additional revision that affects the application of its current rule. Under section23A(c) of the FRA, each loan, extension of credit to, or guarantee, acceptance, or letter of credit issued on behalf of, an affiliate must be secured by collateral having a market value equal to a set percentage of the transaction. A transaction that is secured by notes, drafts, bills of exchange, or bankers' acceptances that are eligible for rediscount or purchase by a Federal Reserve Bank must be collateralized at 100 percent. 12 U.S.C. 371c(c)(10)(A)(iii). This provision requires only that the cited instruments must be eligible for purchase or reinvestment and imposes no requirement that the institution must be a member bank. The current OTS rule adds to the statutory provision by stating that collateral that is eligible for rediscount or purchase by a Federal Home Loan Bank may also be collateralized at 100 percent. 12 CFR 563.41(c)(1)(i)(C). The additional language in the current OTS rule is not necessary to ensure that savings associations have parity with member banks. Accordingly, the interim rule does not include this current language provisions.

[25] These activities include activities approved for bank holding companies by regulation at 12 CFR 225.28, or by case-by-case order of the FRB in accordance with 12 CFR 225.23 and 225.24.

[26] The chart in the interim rule at § 563.41(b)(7) also refers to this prohibition.

generally prohibits these agreements with affiliates that are engaged in non-bank holding company activities. The current rule, however, exempts certain agreements that involve United States Treasury securities and that meet specified requirements.

Section 11 of the HOLA does not define ''loan or other extension of credit,'' and does not compel a legal conclusion that purchases of assets that are subject to an affiliate's agreement to repurchase are, or are not, prohibited by statute. When it originally promulgated this provision, OTS noted that section 11(a)(1)(A) focused on prohibiting transactions with non-banking affiliates that transfer credit and other risks to the savings association. Because a purchase of assets that is subject to an agreement to repurchase generally bears many of the economic characteristics of a loan or extension of credit to such an affiliate,[27] OTS concluded that it was appropriate to treat most of these transactions as loans or extensions of credit under section 11(a)(1)(A). OTS requests comment on whether it should retain these provisions on purchases of assets that are subject to agreements to repurchase.

In addition to the rules on purchases of assets that are subject to an agreement to repurchase, OTS has issued a number of interpretations regarding the loan prohibition. These interpretations are contained in various documents including preambles to proposed and final rules, opinion letters, and other guidance. For example, OTS has considered whether a savings association is barred from extending credit to an affiliate that directly engages only in activities permissible for a bank holding company, but owns subsidiaries engaged in activities not permissible for bank holding companies, such as real estate development. OTS determined that, in the case of affiliates that are not savings associations, such activities are imputed to each parent affiliate in a vertical ownership chain up to, but not including, a controlling holding company in the corporate structure. Activities are not, however, attributed downward to subsidiaries of an affiliate.[28] Where non-bank holding company activities are attributed to an affiliate from its subsidiary, a savings association is barred from extending credit to that affiliate. While this guidance reflects OTS's existing position, OTS has not incorporated its interpretations on the attribution of activities in the interim final rule. OTS specifically requests comment on whether it should include this guidance in the final rule.

OTS has also considered whether a third party attribution rule applies to the loan prohibition. Sections 23A(a)(2) and 23B(a)(3) of the FRA require a member bank (and thus savings associations) to treat any transaction with any person as a transaction with an affiliate to the extent that the proceeds are used for the benefit of, or transferred to, an affiliate. Regulation W includes this third party attribution rule at 12 CFR 223.16 and 223.52(b). By contrast, section 11(a)(1)(A) of the HOLA does not include a third party attribution rule, and OTS has declined to infer such a rule for the purposes of section 11. As a result, OTS's existing rules implementing section 11(a)(1)(A) do not prohibit a loan or extension of credit to a non-affiliate where the proceeds are used for the benefit of, or transferred to, an affiliate that engages in non-bank holding company activities.[29] The interim final rule includes a similar provision. Several OTS legal opinions, however, indicate that the agency may, nonetheless, attribute such a loan to an affiliate if the loan is not bona fide or is not of independent substance, or there is evidence that the loan was a prearranged step in a series of transactions designed to channel funds to an affiliate to which the institution could not lend directly.[30] OTS requests comment on whether it should include this additional guidance in the final rule.

3. Purchases or Investments in Securities Issued by an Affiliate

Section 11(a)(1)(B) provides that ''no savings association may enter into any transaction described in section 23A(b)(7)(B) of [the FRA] with any affiliate other than with respect to shares of a subsidiary.'' Section 23A(b)(7)(B) of the FRA describes ''a purchase of or investment in securities issued by [an] affiliate.''

Section 563.41(c)(2) of the interim final rule restates this restriction.[31] To ensure that a savings association may make investments in a bank or savings association that is a subordinate organization, the interim final rule also continues to state that the term subsidiary includes a bank and a savings association for the purposes of this provision. OTS has issued a number of legal opinions interpreting this prohibition and is considering including these interpretations in the rule. OTS specifically requests comment on whether it should include these or other interpretations of section 11(a)(1)(B) of the HOLA in the final rule.[32]

4. Recordkeeping

Currently §§ 563.41(e) and 563.42(e) require a savings association to make and retain records that reflect in reasonable detail all transactions between a savings association (and its subsidiaries) and affiliates, and transactions with an unaffiliated party that are attributed to an affiliate under the third party attribution rule. The current rule also includes minimum recordkeeping requirements at § 563.41(e)(1)(i) through (vii). OTS imposed these recordkeeping requirements under its authority at section 11(a)(4) of the HOLA, which permits OTS to impose additional restrictions to protect the safety and soundness of savings associations. The interim final rule retains these requirements at § 563.41(c)(3).

5. Notice

Under the existing rules, OTS may require certain savings associations to notify it at least 30 days before the savings association or its subsidiary conducts a transaction with an affiliate. These associations include a savings association that commenced *de novo* operations within the past two years, an association that was the subject (or whose holding company was the subject) of an approved application or notice under the control regulations at 12 CFR part 574 within the past two years, an association with a composite CAMELS rating of ''4'' or ''5,'' an association that does not meet all regulatory capital requirements, an association that has entered into a

[27] The savings association transfers funds to the affiliate, expecting to be repaid when the company repurchases the assets. The purchased assets essentially amount to collateral, since the savings association is required to return the assets at the time of repurchase. The principal risk to the savings association, its depositors and the depot insurance fund is credit risk—the possibility that the affiliate will default on its obligation to make the repurchase. These types of agreements are generally considered the functional equivalent of a loan or extension of credit. *See* amendments to Federal Financial Institutions Examination Council Policy Statement on Repurchase Agreements of Depository Institutions with Securities Dealers and Others, 63 FR 6935 (February 11, 1998).

[28] 56 FR 34405, at 34009.

[29] *See* 12 CFR 563.41(a)(2)(2002).

[30] Op. OTS Chief Counsel (Dec. 22, 1991) and Op. OTS Chief Counsel (March 13, 1992).

[31] The chart in the interim rule at § 563.41(b)(8) also refers to this prohibition.

[32] *See* Op. Acting Chief Counsel (Sept. 9, 1993) (Purchases of mortgage-backed securities that are guaranteed by Fannie Mae, Freddie Mac, or Ginnie Mae from an affiliate are not subject to the section 11(a)(1)(B) prohibition) and Op. Acting Chief Counsel (June 30, 1993) (Purchases of securities, including mutual funds, issued by an affiliate, are not prohibited if the purchase is made on a riskless principal or agency basis).

consent to merge or a supervisory agreement or has been the subject of a cease and desist order within the past two years, an association that is the subject of a formal enforcement proceeding, a problem association, and an association that is in a troubled condition.

OTS restates these requirements with minor revisions at paragraph (c)(4) of the interim final rule. OTS has clarified that ''troubled condition'' is defined at 12 CFR 563.555. OTS has also deleted specific references to problem institutions, institutions that have a composite rating of 4 or 5 under CAMELS, and institutions that are subject to a cease and desist order. These institutions will either fall within the definition of troubled condition, or one of the other listed categories.

IV. Solicitation of Comments Regarding the Use of Plain Language

Section 722 of the GLBA [33] requires federal banking agencies to use ''plain language'' in all proposed and final rules published after January 1, 2000. OTS invites comments on how to make this rule easier to understand. For example:

(1) Have we organized the material to suit your needs? If not, how could the material be better organized?

(2) Do we clearly state the requirements in the rule? If not, how could the rule be more clearly stated?

(3) Does the rule contain technical language or jargon that is not clear? If so, what language requires clarification?

(4) Would a different format (grouping and order of sections, use of headings, paragraphing) make the rule easier to understand? If so, what changes to the format would make the rule easier to understand?

V. Issuance of an Interim final rule

Section 553 of the Administrative Procedure Act (APA) permits an agency to issue a rule without prior notice and public comment if the agency, for good cause, finds that notice and comment is impractical, unnecessary, or contrary to the public interest, and explains its finding when it publishes the final rule. 5 U.S.C. 553(b)(B).

Among the purposes of this interim final rule are updating existing OTS rules to reflect FRB's newly issued Regulation W, interpreting Regulation W to the extent necessary to apply it to savings associations, providing guidance concerning the relationship between the prohibitions imposed by section 11(a)(1) of the HOLA and Regulation W, and clearly setting out additional restrictions imposed by OTS under section 11(a)(4) of the HOLA. OTS's existing regulations at 12 CFR 563.41 and 563.42 contain provisions that conflict with final Regulation W and do not reflect updated interpretations contained in Regulation W. As a result, the continued retention of these rules following the effective date of Regulation W is likely to cause undue confusion concerning applicable restrictions on transactions with affiliates. OTS has already received numerous inquiries on these matters. Having an interim final rule in place will help to minimize this confusion and ensure a smoother transition for savings associations as OTS implements Regulation W. OTS therefore believes that prior notice and public comment on this interim final rule is impractical, unnecessary, and contrary to the public interest.

VI. Effective Date and Transition Rule

The FRB made Regulation W effective April 1, 2003. Accordingly, transactions entered into on or after April 1, 2003, will be immediately subject to Regulation W. Transactions entered into after the date of publication of Regulation W in the **Federal Register**, but before April 1, 2003, will become subject to Regulation W on April 1, 2003.

The FRB included a limited transition rule for transactions consummated on or before the publication date of Regulation W. Under this transition rule, if such a transaction would become subject to section 23A or 23B (or the treatment of the transaction would change) solely as a result of Regulation W, the transaction will not become subject to Regulation W until July 1, 2003. A transaction is subject to section 23A or 23B solely as a result of Regulation W, if the transaction is subject to section 23A or 23B under Regulation W, but was not subject to section 23A or 23B under the terms of the statute or any written interpretation of the statute by the FRB or its staff dated before publication of Regulation W. Similarly, a transaction's treatment under section 23A or section 23B changes solely as a result of Regulation W if the treatment of the transaction under Regulation W differs from the treatment of the transaction under the terms of sections 23A and 23B or any written interpretation of the statute by the FRB or its staff dated before publication of Regulation W.

There are two exceptions to the FRB transition rule. First, a transaction that otherwise qualifies for the transition period will immediately become subject to Regulation W if it is renewed, extended, or materially altered on or after April 1, 2003. Second, a purchase of assets that was consummated on or before the publication of Regulation W and that qualifies for the transaction rule, is not subject to the new requirements in Regulation W.

To relieve regulatory burden, the FRB also permits member banks to apply specified provisions before Regulation W's effective date. Member banks may apply the following rules beginning on the date of publication of Regulation W: (1) Section 223.16(c)(4) (general purpose credit card exemption); (2) § 223.24(a), (b), and (c) (valuation principles applicable to extensions of credit secured by affiliate securities); (3) § 223.31(d) (exemption for step transactions involving the acquisition of an affiliate that becomes a non-affiliate subsidiary after the acquisition); (4) § 223.41(d) (exemption for internal corporate reorganization transactions); and (5) § 223.42(c), (f), (g), (i), (j), and (k) (exemptions for transactions secured by cash or U.S. government securities, purchases of certain marketable securities, purchases of municipal securities, asset purchases by a newly formed institution, transactions approved under the Bank Merger Act, and purchases of extensions of credit from an affiliate).

In today's interim final rule, OTS has established the same effective date, will apply identical transition rules, and will permit savings associations to apply the specified sections of Regulation W before the effective date of the rule. OTS, however, requests comment on whether the appropriate dates for these periods should be based on the date of publication of this interim rule, rather than the date of publication of Regulation W.

VII. Executive Order 12866

The Director of OTS has determined that this rule does not constitute a ''significant regulatory action'' for the purposes of Executive Order 12866.

VIII. Regulatory Flexibility Act Analysis

An initial regulatory flexibility analysis under the Regulatory

Flexibility Act (RFA) is required when an agency must publish a general notice of proposed rulemaking. 5 U.S.C. 603. As noted above, OTS has determined that it is not necessary to publish a notice of proposed rulemaking for this interim final rule. Accordingly, the RFA does not require an initial regulatory flexibility analysis.

Nonetheless, OTS has considered the likely impacts of this rule on small businesses and believes that the rule

[33] 12 U.S.C. 4809.

will not have a significant impact on a substantial number of small entities. OTS has had comprehensive regulations implementing section 11 of the HOLA since 1991. Today's interim final rule updates these provisions to incorporate Regulation W, interprets Regulation W to the extent necessary to apply the FRB rule to savings associations, clarifies the relationship between section 11(a)(1) of the HOLA and Regulation W, and sets out the additional restrictions imposed under section 11(a)(4) of the HOLA. In light of existing § 563.41, OTS does not believe that the interim final rule will significantly increase the applicable burdens for small or large savings associations. Accordingly, a regulatory flexibility analysis is not required.

IX. Unfunded Mandates Act of 1995

The Unfunded Mandates Reform Act of 1995, Public Law 104–4 (Unfunded Mandates Act) applies only when an agency is required to issue a general notice of proposed rulemaking or a final rule for which a general notice of proposed rulemaking was published. 2 U.S.C. 1532. As noted above, OTS has determined that a notice of proposed rulemaking is not required. Accordingly, OTS has concluded that the Unfunded Mandates Act does not require an analysis of this interim final rule.

Moreover, OTS has determined that the interim final rule will not result in expenditures by state, local, or tribal governments or by the private sector of $100 million or more. OTS has had comprehensive regulations implementing section 11 of the HOLA since 1991. Today's interim final rule merely updates these provisions to incorporate Regulation W, interprets Regulation W to the extent necessary to apply the FRB rule to savings associations, interprets Regulation W to the extent necessary to apply the FRB rule to savings associations, clarifies the relationship between section 11(a)(1) of the HOLA and Regulation W, and sets out the additional restrictions imposed under section 11(a)(4) of the HOLA. In light of existing § § 563.41, OTS does not believe that the interim final rule will significantly increase the applicable burdens for savings associations and will not result in increased expenditures by these institutions. Accordingly, OTS has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

X. Paperwork Reduction Act of 1995

The information collection requirements in the existing OTS rules at 12 CFR 563.41(e) and 563.42(e) were previously approved under OMB control number 1550–0078. The interim final rule incorporates these requirements at § 563.41(c)(3) and (4), and does not make any substantive changes that affect the overall burden of compliance.

List of Subjects

12 CFR Part 506

Reporting and recordkeeping requirements.

12 CFR Part 559

Reporting and recordkeeping requirements, Savings associations, Subsidiaries.

12 CFR Part 562

Accounting, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 563

Accounting, Advertising, Crime, Currency, Investments, Reporting and recordkeeping requirements, Savings associations, Securities, Surety bonds.

Accordingly, the Office of Thrift Supervision amends chapter V, title 12, Code of Federal Regulations to read as follows:

PART 506—INFORMATION COLLECTION REQUIREMENTS UNDER THE PAPERWORK REDUCTION ACT

1. The authority citation for part 506 continues to read as follows:

Authority: 44 U.S.C. 3501 *et seq.*

2. Amend § 506.1(b) by adding an entry for § 563.41(c)(3) and(4), and by removing the entries for § 563.41(e) and § 563.42(e) to read as follows:

§ 506.1 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

* * * * *

(b) *Display.*

12 CFR part or section where identified and described.	Current OMB control No.
* * * * *	
563.41(c)(3) and (4)	1550–0078
* * * * *	

PART 559—SUBORDINATE ORGANIZATIONS

3. The authority citation for part 559 continues to read as follows:

Authority: 12 U.S.C. 1462, 1462a, 1463, 1464, 1828.

4. Amend § 559.3 by revising paragraph (l) to read as follows:

§ 559.3 What are the characteristics of, and what requirements apply to, subordinate organizations of Federal savings associations?

* * * * *

	Operating subsidiary	Service corporation
* *	* * *	* *
(l) How do the transactions with affiliates (TWA) regulations (§ 563.41 of this chapter apply?	(1) Section (2) Section 563.41 of this chapter explains how TWA applies. Generally, an operating subsidiary is not an affiliate, unless it is a depository institution; is directly controlled by another affiliate of the savings association or by shareholders that control the savings association; or is an employee stock option plan, trust, or similar organization that exists for the benefit of shareholders, partners, members, or employees of the savings association or an affiliate. An operating subsidiary's transactions with affiliates are aggregated with those of the thrift	(2) Section (2) Section 563.41 of this chapter explains how TWA applies. Generally, a service corporation is not an affiliate, unless it is a depository institution; is directly controlled by another affiliate of the savings association or by shareholders that control the savings association; or is an employee stock option plan, trust, or similar organziaiton that exists for the benefit of shareholders, partners, members, or employees of the savings association or an affiliate. If a savings association directly or indirectly controls a service corporation, the service corporation's transactions with affiliates are aggregated with those of the thrift.
* *	* * *	* *

PART 562—REGULATORY REPORTING STANDARDS

5. The authority citation for part 562 continues to read as follows:

Authority: 12 U.S.C. 1463.

§ 562.4 [Amended]

6. Amend § 562.4(a) and (e) by removing ''12 CFR 563.41(b)(1)'' and adding in lieu thereof ''12 CFR 563.41.''

PART 563—SAVINGS ASSOCIATIONS—OPERATIONS

7. The authority citation for part 563 continues to read as follows:

Authority: 12 U.S.C. 375b, 1462, 1462a, 1463, 1464, 1467a, 1468, 1817, 1820, 1828, 1831o, 3806; 42 U.S.C. 4106.

8. Revise § 563.41 to read as follows:

§ 563.41 Transactions with affiliates.

(a) *Scope.* (1) This section implements section 11(a) of the Home Owners' Loan Act (12 U.S.C. 1468(a)). Section 11(a) applies sections 23A and 23B of the Federal Reserve Act (12 U.S.C. 371c and 371c-1) to every savings association in the same manner and to the same extent as if the association were a member bank; prohibits certain types of transactions with affiliates; and authorizes OTS to impose additional restrictions on a savings association's transactions with affiliates.

(2) For the purposes of this section, ''savings association'' defined at section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813), and also includes any savings bank or any cooperative bank that is a savings association under 12 U.S.C. 1467a(l). A non-affiliate subsidiary of a savings association as described in paragraph (b)(12) of this section is treated as part of the savings association.

(b) *Sections 23A and 23B of the FRA/Regulation W.* A savings association must comply with sections 23A and 23B of the Federal Reserve Act and the Federal Reserve Board (FRB) implementing regulation at 12 CFR part 223 (Regulation W), except as described in the following chart:

Provision of Regulation W	Application
(1) 12 CFR 223.1—Authority, purpose, and scope	Does not apply. Section 563.41(a) addresses these matters.
(2) 12 CFR 223.2(a)(8)—''Affiliate'' includes a financial subsidiary	Does not apply. Savings association subsidiaries do not meet the statutory definition of financial subsidiary.
(3) 12 CFR 223.2(a)(12)—Board or appropriate Federal banking agency determination that ''affiliate'' includes other types of companies.	Shall be read to include the following statement: ''Affiliate also includes any company that OTS determines, by order or regulation, to present a risk to the safety and soundness of the savings association.''
(4) 12 CFR 223.2(b)(1)(ii)—''Affiliate'' includes a subsidiary that is a financial subsidiary.	Does not apply. Savings association subsidiaries do not meet the statutory definition of financial subsidiary.
(5) 12 CFR 223.3(d)—Definition of ''capital stock and surplus''	Does not apply. Capital stock and surplus means ''unimpaired capital and unimpaired surplus,'' as defined in 12 CFR 560.93(b)(11).
(6) 12 CFR 223.3(g)—Definition of ''control''	Does not apply. (i) ''Control'' by a company or shareholder over another company means that the company or shareholder: (A) 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; (B) Is deemed to control the company under 12 CFR 574.4(a); or (C) Is presumed to control the company under 12 CFR 574.4(b) and control has not been rebutted. (ii) Notwithstanding any other provision of this rule, no company owns or controls another company by virtue of its ownership or control of shares in a fiduciary capacity, except as provided in 12 CFR 223.2(a)(3) or if the company owning or controlling the shares is a business trust.
(7) 12 CFR 223.3(h)(1)—Section 23A covered transactions include an extension of credit to the affiliate.	Shall be read to incorporate § 563.41(c)(1), which prohibits loans extensions of credit to an affiliate, unless the affiliate, is engaged in the activities described at 12 U.S.C. 1467a(c)(2)(F)(i), as defined in § 584.2–2 of this chapter.
(8) 12 CFR 223.3(h)(2)—Section 23A covered transactions include a purchase of or investment in securities issued by an affiliate.	Shall be read to incorporate § 563.41(c)(2), which prohibits purchases and investments in securities issued by an affiliate, other than with respect to shares of a subsidiary.
(9) 12 CFR 223.3(k)—Definition of ''depository institution''	Shall be read to include the following statement: ''For the purposes of this definition, a non-affiliate subsidiary of a savings association is treated as part of the depository institution.''
(10) 12 CFR 223.3(p)—Definition of ''financial subsidiary''	Does not apply. Savings association subsidiaries do not meet the statutory definition of financial subsidiary.
(11) 12 CFR 223.3(w)—Definition of ''member bank''	Shall be read to include the following statement: ''Member bank also includes a savings association. For purposes of this definition, a non-affiliate subsidiary of a savings association is treated as part of the savings association.''
(12) 12 CFR 223.3(aa)—Definition of ''operating subsidiary''	Does not apply. Other OTS regulations include a conflicting definition of this same term. Instead, OTS uses the phrase ''non-affiliate subsidiary.'' A non-affiliate subsidiary is a subsidiary of a savings association other than a subsidiary described at 12 CFR 223.2(b)(1) (i), (iii) through (v).
(13) 12 CFR 223.3(ii)—Definition of ''subsidiary''	Shall be read to include the following statement: ''However, a subsidiary of a savings association means a company that is controlled by the savings association within the meaning of part 574 of this chapter.''
(14) 12 CFR 223.31—Application of section 23A to an acquisition of an affiliate that becomes an operating subsidiary.	Shall be read to refer to ''operating subsidiary'' instead of ''a non-affiliate subsidiary.''
(15) 12 CFR 223.32—Rules that apply to financial subsidiaries of a bank.	Does not apply. Savings association subsidiaries do not meet the statutory definition of financial subsidiary.

Provision of Regulation W	Application
(16) 12 CFR 223.42(f)(2)—Exemption for purchasing certain marketable securities.	Shall be read to refer to ''Thrift Financial Report'' instead of ''Call Report.''
(17) 12 CFR 223.42(g)(2)—Exemption for purchasing municipal securities.	Shall be read to refer to ''Thrift Financial Report'' instead of ''Call Report.''
(18) 12 CFR 223.61—Application of sections 23A and 23B to U.S. branches and agencies of foreign banks.	Does not apply. OTS does not regulate U.S. branches and agencies of foreign banks.

(c) *Additional prohibitions and restrictions.* A savings association must comply with the additional prohibitions and restrictions in this paragraph. Except as described in paragraph (b) of this section, the definitions in 12 CFR part 223 apply to these additional prohibitions and restrictions.

(1) *Loans and extensions of credit.* (i) A savings association may not make a loan or other extension of credit to an affiliate, unless the affiliate is solely engaged in the activities described at 12 U.S.C. 1467a(c)(2)(F)(i), as defined in § 584.2–2 of this chapter. This paragraph (c)(1) does not prohibit a loan or extension of credit to a non-affiliate, merely because proceeds of the transaction are used for the benefit of, or transferred to, an affiliate.

(ii) For the purposes of this paragraph (c)(1), a loan or other extension of credit includes a purchase of assets from an affiliate that is subject to the affiliate's agreement to repurchase the assets. Such a purchase is not a loan or extension of credit, however, if the purchase is a transaction or series of transactions meeting all of the following requirements:

(A) The savings association purchases United States Treasury securities from the affiliate, the affiliate agrees to repurchase the securities at the end of a stated term, the remaining term of the securities purchased by the savings association exceeds the term of the affiliate's repurchase agreement, and the savings association has possession or control of the securities and the right to dispose of the securities at any time during the term of the agreement and upon default.

(B) The affiliate purchases United States Treasury securities from the savings association and the savings association agrees to repurchase the securities at the end of a stated term.

(C) The aggregate amount of the affiliate's outstanding obligations to repurchase securities from the savings association under the repurchase obligation described at paragraph (c)(1)(ii)(A) of this section, at all times, is less than the aggregate amount of the savings association's outstanding obligations to repurchase securities from the affiliate under paragraph (c)(1)(ii)(B) of this section.

(2) *Purchases or investments in securities.* A savings association may not purchase or invest in securities issued by any affiliate other than with respect to shares of a subsidiary. For the purposes of this paragraph (c)(2), subsidiary includes a bank and a savings association.

(3) *Recordkeeping.* A savings association must make and retain records that reflect, in reasonable detail, all transactions between the savings association and its affiliates and any other person to the extent that the proceeds of a transaction are used for the benefit of, or transferred to, an affiliate. At a minimum, these records must:

(i) Identify the affiliate;

(ii) Specify the dollar amount of the transaction and demonstrate that this amount is within the quantitative limits in 12 CFR 223.11 and 223.12, or that the transaction is not subject to those limits;

(iii) Indicate whether the transaction involves a low-quality asset;

(iv) Identify the type and amount of any collateral involved in the transaction and demonstrate that this collateral meets the requirements in 12 CFR 223.14 or that the transaction is not subject to those requirements;

(v) Demonstrate that the transaction complies with 12 CFR part 223, subpart F or that the transaction is not subject to those requirements;

(vi) Demonstrate that all loans and extensions of credit to affiliates comply with paragraph (c)(1) of this section; and

(vii) Be readily accessible for examination and supervisory purposes.

(4) *Notice requirement.* (i) OTS may require a savings association to notify the agency before the savings association may engage in a transaction with an affiliate or a subsidiary (other than exempt transactions under 12 CFR part 223). OTS may impose this requirement if:

(A) The savings association is in troubled condition as defined at § 563.555 of this part;

(B) The savings association does not meet its regulatory capital requirements;

(C) The savings association commenced *de novo* operations within the past two years;

(D) OTS approved an application or notice under 12 CFR part 574 involving the savings association or its holding company within the past two years;

(E) The savings association entered into a consent to merge or a supervisory agreement within the past two years; or

(F) OTS or another banking agency initiated a formal enforcement proceeding against the savings association and the proceeding is pending.

(ii) OTS must notify the savings association in writing that it has imposed the notice requirement and must identify the circumstance listed in paragraph (c)(4)(i) of this section that supports the imposition of the notice requirement.

(iii) If OTS has imposed the notice requirement under this paragraph, a savings association must provide a written notice to OTS at least 30 days before the savings association may enter into a transaction with an affiliate or a subsidiary. The written notice must include a full description of the transaction. If OTS does not object during the 30-day period, the savings association may proceed with the proposed transaction.

§ 563.42 [Removed]

9. Remove § 563.42.

10. Amend § 563.43 by revising paragraph (d) to read as follows:

§ 563.43 Loans by savings associations to their executive officers, directors, and principal shareholders.

* * * * *

(d) The term subsidiary includes a savings association that is controlled within the meaning of § 563.41(b)(6) of this part by a company (including for this purpose an insured depository institution) that is a savings and loan holding company. When used to refer to a subsidiary of a savings association, the term subsidiary means a ''subsidiary'' as that term is defined at § 563.41(b)(13) of this part.

* * * * *

Dated: December 12, 2002.

By the Office of Thrift Supervision.

James E. Gilleran,

Director.

[FR Doc. 02–31782 Filed 12–19–02; 8:45 am]

BILLING CODE 6720–01–P