

occur, depending upon the circumstances of the case, where an employment contract provides for an excessive term.

(b) *Required provisions.* Each employment contract shall provide that:

(1) The association's board of directors may terminate the officer or employee's employment at any time, but any termination by the association's board of directors other than termination for cause, shall not prejudice the officer or employee's right to compensation or other benefits under the contract. The officer or employee shall have no right to receive compensation or other benefits for any period after termination for cause. Termination for cause shall include termination because of the officer or employee's personal dishonesty, incompetence, willful misconduct, breach of fiduciary duty involving personal profit, intentional failure to perform stated duties, willful violation of any law, rule, or regulation (other than traffic violations or similar offenses) or final cease-and-desist order, or material breach of any provision of the contract.

(2) If the officer or employee is suspended and/or temporarily prohibited from participating in the conduct of the association's affairs by a notice served under section 8 (e)(3) or (g)(1) of Federal Deposit Insurance Act (12 U.S.C. 1818 (e)(3) and (g)(1)) the association's obligations under the contract shall be suspended as of the date of service unless stayed by appropriate proceedings. If the charges in the notice are dismissed, the association may in its discretion (i) pay the officer or employee all or part of the compensation withheld while its contract obligations were suspended, and (ii) reinstate (in whole or in part) any of its obligations which were suspended.

(3) If the officer or employee is removed and/or permanently prohibited from participating in the conduct of the association's affairs by an order issued under section 8 (e)(4) or (g)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1818 (e)(4) or (g)(1)), all obligations of the association under the contract shall terminate as of the effective date of the order, but vested rights of the contracting parties shall not be affected.

(4) If the savings association is in default (as defined in section 3(x)(1) of the Federal Deposit Insurance Act), all obligations under the contract shall terminate as of the date of default, but this paragraph (b)(4) shall not affect any vested rights of the contracting parties: *Provided*, that this paragraph (b)(4) need not be included in an employment contract if prior written approval is secured from the Director or his or her designee.

(5) All obligations under the contract shall be terminated, except to the extent determined that continuation of the contract is necessary of the continued operation of the association

(i) By the Director or his or her designee, at the time the Federal Deposit Insurance Corporation or Resolution Trust Corporation enters into an agreement to provide assistance to or on behalf of the association under the authority contained in 13(c) of the Federal Deposit Insurance Act; or

(ii) By the Director or his or her designee, at the time the Director or his or her designee approves a supervisory merger to resolve problems related to operation of the association or when the association is determined by the Director to be in an unsafe or unsound condition.

Any rights of the parties that have already vested, however, shall not be affected by such action.

§ 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

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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 mem-

ber 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), 223.3(z), 223.14(c)(4), 223.43, and 223.55.

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)—Determination that “affiliate” includes other types of companies.	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(h)(1)—Section 23A covered transactions include an extension of credit to the affiliate.	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.
(7) 12 CFR 223.3(h)(2)—Section 23A covered transactions include a purchase of or investment in securities issued by an affiliate.	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.
(8) 12 CFR 223.3(k)—Definition of “depository institution.”	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.”
(9) 12 CFR 223.3(p)—Definition of “financial subsidiary.”	Does not apply. Savings association subsidiaries do not meet the statutory definition of financial subsidiary.
(10) 12 CFR 223.3(w)—Definition of “member bank.”	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.”
(11) 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).
(12) 12 CFR 223.3(ii)—Definition of “subsidiary.”	Read to include the following statement: “A subsidiary of a savings association means a company that is controlled by the savings association.”
(13) 12 CFR 223.3(kk)—Definition of “well capitalized.”	Read to include the following statement: “For a savings and loan holding company, however, well-capitalized means that the 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.”
(14) 12 CFR 223.31—Application of section 23A to an acquisition of an affiliate that becomes an operating subsidiary.	Read to refer to “a non-affiliate subsidiary” instead of “operating 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.
(16) 12 CFR 223.42(f)(2)—Exemption for purchasing certain marketable securities.	Read to refer to “Thrift Financial Report” instead of “Call Report.” References to “state member bank” are unchanged.
(17) 12 CFR 223.42(g)(2)—Exemption for purchasing municipal securities.	Read to refer to “Thrift Financial Report” instead of “Call Report.” References to “state member bank” are unchanged.
(18) 12 CFR 223.61—Application of sections 23A and 23B to U.S. branches and agencies of foreign banks.	Does not apply to savings associations or their subsidiaries.

(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

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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. 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 are transferred to, an affiliate.

(ii) If OTS determines that a particular transaction is, in substance, a loan or extension of credit to an affiliate that is engaged in activities other than those described at 12 U.S.C. 1467a(c)(2)(F)(i), as defined in § 584.2-2 of this chapter, or OTS has other supervisory concerns concerning the transaction, OTS may inform the savings association that the transaction is prohibited under this paragraph (c)(1), and require the savings association to divest the loan, unwind the transaction, or take other appropriate action.

(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;

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(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.

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