

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 563

[No. 98-76]

RIN 1550-AB16

**Transactions with Affiliates;
Reverse Repurchase Agreements**

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Final rule.

SUMMARY: The Office of Thrift Supervision (OTS) is issuing a final rule to revise its regulations on transactions with affiliates. The final rule clarifies that OTS will treat reverse repurchase agreements, with one limited exception, as loans or other extensions of credit for the purposes of section 11(a)(1)(A) of the Home Owners' Loan Act (HOLA). Therefore, a savings association generally may not enter into a reverse repurchase agreement with an affiliate that is engaged in non-bank-holding company activities.

EFFECTIVE DATE: October 1, 1998.

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SUPPLEMENTARY INFORMATION:

I. Background

Section 11(a)(1) of the Home Owners' Loan Act (HOLA) applies the provisions of sections 23A and 23B of the Federal Reserve Act (FRA) to every savings association to the same extent as if the thrift were a member bank of the Federal Reserve System. Section 11(a)(1) also imposes several additional restrictions on a savings association's transactions with affiliates beyond those found in sections 23A and 23B of the FRA. Specifically, section 11(a)(1)(A) states that "no loan or other extension of credit may be made to any affiliate unless that affiliate is engaged only in activities described in section 10(c)(2)(F)(i) of the HOLA." These activities include activities approved for bank holding companies by regulation, 12 CFR 225.28, or by case-by-case order of the Federal Reserve Board, 12 CFR 225.23. Thus, under section 11(a)(1)(A), a thrift may not make a loan or other extension of credit to an affiliate engaged in non-bank holding company activities (non-banking affiliate).

OTS is aware that there may be situations where savings associations may wish to enter into reverse repurchase agreements with their non-banking affiliates.¹ These

¹ Sale of assets subject to an agreement to repurchase is known as a "reverse repurchase agreement" when a bank or thrift is the purchaser of the assets. See M. Stigum, *The Repo and Reverse Markets* 4 (1989).

arrangements raise the question whether a reverse repurchase agreement is a loan or other extension of credit for the purposes of the prohibition in section 11(a)(1)(A) of the HOLA.

On April 13, 1998, OTS published a notice of proposed rulemaking that would treat most reverse repurchase agreements as loans or other extensions of credit.² OTS noted that section 11(a)(1)(A) does not define “loan or other extension of credit,” and does not compel a legal conclusion that reverse repurchase agreements are, or are not, prohibited by statute.³ Section 11, however, focuses on prohibiting transactions with non-banking affiliates that transfer credit and other risks to the thrift. As a general matter, a reverse repurchase agreement with a non-banking affiliate bears many of the

² 63 FR 17966 (April 13, 1998).

³ In making this determination, OTS recognized that the definition of “covered transaction” under section 23A(b)(7) of the FRA lists “a purchase of assets, including assets subject to an agreement to repurchase” separately from “a loan or extension of credit.” See 12 U.S.C. 371c(b)(7)(A), (C). The fact that a reverse repurchase is considered to be an asset purchase, rather than an extension of credit under section 23A of the FRA, however, does not control the interpretation of section 11 of the HOLA.

Although section 23A and section 11(a)(1)(A) are both designed to prevent abuses by affiliates, the two statutes pursue this goal differently. Section 23A identifies a class of covered transactions that threaten prudent business relationships and places various restrictions on the transactions. Some restrictions apply to all transactions. Others apply only to certain types of covered transactions. (E.g., loans and extensions of credit are subject to specific collateralization requirements. Purchases, including purchases that are subject to a repurchase agreement, are subject to a prohibition on the purchase of low quality assets.) Thus, to impose the appropriate restrictions, section 23A must distinguish between covered transactions that are reverse repurchase agreements and loans and covered transactions that are other extensions of credit.

Moreover, we note that section 11(a)(1)(A) of the HOLA does not specifically incorporate the definition of covered transaction under section 23A. In light of the numerous other cross-references to section 23A of the FRA that are contained in section 11 of the HOLA, it is reasonable to conclude that if Congress had intended to restrict “loans or other extensions of credit” only to those transactions that are loans and extensions of credit for the purposes of section 23A, it would have included a specific cross-reference to that statute.

economic characteristics of a loan or extension of credit to such an affiliate.⁴ On this basis, OTS concluded that it was appropriate to treat these transactions as loans or extensions of credit under section 11(a)(1)(4).

Credit and other risks may be ameliorated significantly under certain circumstances. For example, in one arrangement recently reviewed by OTS, a thrift planned to sell United States Treasury securities to its holding company, subject to the thrift's agreement to repurchase the securities after a pre-determined period, several years later. Using reverse repurchase agreements, the savings association would also purchase United States Treasury securities from the holding company, subject to the holding company's agreement to repurchase on an overnight (or next-business-day) basis. The holding company, in effect, would use the overnight purchases to manage its available cash. At all times, the savings association's obligation to repurchase securities under its agreement would exceed the holding company's obligation to repurchase securities under its agreement. In this example, risk is mitigated because the thrift is able to dispose of United States Treasury

⁴ 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 savings association earns a pre-determined amount under the agreement. The principal risk to the savings association, its depositors and the deposit 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 ("FFIEC Policy Statement"), 63 FR 6935 (February 11, 1998).

securities, a highly liquid, federally guaranteed form of collateral. The risk is further ameliorated by the offsetting repurchase agreements between the thrift and the affiliate under which the thrift is, at all times a net debtor to the affiliate. Accordingly, OTS proposed to exclude such a connected set of transactions from the regulatory prohibition.

II. Summary of Comment and Description of the Final Rule

The public comment period on the proposed rule closed on June 12, 1998. OTS received one comment from a law firm, on behalf of a client.

The commenter argued that section 11(a)(1)(A) of the HOLA does not provide OTS with legal authority to prohibit reverse repurchase agreements. As noted above, the preamble to the proposed rule recognized that section 11(a)(1)(A) of the HOLA, on its face, did not compel a legal conclusion that reverse repurchase agreements are, or are not, prohibited as loans or extensions of credit. It is, however, within OTS' purview to interpret and clarify the meaning of "loan or other extension of credit" in section 11 by regulation. Section 3(b)(2) of the HOLA authorizes the Director to "prescribe such regulations . . . as the Director may determine to be necessary for

carrying out [the HOLA] and all other laws within the Director's jurisdiction.⁵ Thus, OTS has sufficient legal authority to issue this final rule interpreting the HOLA.

The commenter also responded to a question posed in the preamble to the proposed rule. The proposed regulation outlined the circumstances under which OTS would not treat a reverse repurchase agreement as a loan or other extension of credit under section 11(a)(1)(A) of the HOLA. Specifically, the reverse repurchase agreement must be part of a transaction or series of transactions meeting the following requirements: (1) There must be offsetting repurchase agreements between the thrift and the affiliate under which the thrift sells assets subject to an agreement to repurchase. At all times, when the agreements are netted, the thrift must be a net debtor to the affiliate; and (2) The assets purchased under the agreements must be United States Treasury securities, and the remaining term of securities purchased by the savings association must exceed the term of the reverse repurchase agreement. OTS specifically asked whether a cap should be placed on the length of time by which the remaining term of the securities may exceed the term of the reverse repurchase agreement. The commenter opposed the imposition of any cap.

⁵ 12 U.S.C. 1462a. See also 12 U.S.C. 1463(a) and 1464.

OTS agrees with the commenter that a cap is unnecessary in light of the proposed requirement that the aggregate amount of the thrift's outstanding obligation to repurchase securities from the affiliate must at all times exceed the aggregate amount of the affiliate's outstanding obligation to repurchase securities from the thrift. See proposed § 563.41(a)(3)(iii). Given this requirement, the savings association will always be able to set off all of its repurchase obligations to the affiliate, if the affiliate is unable to repurchase securities from the thrift under the agreement. Thus, the savings association will not have any net credit exposure to its affiliate. The proposal has not been revised to include a cap.⁶

Today's final rule contains a technical clarification. Proposed § 563.41(a)(3)(i) stated that the savings association (or its subsidiary) must ensure "its right to dispose of the securities at any time during the term of the agreement and upon default." OTS has revised the final rule to clarify that the savings association (or its subsidiary) must obtain possession or control of the underlying securities to ensure that it has the right to dispose of the securities. Other than this clarifying change, today's final rule is substantially identical to the April proposal.

⁶ The commenter opposed any additional restrictions. However, if additional restrictions are to be imposed, the commenter suggested that OTS require that the aggregate market value of the securities purchased by the savings association under the reverse repurchase agreement must exceed, by a specified margin (e.g., 102 percent), the amount of the affiliate's repurchase obligation under the reverse repurchase agreement. OTS agrees that further regulatory restrictions are unnecessary to mitigate the risks associated with reverse repurchase agreements. Moreover, under the FFIEC Policy Statement, cited above, we note that savings associations should comply with specific margin guidelines for such repurchase agreements.

III. Executive Order 12866

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

IV. Regulatory Flexibility Act Analysis

Pursuant to section 605(b) of the Regulatory Flexibility Act, OTS certifies that the final rule does not have a significant impact on a substantial number of small entities. The final rule prohibits all savings associations from entering into reverse repurchase agreements with non-banking affiliates, except under very limited circumstances. Thrifts currently engage in few reverse repurchase agreements with affiliates. OTS is not aware of any small savings association that is currently engaging in transactions that would be prohibited by this rule. Accordingly, a regulatory flexibility analysis is not required.

V. Unfunded Mandates Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Pub. L. 104-4 (unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a federal mandate that may result in expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. If a budgetary impact statement is

required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. OTS has determined that the final rule will not result in expenditures by state, local, or tribal governments or by the private sector of \$100 million or more. Accordingly, this rulemaking is not subject to section 202 of the Unfunded Mandates Act.

List of Subjects

12 CFR Part 563

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

Accordingly, the Office of Thrift Supervision hereby amends part 563, chapter V, title 12, Code of Federal Regulations as set forth below:

1. 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, 3806; 42 U.S.C. 4106.

2. Section 563.41 is amended by revising paragraph (a)(3) to read as follows:

§ 563.41 Loans and other transactions with affiliates and subsidiaries.

(a) * * *

(3) A savings association (or its subsidiary) may not make a loan or other extension of credit to an affiliate, unless the affiliate is engaged solely in activities described in 12 U.S.C. 1467a(c)(2)(F)(i), as defined in § 584.2-2 of this chapter. For the purposes of this paragraph (a)(3), 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 of assets, however, will not be considered a loan or other extension of credit if the savings association (or its subsidiary) has entered into a transaction or series of transactions that meets all of the following requirements:

(i) The savings association (or its subsidiary) 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 (or its subsidiary) exceeds the term of the affiliate's repurchase agreement, and the savings association (or its subsidiary) 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.

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

(iii) The aggregate amount of the affiliate's outstanding obligations to repurchase securities from the savings association (or its subsidiary) under the repurchase obligation described at paragraph (a)(3)(i) of this section, at all times, is less than the aggregate amount of the savings association's (or its subsidiary's) outstanding obligations to repurchase securities from the affiliate under paragraph (a)(3)(ii) of this section;

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DATED: August 7, 1998

By the Office of Thrift Supervision.



Ellen Seidman
Director