RESCINDED

Office of Thrift Supervision
Department of the Treasury

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The attached final rule regarding Savings Associations – Transactions with Affiliates was published in the Federal Register on October 7, 2003.

This rescission does not change the applicability of the conveyed document. To determine the applicability of the conveyed document, refer to the original issuer of the document.
described in Section 1 above. The other two amounts, the deposit cutoff level and the reduced reporting limit, are also adjusted annually, by an amount equal to 80 percent of the increase, if any, in total deposits at all depository institutions over the one-year period that ends on the June 30 prior to the adjustment.

Total deposits at all depository institutions increased by 9.3 percent (from $5,959.5 billion to $6,513.9 billion) between June 30, 2002 and June 30, 2003. Accordingly, the Board is adjusting the deposit cutoff level upward by $11.2 million, from its current level of $150.0 million in 2003 to $161.2 million in 2004. The Board is also adjusting the reduced reporting limit upward by $74 million, from its current level of $1.0 billion in 2003 to $1.074 billion in 2004.²

Beginning in September 2004, the boundaries of the four deposit reporting categories will be defined as follows. Those depository institutions with net transaction accounts over $6.6 million (the reserve requirement exemption amount) or total deposits greater than or equal to $1.074 billion (the reduced reporting limit) are subject to detailed recordkeeping requirements.

For the reasons set forth in the preamble, the Board is amending 12 CFR part 204 as follows:

PART 204—RESERVE REQUIREMENTS OF DEPOSITORY INSTITUTIONS (REGULATION D)

1. The authority citation for part 204 continues to read as follows:

Authority: 12 U.S.C. 248(a), 248(c), 371a, 461, 601, 611, and 3105.

2. Section 204.9 is revised to read as follows:

§ 204.9 Reserve requirement ratios.

The following reserve requirement ratios are prescribed for all depository institutions, banking Edge and agreement corporations, and United States branches and agencies of foreign banks:

<table>
<thead>
<tr>
<th>Category</th>
<th>Reserve requirement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Net transaction accounts</td>
<td>0 percent of amount.</td>
</tr>
<tr>
<td>$0 to $6.6 million</td>
<td>3 percent of amount.</td>
</tr>
<tr>
<td>Over $6.6 million and up to $45.4 million</td>
<td>$1,164,000 plus 10 percent of amount over $45.4 million.</td>
</tr>
<tr>
<td>Over $45.4 million</td>
<td>0 percent.</td>
</tr>
<tr>
<td>Nonpersonal time deposits</td>
<td>0 percent.</td>
</tr>
<tr>
<td>Eurocurrency liabilities</td>
<td>0 percent.</td>
</tr>
</tbody>
</table>

²Consistent with Board practice, the deposit cutoff level has been rounded to the nearest $0.1 million, while the reduced reporting limit has been rounded to the nearest $1 million.
affiliate, the acceptance of securities issued by an affiliate as collateral for a loan or extension of credit to any person or company, and the issuance of a guarantee, acceptance, or letter of credit on behalf of an affiliate.

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

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

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

OTS issued comprehensive rules implementing section 11(a) of the HOLA in 1991. These rules, which were codified at 12 CFR 563.41 and 563.42 (2002), defined and clarified the application of sections 23A and 23B to savings associations and their subsidiaries, implemented the two prohibitions imposed under section 11(a) of the HOLA, and imposed additional restrictions and safeguards, as authorized by section 11(a)(4) of the HOLA.

FRB has statutory authority to issue regulations to administer and carry out the purposes of sections 23A and 23B of the FRA. Until recently, FRB had not promulgated comprehensive regulations on this subject. Instead, FRB relied on a series of regulatory interpretations and informal staff guidance.

On December 12, 2002, FRB issued Regulation W, a comprehensive final rule implementing sections 23A and 23B of the FRA.

Regulation W incorporated many existing FRB interpretations, superseded certain outdated interpretations, exempted specific types of transactions, and implemented revisions to sections 23A and 23B contained in the Gramm-Leach-Bliley Act (GLBA). Regulation W does not, by its terms, apply to savings associations. However, because sections 23A and 23B apply to every savings association in the same manner and to the same extent as if the savings association were a member bank, OTS issued an interim final rule revising its regulations on transactions with affiliates to reflect Regulation W.

The interim final rule had three goals:

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

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

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

II. Discussion of Comments

A. Affiliates

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

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

1. Control

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

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

For example, the rule did not address additional restrictions on transactions with affiliates that OTS may require as prompt corrective action under section 386(f)(2)(B) of the Federal Deposit Insurance Act (FDIA). 12 U.S.C. 1831o(f)(2)(B).
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, securities by a subsidiary, convertible instruments, and nonvoting equity securities. See 12 CFR 223.3(g)(2)-(5).

Until today, OTS’s transactions with affiliates regulation included a more expansive concept of control than prescribed by the FRB in final Regulation W. Specifically, OTS’s prior rule stated 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 §574.4(a) or presumed to control the company under 12 CFR 574.4(b). See 12 CFR 563.41(b)(3) (2002). OTS also applied its own concepts of control to define a subsidiary of a savings association. 12 CFR 563.41(b)(4)(2002). This definition stated that a subsidiary of a savings association is a company that is controlled by a savings association within the meaning of part 574.

The major substantive difference between the control definitions in the prior OTS rule and final Regulation W involved the application of certain OTS rebuttable presumptions of control from part 574. For example under these control presumptions, a company will control another if it owns between 10 percent and 25 percent of any class of a company’s voting stock and one or more control factors is present. 7 When OTS originally promulgated its transactions with affiliates rule in 1991, FRB had promulgated no rules interpreting the meaning of control under sections 23A and 23B. In the absence of such guidance, OTS defined control for transactions with affiliates consistently with other OTS rules addressing similar concepts. At the time, part 574 represented OTS’s most current and comprehensive analysis of control issues. Most savings associations had some familiarity with the control concepts in part 574.

Now that FRB has issued final rules interpreting the definition of control for sections 23A and 23B it is difficult to articulate any regulatory purpose that would be furthered by continuing to prescribe a different definition. Applying part 574 control concepts to transactions with affiliates restricts savings associations in two ways. First, it broadens the application of the section 23A and 23B restrictions for thrifts in comparison to similarly situated member banks. OTS does not believe that savings association transactions with the additional “affiliates” reached by the OTS control definitions raise safety and soundness concerns that necessitate treating them differently from similarly situated member banks. Indeed, the application of the OTS definition of control leads to anomalous results because a company with identical relationships to a bank and a savings association in the same bank holding company structure could have been an affiliate of the savings association under the OTS interim rule, but not an affiliate of the member bank under Regulation W.

Second, the application of the part 574 control concepts also expands the scope of the additional prohibitions imposed under section 11 of the HOLA. These prohibitions apply only to savings associations and were imposed to reflect the fact that affiliates of savings associations engage in a greater range of activities than affiliates of banks, which may expose the savings association to greater risk. 8 There is no indication that Congress was concerned about the risks posed by relationships with companies that do not meet the definition of affiliate in section 23A. Indeed, the statute appears to contemplate that OTS would use the same definitions of “control” and “affiliate” as set forth in section 23A and Regulation W. 9 Accordingly, to promote consistency and equal treatment of insured depository institutions to the maximum extent possible, OTS has revised the final rule to use Regulation W control concepts.

Certain companies will no longer be considered to be savings association affiliates under the revised definitions in the final rule. OTS may, nonetheless, continue to treat such a company as an affiliate if it has a relationship with a savings association or any affiliate of the savings association such that covered transactions by the savings association and the company may be affected by the relationship to the detriment of the savings association, or where the company presents a risk to the safety and soundness of the savings association. 10

While certain companies will no longer be subject to the full range of restrictions and prohibitions under section 11 of the HOLA, some restrictions will continue to apply. For example, transactions between a savings association and a non-affiliate are subject to the “market terms” standards under section 23B, if an affiliate of the savings association has a financial interest in the non-affiliate. Thus, the market terms requirements will continue to apply to these entities. As a related matter, OTS has identified an area where the OTS control rules may not have been as rigorous as final Regulation W. The definition of control in final Regulation W includes two provisions, not specifically addressed in section 23A, which discuss the treatment of convertible securities and nonvoting equity securities. 11 While the OTS control rules address similar concepts, the two rules are not identical. 12 As a savings association were a member bank (as such term is defined in such Act) shall be deemed to be an affiliate of such savings association for purposes of [section 11(a)(1) of the HOLA].

8 12 CFR 574.4(b)(1)(ii). The eight control factors are described at 12 CFR 574.4(c) and include situations where an acquiror would: (1) own one of the two largest holders of any class of voting stock; (2) hold more than 25 percent of the total stockholders’ equity; or (3) hold more than 35 percent of the combined debt securities and stockholders’ equity.

9 OTS’s rule is more expansive in other ways. For example, under 12 CFR 574.4(b)(1)(ii) an acquiror has rebuttable presumption of control if it directly or indirectly owns more than 25 percent of any class of stock and is subject to a control factor listed at 12 CFR 574.4(c). FRB does not have a similar provision.

10 Section 11(a)(3) states: Any company that would be an affiliate (as defined in sections 23A and 23B of the Federal Reserve Act [12 U.S.C. 371c and 371c-1]) of any savings association if such
result, certain entities could have been affiliates under Regulation W, but not affiliates under the OTS interim final rules. By adopting the FRB’s definition of control, the OTS will conform its rules regarding the treatment of these securities.

Several regulations cross-reference the definition of “affiliate” at §563.41. These rules include: 12 CFR 560.93(a) (loans to one borrower restrictions); 562.4 (regulatory reporting standards); and 563.142 (capital distributions). As a result of changes in this final rule, the coverage of these other rules also will change.14

2. Financial Subsidiaries

Regulation W defines affiliate to include a financial subsidiary of a member bank. 12 CFR 223.2(a)(8). A financial subsidiary generally is 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.”15

In the preamble to the interim rule, OTS addressed whether a savings association subsidiary would be considered to be financial subsidiary and, thus, an affiliate under section 23A of the FRA. OTS concluded that there is no statutory or supervisory basis for applying affiliate restrictions to savings association subsidiaries by classifying them as financial subsidiaries. The one commenter who addressed this issue agreed with OTS’s conclusion regarding financial subsidiaries.

For the reasons stated in the preamble to the interim rule, the final rule at §563.41(b) continues to state that savings association subsidiaries do not meet the statutory definition of financial subsidiary. As a result, Regulation W references to financial subsidiaries do not apply.

B. Prohibition of Loans and Extensions of Credit to Affiliates Engaged in Non-Bank Holding Company Activities

As noted above, section 11 of the HOLA applies two prohibitions to a savings association’s transactions with its affiliates in addition to the section 23A and 23B limitations. Commenters raised several issues regarding OTS’s implementation of section 11(a)(1)(A) of the HOLA, which prohibits a savings association from making a loan or other extension of credit to an affiliate unless the affiliate is engaged only in activities that a bank holding company may conduct.

1. Reverse Repurchase Agreements

The interim rule retained a provision on repurchase agreements that was adopted in a final rule published August 13, 1998 (63 FR 43292). Specifically, the interim rule states that a purchase of assets that is subject to the affiliate’s agreement to repurchase (reverse repurchase agreement)16 is a loan or extension of credit for the purposes of the section 11 loan prohibition. As a result, a savings association may not generally enter into reverse repurchase agreements with an affiliate that engages in non-bank holding company activities. The interim rule exempted certain agreements that involve United States Treasury securities and that meet other specified requirements. OTS specifically requested comment whether it should retain the repurchase agreement provisions.

Both commenters responded to this request. One urged OTS to delete the repurchase agreement prohibition. The commenter asserted that “loan or extension of credit,” as used in section 11 of the HOLA, does not encompass reverse repurchase agreements. At a minimum, both commenters urged OTS to retain the current exemption for transactions in United States Treasury securities.

Upon further review, OTS has decided to delete the repurchase agreement prohibition. In the preamble to the 1998 rule, OTS noted that 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.

While the text of section 11 does not “compel” either legal conclusion, upon further review, OTS now believes that other factors strongly suggest that Congress did not intend for such transactions to be included as loans or extensions of credit under this section. OTS has two bases for this conclusion. First, the definition of “covered transaction” in section 23A of the FRA treats repurchase agreements as asset purchases, rather than as loans or extensions of credit. Specifically, section 23A(b)(7)(C) of the FRA defines purchases of assets to include “assets subject to an agreement to repurchase,” rather than a loan or extension of credit under section 23A(b)(7)(A). Based upon the language of the statute, FRB staff has informally indicated that it considers reverse repurchase agreements to be purchases of assets and not extensions of credit.17

Second, the legislative history of the statutes governing thrift transactions with affiliates reinforces the conclusion that reverse repurchase agreements should not be treated as loans or extensions of credit under section 11(a)(1)(A). Before the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Public Law 101–73 (FIRREA), a savings association’s transactions with affiliates were governed by section 408 of the National Housing Act (NHA). 12 U.S.C. 1730a. Under section 408(p) of the NHA, thrift transactions with affiliates engaged only in bank holding company activities were subject to sections 23A and 23B of the FRA. Section 408(d) of the NHA addressed transactions with affiliates engaged in non-bank holding company activities. This section specifically prohibited six types of transactions and, like current section 23A, listed loans and extensions of credit separately from the “purchase [of] securities or other assets or obligations under repurchase agreement from any affiliate.”18 Compare section 408(d)(1) with (d)(4). The successor statute addressing transactions with affiliates engaged in non-bank holding company activities at section 11(a)(1)(A) of the HOLA, however, specifically prohibits only transactions within one of the original six categories—loans and extensions of credit. This suggests that Congress did not intend to prohibit transactions with affiliates that engage in non-bank holding companies activities to the extent that the transactions fell within one of the other five categories.

The 1998 rule on repurchase agreements treated reverse repurchase agreements treated reverse repurchase...
agreements as loans because these transactions bear some of the economic characteristics of a loan. However, the typical reverse repurchase agreement structured in conformity with general market practices has economic attributes that distinguish it from other loans and extensions of credit. For example, such agreements typically involve an institution’s purchase of a security, subject to an agreement by the counterparty to repurchase the same or a similar security at a fixed price at a later date. In these transactions, the “purchaser” of the securities takes title to the securities and can trade, sell or pledge the security during the term of the contract. The reverse repurchase agreement merely imposes a contractual obligation to deliver identical securities on the settlement date set by the contract. This unique feature makes it far more flexible than a standard collateralized loan, where the lender cannot obtain access to the collateral in the absence of a default.

OTS may, of course, impose additional restrictions on transactions with affiliates under section 11(a)(4) of the HOLA if it determines that the restriction is necessary to protect the safety and soundness of savings associations. OTS believes that the quantitative limits, safety and soundness requirements, and low-quality asset prohibitions contained in section 23A, and the arms-length requirements in section 23B sufficiently address the safety and soundness concerns raised by repurchase agreements. To the extent that a particular savings association may attempt to evade the lending prohibition through artful restructuring of a prohibited loan as a reverse repurchase agreement, § 563.41(c)(1) (discussed below) provides OTS with sufficient authority to address the circumvention. Accordingly, the final rule treats reverse repurchase agreements as purchases of assets, and not as extensions of credit.

2. Attribution of Transactions and Activities

a. Third-party Attribution Rule

Sections 23A(a)(2) and 23B(a)(3) of the FRA require a member bank (and, thus, a savings association) to treat a 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. The text of section 11(a)(1)(A) of the HOLA does not specify a third party attribution requirement for the loan prohibition, and OTS has declined to infer such a requirement. To clarify this matter, the interim rule specifically stated that a loan or extension of credit to a third party is not prohibited under section 11(a)(1)(A) of the HOLA “merely because proceeds of the transaction are used for the benefit of, or transferred to, an affiliate.” Interim rule at § 563.41(c)(1).

The preamble to the interim rule noted that OTS may, nonetheless, attribute a loan to a third party to an affiliate, for example, where a savings association attempts to circumvent the loan prohibition through sham transactions. OTS requested comment whether it should include this additional guidance in the final rule. One commenter responded asserting that further guidance was not needed.

The final regulation continues to state that a loan or extension of credit to a third party is not prohibited under section 11(a)(1)(A) merely because proceeds of the transaction are used for the benefit of, or transferred to, an affiliate. However, OTS is concerned that savings associations and their affiliates may misinterpret this provision and incorrectly conclude that the third party attribution rule will not apply to the loan prohibition under any circumstances. Accordingly, OTS clarified the final rule to state that OTS may inform the savings association that a particular transaction is prohibited if OTS determines that the transaction is, in substance, a loan or extension of credit to an affiliate that is engaged in non-bank holding company activities, or OTS has other supervisory concerns concerning the transaction. OTS will make such a determination, for example, if a loan is a prearranged step in a series of transactions designed to channel funds to an affiliate engaged in non-bank holding company activities, or is otherwise designed to circumvent the loan prohibition. If OTS determines that a particular transaction is prohibited it may direct the savings association to divest the loan, unwind the transaction, or take other appropriate action.

b. Attribution of Activities Among Affiliates

When OTS originally issued its transactions with affiliates rule in 1991, it considered whether a savings association would be barred from extending credit to an affiliate that directly engaged only in activities permissible for a bank holding company, but the affiliate owned or controlled subsidiaries engaged in impermissible activities. OTS determined that activities must be attributed from a subsidiary to a parent affiliate in a vertical ownership chain up to, but not including, a controlling holding company in the corporate structure. The preamble to the 1991 rule suggests that this attribution determination was intended to prevent savings associations from evading the section 11 loan prohibition by structuring transactions through “strawmen” affiliates.

OTS specifically requested comment whether this interpretation should be included in the final rule. One commenter urged OTS to withdraw the guidance.

Upon reconsideration, OTS has decided to withdraw its 1991 guidance. Section 11 does not specifically require the attribution of activities from affiliated subsidiaries to their parent companies and, in the absence of information suggesting that this interpretation is necessary to protect the safety and soundness of savings associations, OTS is disinclined to interpret section 11 in a way that imposes additional burdens on savings associations. Rather than unduly restrict all savings associations, OTS believes that it can best address attempts at circumvention on a case-by-case basis. As noted above, the final rule states that OTS may prohibit a transaction if it determines that the transaction is, in substance, a loan or extension of credit to an affiliate that is engaged in non-bank holding company activities or OTS has other supervisory concerns concerning the transaction. Under this provision, OTS will prohibit a loan, for example, if it is a prearranged step in a

\[18\] 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 because 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 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 to be the functional equivalent of a loan. See amendments to Federal Financial Institution Examination Counsel Policy Statement on Repurchase Agreements of Depository Institutions with Securities Dealers and Others (FYIEC Policy Statement), 63 FR 6935 (Feb. 11, 1998).

\[19\] In addition, the bankruptcy code permits the purchaser under the agreement to liquidate securities without being subject to an automatic stay or similar delay. 11 U.S.C. 362(b)(7).

\[20\] Regulation W addresses the “third party attribution rule” at 12 CFR 223.16 and 223.52(b).


\[22\] See 56 FR 34005, at 34008. (Discussion of attribution of transactions)
series of transactions designed to channel funds to an affiliate engaged in non-bank holding company activities, or is otherwise designed to circumvent the loan prohibition.

C. Other Matters

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

OTS has not issued similar guidance regarding the attribution of transactions. To the contrary, the preamble to final Regulation W states that the 10 percent limit would prohibit a bank from engaging in a covered transaction with an affiliate only when the aggregate amount of transactions between the bank and that affiliate would exceed 10 percent of the bank’s capital. 67 FR 76560, at 76572. Nothing in section 11 of the HOLA requires the attribution of transactions among affiliates.24 OTS may impose additional restrictions on savings associations if it determines that a restriction is necessary to protect the safety and soundness of savings associations. However, there is no reason to impose additional burdens on savings associations, particularly in light of other safeguards in sections 23A and 23B, including the overall 20 percent quantitative limits, qualitative restrictions, and other supervisory tools available to OTS.25

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

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

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

To require savings associations and their holding companies to engage in a burdensome exercise merely to comply with specifications designed to address a more homogenous universe of holding companies, would serve no purpose. Rather, such a requirement would unduly obstruct some savings associations’ ability to take advantage of the corporate reorganization exception, contrary to the stated intent of the FRB.28 In addition, other savings and loan holding companies associations might attempt to claim the exception, even though their capital would be less than the amount OTS believed necessary to support their higher risk.

Accordingly, to apply the internal corporate reorganization exception to savings associations in the same manner and to the same extent as to member banks OTS has clarified the “well capitalized” definition in light of the purposes of the exemption.

The stated purpose of the well capitalized requirement is to “prevent banking companies from abusing their banking units in reorganization transactions” by ensuring that holding companies engaging in such transactions are appropriately capitalized and remain appropriately capitalized following the transaction. In light of the diverse activities engaged in by savings and loan holding companies, OTS believes that its case-by-case capital analysis best serves this goal.

Accordingly, the final rule clarifies that for a savings and loan holding company, well-capitalized means that a holding company significantly exceeds OTS expectations for the amount of capital needed to adequately support the holding company’s risk profile, as determined by OTS on a case-by-case basis. OTS emphasizes that this clarification does not substitute a relaxed standard for savings associations that avail themselves of the corporate reorganization exception. Rather, the clarification is intended to apply Regulation W meaningfully to savings associations while simultaneously recognizing the differences between bank and savings and loan holding companies and the

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

24 56 FR 34005, at 34008.

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

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

26 67 FR 76560, at 76562 fn. 13 (“An insured savings association * * * may take advantage of Regulation W’s exemptions as if it were a member bank.”)

27 The references to the FRB at 12 CFR 223.2(b)(6)(iv), 223.3(h), 223.14(c)(4), 223.43, and 223.55 are unchanged.
goals of the corporate reorganization exemption.\textsuperscript{30}

III. 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.

IV. Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (RFA) does not apply to a rule for which an agency is not required to publish a notice of proposed rulemaking. 5 U.S.C. 603. In issuing the interim rule, OTS concluded, for good cause, that it was not required to publish a notice of proposed rulemaking. Accordingly, the RFA does not require an initial or final regulatory flexibility analysis.

Nonetheless, OTS considered the likely impact of this final rule on small businesses and believes that the rule 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 final rule 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 these preexisting rules, OTS does not believe that the final rule will significantly increase the applicable burdens for small or large savings associations. Accordingly, a regulatory flexibility analysis is not required.

V. 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 notice of proposed rulemaking or issues a final rule for which a notice of proposed rulemaking was published. 2 U.S.C. 1532. As noted above, OTS determined that a notice of proposed rulemaking was not required for the interim final rule. Accordingly, OTS concluded that the Unfunded Mandates Act does not require an analysis of this final rule.

Nonetheless, OTS has considered the impact of the final rule under the

\textsuperscript{30}OTS is aware that the FRB also defined well capitalized with respect to a “holding company that is not a bank holding company” by reference to the capital requirements at § 225.2. By its own terms, Regulation W applies only to member banks. 67 FR 76560, at 76561. A holding company that is not a bank holding company would include, for example, holding companies of OCC-chartered credit card companies or trust companies.

Unfunded Mandates Act and has concluded 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. OTS has had comprehensive regulations implementing section 11 of the HOLA since 1991. Today’s 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 these preexisting rules, OTS does not believe that the final rule will significantly increase the applicable burdens for savings associations and will not result in increased expenditures by these institutions. Accordingly, OTS did not prepare a budgetary impact statement or specifically address the regulatory alternatives considered.

VI. Effective Date

Under 12 U.S.C. 4802(b), final rules that impose additional reporting, disclosure, or other new requirements on insured depository institutions must take effect on the first day of a calendar quarter that begins on or after the date of publication. The Administrative Procedure Act (5 U.S.C. 553(d)(APA) provides that a final rule cannot be made effective less than 30 days after its publication. Together, these two statutes would require OTS to establish a January 1, 2004 effective date for this final rule.

Both statutes, however, permit the OTS to find good cause for establishing an earlier effective date. Today’s rule changes generally relieve burdens or recognize exceptions to requirements imposed under the interim final rule. For example, the final rule revises OTS’s definition of control, generally narrowing the definition of affiliate; removes repurchase agreements from the scope of the section 11 loan prohibition; and clarifies previously issued guidance on the attribution of activities and the calculation of quantitative limits. While the final rule applies slightly broader presumptions of control for convertible securities and nonvoting equity securities and, thus, expands the definition of affiliate in these areas, OTS believes that this change should have only a marginal impact on the regulatory burdens imposed on savings associations as a whole. Accordingly, OTS finds good cause not to delay making this rule effective until the calendar quarter beginning January 1, 2004.

On the other hand, institutions will need some time to understand and adapt to the revised final rule. Consistent with the requirements of the APA, OTS believes that it is appropriate to delay the effective date of this rule for at least 30 days from publication. The effective date of this rule will be November 6, 2003.

VII. Paperwork Reduction Act of 1995

The information collection requirements in the OTS rules were previously approved under OMB control number 5590–0078. The final rule incorporates these requirements at § 563.41(c)(3) and (4), and does not make any changes that materially affect the overall burden of compliance.

List of Subjects

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 adopts as final the interim rule published on December 20, 2002 at 67 FR 77909, amending parts 559, 562, and 563 in Title 12, Chapter V, Code of Federal Regulations, with the following changes:

PART 559—SUBORDINATE ORGANIZATIONS

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


2. Amend § 559.3 by revising paragraph (I) to read as follows:

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

* * * * *
### PART 563—SAVINGS ASSOCIATIONS—OPERATIONS

#### 3. 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.

#### 4. 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 FRA (12 U.S.C. 371c and 371c1) 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” is 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)(11) 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 implementing regulations at 12 CFR part 223 (Regulation W) as if it were a member bank, except as described in the following chart. In addition, a savings association should read all references to “the Board” or “appropriate federal banking agency” to refer only to “OTS,” except for references at 12 CFR 223.2(a)(9)(iv), 223.3(h), 223.14(c)(4), 223.43, and 223.55.

<table>
<thead>
<tr>
<th>Provision of Regulation W</th>
<th>Application</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) 12 CFR 223.1---Authority, purpose, and scope ........................................</td>
<td>Does not apply. Section 563.41(a) addresses these matters.</td>
</tr>
<tr>
<td>(2) 12 CFR 223.2(a)(8)—“Affiliate” includes a financial subsidiary ........................</td>
<td>Does not apply. Savings association subsidiaries do not meet the statutory definition of financial subsidiary.</td>
</tr>
<tr>
<td>(3) 12 CFR 223.2(a)(12)—Determination that “affiliate” includes other types of companies.</td>
<td>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.”</td>
</tr>
<tr>
<td>(4) 12 CFR 223.2(b)(1)(ii)—“Affiliate” includes a subsidiary that is a financial subsidiary.</td>
<td>Does not apply. Capital stock and surplus means “unimpaired capital and unimpaired surplus,” as defined in 12 CFR 560.93(b)(11).</td>
</tr>
<tr>
<td>(5) 12 CFR 223.3(d)—Definition of “capital stock and surplus.” ................................</td>
<td>Read to incorporate §563.41(c)(1), which prohibits loans or extensions of credit to an affiliate, unless the affiliate is engaged only in the activities described at 12 U.S.C. 1467a(c)(2)(F)(i), as defined in §584.2–2 of this chapter.</td>
</tr>
<tr>
<td>(6) 12 CFR 223.3(h)(1)—Section 23A covered transactions include an extension of credit to the affiliate.</td>
<td>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.</td>
</tr>
<tr>
<td>(7) 12 CFR 223.3(h)(2)—Section 23A covered transactions include a purchase of or investment in securities issued by an affiliate.</td>
<td>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.”</td>
</tr>
<tr>
<td>(8) 12 CFR 223.3(k)—Definition of “depository institution.” ..................................</td>
<td>Does not apply. Savings association subsidiaries do not meet the statutory definition of financial subsidiary.</td>
</tr>
<tr>
<td>(9) 12 CFR 223.3(p)—Definition of “financial subsidiary.” ....................................</td>
<td>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.”</td>
</tr>
<tr>
<td>(10) 12 CFR 223.3(w)—Definition of “member bank.” ...........................................</td>
<td>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.”</td>
</tr>
</tbody>
</table>
(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)(ii), as defined in §584.2–2 of this chapter. A loan or extension of credit to a third party is not prohibited merely because proceeds of the transaction are used for the benefit of, or transferred to, an affiliate. At a minimum, these records must:

(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;

(ii) OTS may impose the notice requirement and require the savings association and the proceeding is pending.

(iii) 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.

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

(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 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;

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

(iv) 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.

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

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

(iv) 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.

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

(vi) 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.

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

(5) Amend §563.43 by revising paragraphs (d) and (e) 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 by a company (including for this purpose...
an insured depository institution) that is a savings and loan holding company. A company has control over a saving association if it: 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 would be deemed to control the company under § 574.4(a) of this chapter or presumed to control the company under § 574.4(b) of this chapter, and in the latter case, control has not been rebutted. Notwithstanding any other provision of this section, no company shall be deemed to own or control another by virtue of its ownership or control of shares in a fiduciary capacity. When used to refer to a subsidiary of a savings association, the term subsidiary means a “subsidiary” that is controlled by the savings association within the meaning of 12 CFR part 574 of this chapter.

(e) References to the Reserve Bank or the Comptroller shall be deemed to include the Director of OTS; and

* * * * *


By the Office of Thrift Supervision.

James E. Gilleran,
Director.

[FR Doc. 03–25217 Filed 10–6–03; 8:45 am]

BILLING CODE 6720–01–P

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1000

Statement of Organization and Functions

AGENCY: Consumer Product Safety Commission.

ACTION: Final rule.

SUMMARY: The Consumer Product Safety Commission is amending its statement of organization and functions to reflect the transfer of the National Injury Information Clearinghouse from the Directorate for Epidemiology to the Office of the Secretary.


SUPPLEMENTARY INFORMATION: The reference to the Clearinghouse in section 1000.27, Directorate for Epidemiology, is being moved to section 1000.16, Office of the Secretary. Since this rule relates solely to internal agency management, pursuant to 5 U.S.C. 552(b) notice and other public procedures are not required and it is effective immediately upon publication in the Federal Register. Further, this action is not a rule as defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612, and, thus, is exempt from the provisions of the Act.

List of Subjects in 16 CFR Part 1000

Organization and functions (government agencies).

Accordingly, part 1000 is amended as follows:

PART 1000—[AMENDED]

1. The authority citation for part 1000 continues to read as follows:

Authority: 5 U.S.C. 552(a).

§ 1000.27 [Amended]

2. In § 1000.27, remove the last sentence.

§ 1000.16 [Amended]

3. In § 1000.16, add at the end the sentence “It administers the National Injury Information Clearinghouse.”


Todd A. Stevenson,
Secretary, Consumer Product Safety Commission.

[FR Doc. 03–25297 Filed 10–6–03; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 172

[Docket No. 1987F–0179]

Food Additives Permitted for Direct Addition to Food for Human Consumption; Olestra; Correction

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; correction.

SUMMARY: The Food and Drug Administration (FDA) is correcting a final rule that appeared in the Federal Register of August 5, 2003 (68 FR 46403). The document denied the requests for a hearing and response to objections it has received on the final rule that amended the food additive regulations to provide for the safe use of sucrose esterified with medium and long chain fatty acids (olestra) as a replacement for fats and oils in savory snacks. The document was published with inadvertent errors. This document corrects those errors.


SUPPLEMENTARY INFORMATION: In FR Doc. 03–19509, appearing on page 46403 in the Federal Register of Tuesday, August 5, 2003, the following corrections are made:

1. On page 46408, in the second column, under the heading “D. Adequacy of Olestra’s Label Statement” the first sentence is corrected to read “In its fifth objection and request for a hearing, CSPI challenges the label statement required by the 1996 final rule, claiming that it is not sufficient to protect the public from adverse effects associated with consumption of olestra.”

2. On page 46408, in the third column, under the heading “E. Alleged Procedural Problems in the Olestra Proceeding” the first sentence is corrected to read “In its sixth objection and hearing request, CSPI claims that there were a number of problems with the procedures utilized by FDA to reach a decision about the safety of olestra.”

3. On page 46408, in the third column, under heading “E. Alleged Procedural Problems in the Olestra Proceeding” the second to the last sentence on that page is corrected to read “As in the case with its fifth objection and hearing request, CSPI specifically identifies no factual issue underlying any of its six procedural complaints.”


Jeffrey Shuren,
Assistant Commissioner for Policy.

[FR Doc. 03–25198 Filed 10–6–03; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Parts 1300, 1309, and 1310

[Docket No. DEA–210F]

RIN 1117–AA69

Implementation of the Methamphetamine Anti-Proliferation Act; Thresholds for Retailers and for Distributors Required To Submit Mail Order Reports; Changes to Mail Order Reporting Requirements

AGENCY: Drug Enforcement Administration (DEA), Justice.

ACTION: Final rule.