

(2) Any request submitted pursuant to this paragraph (a) of this section shall, at a minimum, include the following information:

(i) The length of the transition period requested;

(ii) A description of the quantitative and qualitative impacts of divestiture or cessation of swap or security-based swaps activities on the insured depository institution, including information that addresses the factors in paragraph (c) of this section; and

(iii) A detailed explanation of the insured depository institution's plan for conforming its activities to the requirements of section 716 of the Dodd-Frank Act (15 U.S.C. 8305) and this part.

(3) The Board may, at any time, request additional information that it believes is necessary for its decision.

(b) *Transition period for insured depository institutions.* Following review of a written request submitted under paragraph (a) of this section, the Board shall permit an insured depository institution for which it is the appropriate Federal banking agency up to 24 months after the later of July 16, 2013, or the date on which the insured depository institution becomes a swaps entity, to comply with the requirements of section 716 of the Dodd-Frank Act (15 U.S.C. 8305) and this subpart based on its consideration of the factors in paragraph (c).

(c) *Factors governing Board determinations.* In establishing an appropriate transition period pursuant to any request under this section, the Board will take into account and make written findings regarding:

(1) The potential impact of divestiture or cessation of swap or security-based swaps activities on the insured depository institution's:

(i) Mortgage lending;

(ii) Small business lending;

(iii) Job creation; and

(iv) Capital formation versus the potential negative impact on insured depositors and the Deposit Insurance Fund of the Federal Deposit Insurance Corporation; and

(2) Any other factor that the Board believes appropriate.

(d) *Timing of Board review.* The Board will seek to act on a request under

paragraph (a) of this section expeditiously after the receipt of a complete request.

(e) *Extension of transition period.* The Board may extend a transition period provided under this section for a period of up to one additional year. To request an extension of the transition period, an insured depository institution must submit a written request containing the information set forth in paragraph (a) of this section no later than 60 days before the end of the transition period.

(f) *Authority to impose restrictions during any transition period.* The Board may impose such conditions on any transition period granted under this section as the Board determines are necessary or appropriate.

(g) *Consultation.* The Board shall consult with the Commodity Futures Trading Commission or the Securities and Exchange Commission, as appropriate, prior to the approval of a request by an insured depository institution for a transition period under this section.

PART 238—SAVINGS AND LOAN HOLDING COMPANIES (REGULATION LL)

Subpart A—General Provisions

Sec.

238.1 Authority, purpose and scope.

238.2 Definitions.

238.3 Administration.

238.4 Records, reports, and inspections.

238.5 Audit of savings association holding companies.

238.6 Penalties for violations.

238.7 Tying restriction exception.

238.8 Safe and sound operations.

238.9 Small Bank Holding Company Policy Statement.

Subpart B—Acquisitions of Savings Association Securities or Assets

238.11 Transactions requiring Board approval.

238.12 Transactions not requiring Board approval.

238.13 Prohibited acquisitions.

238.14 Procedural requirements.

238.15 Factors considered in acting on applications.

Subpart C—Control Proceedings

238.21 Control proceedings.

§ 238.1

12 CFR Ch. II (1–1–16 Edition)

Subpart D—Change in Bank Control

- 238.31 Transactions requiring prior notice.
- 238.32 Transactions not requiring prior notice.
- 238.33 Procedures for filing, processing, publishing, and acting on notices.

Subpart E—Qualified Stock Issuances

- 238.41 Qualified stock issuances by undercapitalized savings associations or holding companies.

Subpart F—Savings and Loan Holding Company Activities and Acquisitions

- 238.51 Prohibited activities.
- 238.52 Exempt savings and loan holding companies and grandfathered activities.
- 238.53 Prescribed services and activities of savings and loan holding companies.
- 238.54 Permissible bank holding company activities of savings and loan holding companies.

Subpart G—Financial Holding Company Activities

- 238.61 Scope.
- 238.62 Definitions.
- 238.63 Requirements to engage in financial holding company activities.
- 238.64 Election required.
- 238.65 Election procedures.
- 238.66 Ongoing requirements.

Subpart H—Notice of Change of Director or Senior Executive Officer

- 238.71 Purpose.
- 238.72 Definitions.
- 238.73 Prior notice requirement.
- 238.74 Filing and processing procedures.
- 238.75 Standards for review.
- 238.76 Waiting period.
- 238.77 Waiver of prior notice requirement.

Subpart I—Prohibited Service at Savings and Loan Holding Companies

- 238.81 Purpose.
- 238.82 Definitions.
- 238.83 Prohibited actions.
- 238.84 Covered convictions or agreements to enter into pre-trial diversions or similar programs.
- 238.85 Adjudications and offenses not covered.
- 238.86 Exemptions.
- 238.87 Filing procedures.
- 238.88 Factors for review.
- 238.89 Board action.
- 239.90 Hearings.

Subpart J—Management Official Interlocks

- 238.91 Authority, purpose, and scope.

- 238.92 Definitions.
- 238.93 Prohibitions.
- 238.94 Interlocking relationships permitted by statute.
- 238.95 Small market share exemption.
- 238.96 General exemption.
- 238.97 Change in circumstances.
- 238.98 Enforcement.
- 238.99 Interlocking relationships permitted pursuant to Federal Deposit Insurance Act.

Subpart K—Dividends by Subsidiary Savings Associations

- 238.101 Authority and purpose.
- 238.102 Definitions.
- 238.103 Filing requirement.
- 238.104 Board action and criteria for review.

Subpart L—Investigative Proceedings and Formal Examination Proceedings

- 238.111 Scope.
- 238.112 Definitions.
- 238.113 Confidentiality of proceedings.
- 238.114 Transcripts.
- 238.115 Rights of witnesses.
- 238.116 Obstruction of the proceedings.
- 238.117 Subpoenas.

AUTHORITY: 5 U.S.C. 552, 559; 12 U.S.C. 1462, 1462a, 1463, 1464, 1467, 1467a, 1468, 1813, 1817, 1829e, 1831i, 1972; 15 U.S.C. 78 l.

SOURCE: Reg. LL, 76 FR 56532, Sept. 13, 2011, unless otherwise noted.

Subpart A—General Provisions

§ 238.1 Authority, purpose and scope.

(a) *Authority.* This part is issued by the Board of Governors of the Federal Reserve System (*Board*) under section 10(g) of the Home Owners' Loan Act (*HOLA*); section 7(j)(13) of the Federal Deposit Insurance Act, as amended by the Change in Bank Control Act of 1978 (12 U.S.C. 1817(j)(13)) (*Bank Control Act*); sections 8(b), 19 and 32 of the Federal Deposit Insurance Act (12 U.S.C. 1818(b), 1829, and 1831i); and section 914 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (12 U.S.C. 1831i) and the Depository Institution Management Interlocks Act (12 U.S.C. 3201 *et seq.*).

(b) *Purpose.* The principal purposes of this part are to:

- (1) Regulate the acquisition of control of savings associations by companies and individuals;

Federal Reserve System

§ 238.2

(2) Define and regulate the activities in which savings and loan holding companies may engage;

(3) Set forth the procedures for securing approval for these transactions and activities; and

(4) Set forth the procedures under which directors and executive officers may be appointed or employed by savings and loan holding companies in certain circumstances.

§ 238.2 Definitions.

As used in this part and in the forms under this part, the following definitions apply, unless the context otherwise requires:

(a) *Affiliate* means any person or company which controls, is controlled by or is under common control with a person, savings association or company.

(b) *Bank* means any national bank, state bank, state-chartered savings bank, cooperative bank, or industrial bank, the deposits of which are insured by the Deposit Insurance Fund.

(c) *Bank holding company* has the meaning found in the Board's Regulation Y (12 CFR 225.2(c)).

(d) *Company* means any corporation, partnership, trust, association, joint venture, pool, syndicate, unincorporated organization, joint-stock company or similar organization, as defined in paragraph (o) of this section; but a company does not include:

(1) The Federal Deposit Insurance Corporation, the Resolution Trust Corporation, or any Federal Home Loan Bank, or

(2) Any company the majority of shares of which is owned by:

(i) The United States or any State,

(ii) An officer of the United States or any State in his or her official capacity, or

(iii) An instrumentality of the United States or any State.

(e) A person shall be deemed to have control of:

(1) A savings association if the person directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, or holds with power to vote, or holds proxies representing, more than 25 percent of the voting shares of such savings association, or controls in any manner the election of

a majority of the directors of such association;

(2) Any other company if the person directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, or holds with power to vote, or holds proxies representing, more than 25 percent of the voting shares or rights of such other company, or controls in any manner the election or appointment of a majority of the directors or trustees of such other company, or is a general partner in or has contributed more than 25 percent of the capital of such other company;

(3) A trust if the person is a trustee thereof; or

(4) A savings association or any other company if the Board determines, after reasonable notice and opportunity for hearing, that such person directly or indirectly exercises a controlling influence over the management or policies of such association or other company.

(f) *Director* means any director of a corporation or any individual who performs similar functions in respect of any company, including a trustee under a trust.

(g) *Management official* means any president, chief executive officer, chief operating officer, vice president, director, partner, or trustee, or any other person who performs or has a representative or nominee performing similar policymaking functions, including executive officers of principal business units or divisions or subsidiaries who perform policymaking functions, for a savings association or a company, whether or not incorporated.

(h) *Multiple savings and loan holding company* means any savings and loan holding company which directly or indirectly controls two or more savings associations.

(i) *Officer* means the chairman of the board, president, vice president, treasurer, secretary, or comptroller of any company, or any other person who participates in its major policy decisions.

(j) *Person* includes an individual, bank, corporation, partnership, trust, association, joint venture, pool, syndicate, sole proprietorship, unincorporated organization, or any other form of entity.

§ 238.2

12 CFR Ch. II (1-1-16 Edition)

(k) *Qualified thrift lender* means a financial institution that meets the appropriate qualified thrift lender test set forth in 12 U.S.C. 1467a(m).

(1) *Savings Association* means a Federal savings and loan association or a Federal savings bank chartered under section 5 of the Home Owners' Loan Act, a building and loan, savings and loan or homestead association or a cooperative bank (other than a cooperative bank described in 12 U.S.C. 1813(a)(2)) the deposits of which are insured by the Federal Deposit Insurance Corporation, and any corporation (other than a bank) the deposits of which are insured by the Federal Deposit Insurance Corporation that the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation jointly determine to be operating in substantially the same manner as a savings association, and shall include any savings bank or any cooperative bank which is deemed by the Office of the Comptroller of the Currency to be a savings association under 12 U.S.C. 1467a(1).

(m) *Savings and loan holding company* means any company (including a savings association) that directly or indirectly controls a savings association, but does not include:

(1) Any company by virtue of its ownership or control of voting stock of a savings association acquired in connection with the underwriting of securities if such stock is held only for such period of time (not exceeding 120 days unless extended by the Board) as will permit the sale thereof on a reasonable basis;

(2) Any trust (other than a pension, profit-sharing, stockholders', voting, or business trust) which controls a savings association if such trust by its terms must terminate within 25 years or not later than 21 years and 10 months after the death of individuals living on the effective date of the trust, and:

(i) Was in existence and in control of a savings association on June 26, 1967, or

(ii) Is a testamentary trust;

(3) A bank holding company that is registered under, and subject to, the Bank Holding Company Act of 1956, or any company directly or indirectly

controlled by such company (other than a savings association);

(4) A company that controls a savings association that functions solely in a trust or fiduciary capacity as provided in section 2(c)(2)(D) of the Bank Holding Company Act; or

(5) A company described in section 10(c)(9)(C) of HOLA solely by virtue of such company's control of an intermediate holding company established under section 10A of the Home Owners' Loan Act.

(n) *Shareholder*—(1) *Controlling shareholder* means a person that owns or control, directly or indirectly, more than 25 percent of any class of voting securities of a savings association or other company.

(2) *Principal shareholder* means a person that owns or controls, directly or indirectly, 10 percent or more of any class of voting securities of a savings association or other company, or any person that the Board determines has the power, directly or indirectly, to exercise a controlling influence over the management or policies of a savings association or other company.

(o) *Stock* means common or preferred stock, general or limited partnership shares or interests, or similar interests.

(p) *Subsidiary* means any company which is owned or controlled directly or indirectly by a person, and includes any service corporation owned in whole or in part by a savings association, or a subsidiary of such service corporation.

(q) *Uninsured institution* means any financial institution the deposits of which are not insured by the Federal Deposit Insurance Corporation.

(r)(1) *Voting securities* means shares of common or preferred stock, general or limited partnership shares or interests, or similar interests if the shares or interest, by statute, charter, or in any manner, entitle the holder:

(i) To vote for or to select directors, trustees, or partners (or persons exercising similar functions of the issuing company); or

(ii) To vote on or to direct the conduct of the operations or other significant policies of the issuing company.

(2) *Nonvoting shares*. Preferred shares, limited partnership shares or interests,

Federal Reserve System

§ 238.4

or similar interests are not *voting securities* if:

(i) Any voting rights associated with the shares or interest are limited solely to the type customarily provided by statute with regard to matters that would significantly and adversely affect the rights or preference of the security or other interest, such as the issuance of additional amounts or classes of senior securities, the modification of the terms of the security or interest, the dissolution of the issuing company, or the payment of dividends by the issuing company when preferred dividends are in arrears;

(ii) The shares or interest represent an essentially passive investment or financing device and do not otherwise provide the holder with control over the issuing company; and

(iii) The shares or interest do not entitle the holder, by statute, charter, or in any manner, to select or to vote for the selection of directors, trustees, or partners (or persons exercising similar functions) of the issuing company.

(3) *Class of voting shares.* Shares of stock issued by a single issuer are deemed to be the same class of voting shares, regardless of differences in dividend rights or liquidation preference, if the shares are voted together as a single class on all matters for which the shares have voting rights other than matters described in paragraph (r)(2)(i) of this section that affect solely the rights or preferences of the shares.

(s) *Well capitalized.* (1) A savings and loan holding company is well capitalized if:

(i) Each of the savings and loan holding company's depository institutions is well capitalized; and

(ii) The savings and loan holding company is not subject to any written agreement, order, capital directive, or prompt corrective action directive issued by the Board to meet and maintain a specific capital level for any capital measure.

(2) In the case of a savings association, "well capitalized" takes the meaning provided in § 225.2(r)(2) of this chapter.

(t) *Well managed.* The term "well managed" takes the meaning provided in § 225.2(s) of this chapter except that a "satisfactory rating for manage-

ment" refers to a management rating, if such rating is given, or otherwise a risk-management rating, if such rating is given.

(u) *Depository institution.* For purposes of this part, the term "depository institution" has the same meaning as in section 3(c) of Federal Deposit Insurance Act (12 U.S.C. 1813(c)).

§ 238.3 Administration.

(a) *Delegation of authority.* Designated Board members and officers and the Federal Reserve Banks are authorized by the Board to exercise various functions prescribed in this regulation, in the Board's Rules Regarding Delegation of Authority (12 CFR part 265), the Board's Rules of Procedure (12 CFR part 262), and in Board orders.

(b) *Appropriate Federal Reserve Bank.* In administering this regulation, unless a different Federal Reserve Bank is designated by the Board, the appropriate Federal Reserve Bank is as follows:

(1) For a savings and loan holding company (or a company applying to become a savings and loan holding company): the Reserve Bank of the Federal Reserve district in which the company's banking operations are principally conducted, as measured by total domestic deposits in its subsidiary savings association on the date it became (or will become) a savings and loan holding company;

(2) For an individual or company submitting a notice under subpart D of this part: The Reserve Bank of the Federal Reserve district in which the banking operations of the savings and loan holding company to be acquired are principally conducted, as measured by total domestic deposits on the date the notice is filed.

§ 238.4 Records, reports, and inspections.

(a) *Records.* Each savings and loan holding company shall maintain such books and records as may be prescribed by the Board. Each savings and loan holding company and its non-depository affiliates shall maintain accurate and complete records of all business transactions. Such records shall support and be readily reconcilable to any regulatory reports submitted to the

§ 238.5

12 CFR Ch. II (1–1–16 Edition)

Board and financial reports prepared in accordance with GAAP.

The records shall be maintained in the United States and be readily accessible for examination and other supervisory purposes within 5 business days upon request by the Board, at a location acceptable to the Board.

(b) *Reports.* Each savings and loan holding company and each subsidiary thereof, other than a savings association, shall file with the Board such reports as may be required by the Board. Such reports shall be made under oath or otherwise, and shall be in such form and for such periods, as the Board may prescribe. Each report shall contain information concerning the operations of such savings and loan holding company and its subsidiaries as the Board may require.

(c) *Registration statement*—(1) *Filing of registration statement.* Not later than 90 days after becoming a savings and loan holding company, each savings and loan holding company shall register with the Board by furnishing information in the manner and form prescribed by the Board.

(2) *Date of registration.* The date of registration of a savings and loan holding company shall be the date on which its registration statement is received by the Board.

(3) *Extension of time for registration.* For timely and good cause shown, the Board may extend the time within which a savings and loan holding company shall register.

(d) *Release from registration.* The Board may at any time, upon its own motion or upon application, release a registered savings and loan holding company from any registration theretofore made by such company, if the Board shall determine that such company no longer has control of any savings association or no longer qualifies as a savings and loan holding company.

(e) *Examinations.* Each savings and loan holding company and each subsidiary thereof shall be subject to such examinations as the Board may prescribe. The Board shall, to the extent deemed feasible, use for the purposes of this section reports filed with or examinations made by other Federal agencies or the appropriate State supervisory authority.

(f) *Appointment of agent.* The Board may require any savings and loan holding company, or persons connected therewith if it is not a corporation, to execute and file a prescribed form of irrevocable appointment of agent for service of process.

§ 238.5 Audit of savings association holding companies.

(a) *General.* The Board may require, at any time, an independent audit of the financial statements of, or the application of procedures agreed upon by the Board to a savings and loan holding company, or nondepository affiliate by qualified independent public accountants when needed for any safety and soundness reason identified by the Board.

(b) *Audits required for safety and soundness purposes.* The Board requires an independent audit for safety and soundness purposes if, as of the beginning of its fiscal year, a savings and loan holding company controls savings association subsidiary(ies) with aggregate consolidated assets of \$500 million or more.

(c) *Procedures.* (1) When the Board requires an independent audit because such an audit is needed for safety and soundness purposes, the Board shall determine whether the audit was conducted and filed in a manner satisfactory to the Board.

(2) When the Board requires the application of procedures agreed upon by the Board for safety and soundness purposes, the Board shall identify the procedures to be performed. The Board shall also determine whether the agreed upon procedures were conducted and filed in a manner satisfactory to the Board.

(d) *Qualifications for independent public accountants.* The audit shall be conducted by an independent public accountant who:

(1) Is registered or licensed to practice as a public accountant, and is in good standing, under the laws of the state or other political subdivision of the United States in which the savings association's or holding company's principal office is located;

(2) Agrees in the engagement letter to provide the Board with access to and copies of any work papers, policies, and

Federal Reserve System

§ 238.9

procedures relating to the services performed;

(3)(i) Is in compliance with the American Institute of Certified Public Accountants' (AICPA) Code of Professional Conduct; and

(ii) Meets the independence requirements and interpretations of the Securities and Exchange Commission and its staff; and

(4) Has received, or is enrolled in, a peer review program that meets guidelines acceptable to the Board.

(e) *Voluntary audits.* When a savings and loan holding company or non-depository affiliate obtains an independent audit voluntarily, it must be performed by an independent public accountant who satisfies the requirements of paragraphs (d)(1), (d)(2), and (d)(3)(i) of this section.

§ 238.6 Penalties for violations.

(a) *Criminal and civil penalties.* (1) Section 10 of the HOLA provides criminal penalties for willful violation, and civil penalties for violation, by any company or individual, of HOLA or any regulation or order issued under it, or for making a false entry in any book, report, or statement of a savings and loan holding company.

(2) Civil money penalty assessments for violations of HOLA shall be made in accordance with subpart C of the Board's Rules of Practice for Hearings (12 CFR part 263, subpart C). For any willful violation of the Bank Control Act or any regulation or order issued under it, the Board may assess a civil penalty as provided in 12 U.S.C. 1817(j)(15).

(b) *Cease-and-desist proceedings.* For any violation of HOLA, the Bank Control Act, this regulation, or any order or notice issued thereunder, the Board may institute a cease-and-desist proceeding in accordance with the Financial Institutions Supervisory Act of 1966, as amended (12 U.S.C. 1818(b) *et seq.*).

§ 238.7 Tying restriction exception.

(a) *Safe harbor for combined-balance discounts.* A savings and loan holding company or any savings association or any affiliate of either may vary the consideration for any product or package of products based on a customer's

maintaining a combined minimum balance in certain products specified by the company varying the consideration (eligible products), if:

(1) That company (if it is a savings association) or a savings association affiliate of that company (if it is not a savings association) offers deposits, and all such deposits are eligible products; and

(2) Balances in deposits count at least as much as non-deposit products toward the minimum balance.

(b) *Limitations on exception.* This exception shall terminate upon a finding by the Board that the arrangement is resulting in anti-competitive practices. The eligibility of a savings and loan holding company or savings association or affiliate of either to operate under this exception shall terminate upon a finding by the Board that its exercise of this authority is resulting in anti-competitive practices.

§ 238.8 Safe and sound operations.

(a) *Savings and loan holding company policy and operations.* (1) A savings and loan holding company shall serve as a source of financial and managerial strength to its subsidiary savings associations and shall not conduct its operations in an unsafe or unsound manner.

(2) Whenever the Board believes an activity of a savings and loan holding company or control of a nonbank subsidiary (other than a nonbank subsidiary of a savings association) constitutes a serious risk to the financial safety, soundness, or stability of a subsidiary savings association of the savings and loan holding company and is inconsistent with sound banking principles or the purposes of HOLA or the Financial Institutions Supervisory Act of 1966, as amended (12 U.S.C. 1818(b) *et seq.*), the Board may require the savings and loan holding company to terminate the activity or to terminate control of the subsidiary, as provided in section 10(g)(5) of the HOLA.

§ 238.9 Small Bank Holding Company Policy Statement.

(a) The Board's Small Bank Holding Company Policy Statement (12 CFR part 225, appendix C) (Policy Statement) applies to savings and loan holding companies as if they were bank

holding companies. To qualify or rely on the Policy Statement, savings and loan holding companies must meet all qualifying requirements in the Policy Statement as if they were a bank holding company. For purposes of applying the Policy Statement, the term “nonbank subsidiary” as used in the Policy Statement refers to a subsidiary of a savings and loan holding company other than a savings association or a subsidiary of a savings association.

(b) The Board may exclude any savings and loan holding company, regardless of asset size, from the Policy Statement under paragraph (a) of this section if the Board determines that such action is warranted for supervisory purposes.

[80 FR 20158, Apr. 15, 2015]

Subpart B—Acquisitions of Saving Association Securities or Assets

§ 238.11 Transactions requiring Board approval.

The following transactions require the Board’s prior approval under section 10 of HOLA except as exempted under § 238.12:

(a) *Formation of savings and loan holding company.* Any action that causes a savings association or other company to become a savings and loan holding company.

(b) *Acquisition of subsidiary savings association.* Any action that causes a savings association to become a subsidiary of a savings and loan holding company.

(c) *Acquisition of control of savings association or savings and loan holding company securities.* (1) The acquisition by a savings and loan holding company of direct or indirect ownership or control of any voting securities of a savings association or savings and loan holding company, that is not a subsidiary, if the acquisition results in the company’s control of more than 5 percent of the outstanding shares of any class of voting securities of the savings association or savings and loan holding company.

(2) An acquisition includes the purchase of additional securities through the exercise of preemptive rights, but does not include securities received in a stock dividend or stock split that

does not alter the savings and loan holding company’s proportional share of any class of voting securities.

(3) In the case of a multiple savings and loan holding company, acquisition of direct or indirect ownership or control of any voting securities of a savings association or savings and loan holding company, that is not a subsidiary, if the acquisition results in the company’s control of more than 5 percent of the outstanding shares of any class of voting securities of the savings association or savings and loan holding company that is engaged in any business activity other than those specified in § 238.51 of this part.

(d) *Acquisition of savings association or savings and loan holding company assets.* The acquisition by a savings and loan holding company or by a subsidiary thereof (other than a savings association) of all or substantially all of the assets of a savings association, or savings and loan holding company.

(e) *Merger of savings and loan holding companies.* The merger or consolidation of savings and loan holding companies, and the acquisition of a savings association through a merger or consolidation.

(f) *Acquisition of control by certain individuals.* The acquisition, by a director or officer of a savings and loan holding company, or by any individual who owns, controls, or holds the power to vote (or holds proxies representing) more than 25 percent of the voting shares of such savings and loan holding company, of control of any savings association that is not a subsidiary of such savings and loan holding company.

§ 238.12 Transactions not requiring Board approval.

(a) The requirements of § 238.11(a), (b), (d), (e) and (f) do not apply to:

(1) Control of a savings association acquired by devise under the terms of a will creating a trust which is excluded from the definition of savings and loan holding company;

(2) Control of a savings association acquired in connection with a reorganization that involves solely the acquisition of control of that association by

Federal Reserve System

§ 238.12

a newly formed company that is controlled by the same acquirors that controlled the savings association for the immediately preceding three years, and entails no other transactions, such as an assumption of the acquirors' debt by the newly formed company: Provided, that the acquirors have filed the designated form with the appropriate Reserve Bank and have provided all additional information requested by the Board or Reserve Bank, and the Board nor the appropriate Reserve Bank object to the acquisition within 30 days of the filing date;

(3) Control of a savings association acquired by a bank holding company that is registered under and subject to, the Bank Holding Company Act of 1956, or any company controlled by such bank holding company;

(4) Control of a savings association acquired solely as a result of a pledge or hypothecation of stock to secure a loan contracted for in good faith or the liquidation of a loan contracted for in good faith, in either case where such loan was made in the ordinary course of the business of the lender: *Provided, further,* That acquisition of control pursuant to such pledge, hypothecation or liquidation is reported to the Board within 30 days, and *Provided, further,* That the acquiror shall not retain such control for more than one year from the date on which such control was acquired; however, the Board may, upon application by an acquiror, extend such one-year period from year to year, for an additional period of time not exceeding three years, if the Board finds such extension is warranted and would not be detrimental to the public interest;

(5) Control of a savings association acquired through a percentage increase in stock ownership following a *pro rata* stock dividend or stock split, if the proportional interests of the recipients remain substantially the same;

(6) Acquisitions of up to twenty-five percent (25%) of a class of stock by a tax-qualified employee stock benefit plan; and

(7) Acquisitions of up to 15 percent of the voting stock of any savings association by a savings and loan holding company (other than a bank holding company) in connection with a quali-

fied stock issuance if such acquisition is approved by the Board pursuant to subpart E.

(b) The requirements of § 238.11(c) do not apply to voting shares of a savings association or of a savings and loan holding company—

(1) Held as a *bona fide* fiduciary (whether with or without the sole discretion to vote such shares);

(2) Held temporarily pursuant to an underwriting commitment in the normal course of an underwriting business;

(3) Held in an account solely for trading purposes or over which no control is held other than control of voting rights acquired in the normal course of a proxy solicitation;

(4) Acquired in securing or collecting a debt previously contracted in good faith, for two years after the date of acquisition or for such additional time (not exceeding three years) as the Board may permit if, in the Board's judgment, such an extension would not be detrimental to the public interest;

(5) Acquired under section 13(k)(1)(A)(i) of the Federal Deposit Insurance Act (or section 408(m) of the National Housing Act as in effect immediately prior to the enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989);

(6) Held by any insurance companies as defined in section 2(a)(17) of the Investment Company Act of 1940: *Provided,* That all shares held by all insurance company affiliates of such savings association or savings and loan holding company may not, in the aggregate, exceed five percent of all outstanding shares or of the voting power of the savings association or savings and loan holding company, and such shares are not acquired or retained with a view to acquiring, exercising, or transferring control of the savings association or savings and loan holding company; and

(7) Acquired pursuant to a qualified stock issuance if such a purchase is approved pursuant to subpart E of this part.

(c) The aggregate amount of shares held under paragraph (b) of this section (other than pursuant to paragraphs (b)(1) through (4) and (b)(6)) may not exceed 15 percent of all outstanding shares or the voting power of a savings

§ 238.12

12 CFR Ch. II (1–1–16 Edition)

association or savings and loan holding company.

(d) *Acquisitions involving savings association mergers and internal corporate reorganizations*—The requirements of § 238.11 do not apply to:

(1) *Certain transactions subject to the Bank Merger Act.* The acquisition by a savings and loan holding company of shares of a savings association or company controlling a savings association or the merger of a company controlling a savings association with the savings and loan holding company, if the transaction is part of the merger or consolidation of the savings association with a subsidiary savings association (other than a nonoperating subsidiary savings association) of the acquiring savings and loan holding company, or is part of the purchase of substantially all of the assets of the savings association by a subsidiary savings association (other than a nonoperating subsidiary savings association) of the acquiring savings and loan holding company, and if:

(i) The savings association merger, consolidation, or asset purchase occurs simultaneously with the acquisition of the shares of the savings association or savings and loan holding company or the merger of holding companies, and the savings association is not operated by the acquiring savings and loan holding company as a separate entity other than as the survivor of the merger, consolidation, or asset purchase;

(ii) The transaction requires the prior approval of a federal supervisory agency under the Bank Merger Act (12 U.S.C. 1828(c));

(iii) The transaction does not involve the acquisition of any company that would require prior notice or approval under section 10(c) of the HOLA;

(iv) The transaction does not involve a depository institution organized in mutual form, a savings and loan holding company organized in mutual form, a subsidiary holding company of a savings and loan holding company organized in mutual form, or a bank holding company organized in mutual form;

(v) The transaction will not have a material adverse impact on the financial condition of the acquiring savings and loan holding company;

(vi) At least 10 days prior to the transaction, the acquiring savings and

loan holding company has provided to the Reserve Bank written notice of the transaction that contains:

(A) A copy of the filing made to the appropriate federal banking agency under the Bank Merger Act; and

(B) A description of the holding company's involvement in the transaction, the purchase price, and the source of funding for the purchase price; and

(vii) Prior to expiration of the period provided in paragraph (d)(1)(vi) of this section, neither the Board nor the Reserve Bank has informed the savings and loan holding company that an application under § 238.11 is required.

(2) *Internal corporate reorganizations.*

(i) Subject to paragraph (d)(2)(ii) of this section, any of the following transactions performed in the United States by a savings and loan holding company:

(A) The merger of holding companies that are subsidiaries of the savings and loan holding company;

(B) The formation of a subsidiary holding company;¹

(C) The transfer of control or ownership of a subsidiary savings association or a subsidiary holding company between one subsidiary holding company and another subsidiary holding company or the savings and loan holding company.

(ii) A transaction described in paragraph (d)(2)(i) of this section qualifies for this exception if—

(A) The transaction represents solely a corporate reorganization involving companies and insured depository institutions that, both preceding and following the transaction, are lawfully controlled and operated by the savings and loan holding company;

(B) The transaction does not involve the acquisition of additional voting shares of an insured depository institution that, prior to the transaction, was less than majority owned by the savings and loan holding company;

(C) The transaction does not involve a savings and loan holding company organized in mutual form, a subsidiary

¹In the case of a transaction that results in the formation or designation of a new savings and loan holding company, the new savings and loan holding company must complete the registration requirements described in section 238.11.

Federal Reserve System

§ 238.14

holding company of a savings and loan holding company organized in mutual form, or a bank holding company organized in mutual form; and

(D) The transaction will not have a material adverse impact on the financial condition of the holding company.

§ 238.13 Prohibited acquisitions.

(a) No savings and loan holding company may, directly or indirectly, or through one or more subsidiaries or through one or more transactions, acquire control of an uninsured institution or retain, for more than one year after the date any savings association subsidiary becomes uninsured, control of such association.

(b) *Control of mutual savings association.* No savings and loan holding company or any subsidiary thereof, or any director, officer, or employee of a savings and loan holding company or subsidiary thereof, or person owning, controlling, or holding with power to vote, or holding proxies representing, more than 25 percent of the voting shares of such holding company or subsidiary, may hold, solicit, or exercise any proxies in respect of any voting rights in a mutual savings association.

§ 238.14 Procedural requirements.

(a) *Filing application.* An application for the Board's prior approval under § 238.11 shall be governed by the provisions of this section and shall be filed with the appropriate Reserve Bank on the designated form.

(b) *Request for confidential treatment.* An applicant may request confidential treatment for portions of its application pursuant to 12 CFR 261.15.

(c) *Public notice—(1) Newspaper publication—(i) Location of publication.* In the case of each application, the applicant shall publish a notice in a newspaper of general circulation, in the form and at the locations specified in § 262.3 of the Rules of Procedure (12 CFR 262.3) in this chapter;

(ii) *Contents of notice.* A newspaper notice under this paragraph shall provide an opportunity for interested persons to comment on the proposal for a period of at least 30 calendar days;

(iii) *Timing of publication.* Each newspaper notice published in connection with a proposal under this paragraph

shall be published no more than 15 calendar days before and no later than 7 calendar days following the date that an application is filed with the appropriate Reserve Bank.

(2) *FEDERAL REGISTER Notice—(i) Publication by Board.* Upon receipt of an application, the Board shall promptly publish notice of the proposal in the FEDERAL REGISTER and shall provide an opportunity for interested persons to comment on the proposal for a period of no more than 30 days;

(ii) *Request for advance publication.* An applicant may request that, during the 15-day period prior to filing an application, the Board publish notice of a proposal in the FEDERAL REGISTER. A request for advance FEDERAL REGISTER Notice publication shall be made in writing to the appropriate Reserve Bank and shall contain the identifying information prescribed by the Board for FEDERAL REGISTER Notice publication.

(3) *Waiver or shortening of notice.* The Board may waive or shorten the required notice periods under this section if the Board determines that an emergency exists requiring expeditious action on the proposal, or if the Board finds that immediate action is necessary to prevent the probable failure of an insured depository institution.

(d) *Public comment—*

(1) *Timely comments.* Interested persons may submit information and comments regarding a proposal filed under this subpart. A comment shall be considered timely for purposes of this subpart if the comment, together with all supplemental information, is submitted in writing in accordance with the Board's Rules of Procedure and received by the Board or the appropriate Reserve Bank prior to the expiration of the latest public comment period provided in paragraph (c) of this section.

(2) *Extension of comment period—*

(i) *In general.* The Board may, in its discretion, extend the public comment period regarding any proposal submitted under this subpart.

(ii) *Requests in connection with obtaining application or notice.* In the event that an interested person has requested a copy of a notice or application submitted under this subpart, the Board may, in its discretion and based on the

§ 238.14

12 CFR Ch. II (1–1–16 Edition)

facts and circumstances, grant such person an extension of the comment period for up to 15 calendar days.

(iii) *Joint requests by interested person and applicant.* The Board will grant a joint request by an interested person and the applicant for an extension of the comment period for a reasonable period for a purpose related to the statutory factors the Board must consider under this subpart.

(3) *Substantive comment.* A comment will be considered substantive for purposes of this subpart unless it involves individual complaints, or raises frivolous, previously-considered or wholly unsubstantiated claims or irrelevant issues.

(e) *Hearings.* The Board may order a formal or informal hearing or other proceeding on the application, as provided in § 262.3(i)(2) of this chapter. Any request for a hearing (other than from the primary supervisor) shall comply with § 262.3(e) in this chapter.

(f) *Accepting application for processing.* Within 7 calendar days after the Reserve Bank receives an application under this section, the Reserve Bank shall accept it for processing as of the date the application was filed or return the application if it is substantially incomplete. Upon accepting an application, the Reserve Bank shall immediately send copies to the Board and to the primary banking supervisor of the savings association to be acquired and to the Attorney General, and shall request from the Attorney General a report on the competitive factors involved. The Reserve Bank or the Board may request additional information necessary to complete the record of an application at any time after accepting the application for processing.

(g) *Action on applications—(1) Action under delegated authority.* Except as provided in paragraph (g)(4) of this section, unless the Reserve Bank, upon notice to the applicant, refers the application to the Board for decision because action under delegated authority is not appropriate, the Reserve Bank shall approve an application under this section:

(i) Not earlier than the third business day following the close of the public comment period; and

(ii) Not later than the later of the fifth business day following the close of the public comment period or the 30th calendar day after the acceptance date for the application.

(2) *Board action.* The Board shall act on an application under this section that is referred to it for decision within 60 calendar days after the acceptance date for the application, unless the Board notifies the applicant that the 60-day period is being extended for a specified period and states the reasons for the extension. The Board may, at any time, request additional information that it believes is necessary for its decision.

(3) *Approval through failure to act—(i) Ninety-one day rule.* An application shall be deemed approved if the Board fails to act on the application within 91 calendar days after the date of submission to the Board of the complete record on the application. For this purpose, the Board acts when it issues an order stating that the Board has approved or denied the application or notice, reflecting the votes of the members of the Board, and indicating that a statement of the reasons for the decision will follow promptly.

(ii) *Complete record.* For the purpose of computing the commencement of the 91-day period, the record is complete on the latest of:

(A) The date of receipt by the Board of an application that has been accepted by the Reserve Bank;

(B) The last day provided in any notice for receipt of comments and hearing requests on the application or notice;

(C) The date of receipt by the Board of the last relevant material regarding the application that is needed for the Board's decision, if the material is received from a source outside of the Federal Reserve System; or

(D) The date of completion of any hearing or other proceeding.

(4) *Expedited reorganization—(i) In general.* The Board or the appropriate Reserve Bank shall act on an application of a reorganization that meets the requirements of § 238.15(f):

(A) Not earlier than the third business day following the close of the public comment period; and

Federal Reserve System

§ 238.15

(B) Not later than the fifth business day following the close of the public comment period, except that the Board may extend the period for action under this paragraph (g)(4) for up to 5 business days.

(ii) *Acceptance of notice in event expedited procedure not available.* In the event that the Board or the Reserve Bank determines that an application filed pursuant to 238.15(f) does not meet one or more of the requirements of § 238.15(f), paragraph (g)(4) of this section shall not apply and the Board or Reserve Bank will act on the application according to the other provisions of paragraph (g) of this section.

§ 238.15 Factors considered in acting on applications.

(a) *Generally.* The Board may not approve any application under this subpart if:

(1) The transaction would result in a monopoly or would further any combination or conspiracy to monopolize, or to attempt to monopolize, the savings and loan business in any part of the United States;

(2) The effect of the transaction may be substantially to lessen competition in any section of the country, tend to create a monopoly, or in any other manner be in restraint of trade, unless the Board finds that the transaction's anti-competitive effects are clearly outweighed by its probable effect in meeting the convenience and needs of the community;

(3) The applicant has failed to provide the Board with adequate assurances that it will make available such information on its operations or activities, and the operations or activities of any affiliate of the applicant, that the Board deems appropriate to determine and enforce compliance with HOLA and other applicable federal banking statutes, and any regulations thereunder; or

(4) In the case of an application involving a foreign banking organization, the foreign banking organization is not subject to comprehensive supervision or regulation on a consolidated basis by the appropriate authorities in its home country, as provided in § 211.24(c)(1)(ii) of the Board's Regulation K (12 CFR 211.24(c)(1)(ii)).

(5) In the case of an application by a savings and loan holding company to acquire an insured depository institution, section 10(e)(2)(E) of HOLA prohibits the Board from approving the transaction.

(b) *Other factors.* In deciding applications under this subpart, the Board also considers the following factors with respect to the acquiror, its subsidiaries, any savings associations or banks related to the acquiror through common ownership or management, and the savings association or associations to be acquired:

(1) *Financial condition.* Their financial condition and future prospects, including whether current and projected capital positions and levels of indebtedness conform to standards and policies established by the Board.

(2) *Managerial resources.* The competence, experience, and integrity of the officers, directors, and principal shareholders of the acquiror, its subsidiaries, and the savings association and savings and loan holding companies concerned; their record of compliance with laws and regulations; and the record of the applicant and its affiliates of fulfilling any commitments to, and any conditions imposed by, the Board in connection with prior applications.

(3) *Convenience and needs of community.* In the case of an application required under § 238.11(c), (d), or (e), (or an application by a savings and loan holding company under § 238.11(b)), the convenience and needs of the communities to be served, including the record of performance under the Community Reinvestment Act of 1977 (12 U.S.C. 2901 *et seq.*) and regulations issued thereunder, including the Board's Regulation BB (12 CFR part 228).

(c) *Presumptive disqualifiers*—(1) *Integrity factors.* The following factors shall give rise to a rebuttable presumption that an acquiror may fail to satisfy the managerial resources and future prospects tests of paragraph (b) of this section:

§ 238.15

12 CFR Ch. II (1–1–16 Edition)

(i) During the 10-year period immediately preceding filing of the application or notice, criminal, civil or administrative judgments, consents or orders, and any indictments, formal investigations, examinations, or civil or administrative proceedings (excluding routine or customary audits, inspections and investigations) that terminated in any agreements, undertakings, consents or orders, issued against, entered into by, or involving the acquiror or affiliates of the acquiror by any federal or state court, any department, agency, or commission of the U.S. Government, any state or municipality, any Federal Home Loan Bank, any self-regulatory trade or professional organization, or any foreign government or governmental entity, which involve:

(A) Fraud, moral turpitude, dishonesty, breach of trust or fiduciary duties, organized crime or racketeering;

(B) Violation of securities or commodities laws or regulations;

(C) Violation of depository institution laws or regulations;

(D) Violation of housing authority laws or regulations; or

(E) Violation of the rules, regulations, codes of conduct or ethics of a self-regulatory trade or professional organization;

(ii) Denial, or withdrawal after receipt of formal or informal notice of an intent to deny, by the acquiror or affiliates of the acquiror, of

(A) Any application relating to the organization of a financial institution,

(B) An application to acquire any financial institution or holding company thereof under HOLA or the Bank Holding Company Act or otherwise,

(C) A notice relating to a change in control of any of the foregoing under the CIC Act; or

(D) An application or notice under a state holding company or change in control statute;

(iii) The acquiror or affiliates of the acquiror were placed in receivership or conservatorship during the preceding 10 years, or any management official of the acquiror was a management official or director (other than an official or director serving at the request of the Board, the Federal Deposit Insurance Corporation, the Resolution Trust

Corporation, the former Federal Savings and Loan Insurance Corporation, or their predecessors) or principal shareholder of a company or savings association that was placed into receivership, conservatorship, or a management consignment program, or was liquidated during his or her tenure or control or within two years thereafter;

(iv) Felony conviction of the acquiror, an affiliate of the acquiror or a management official of the acquiror or an affiliate of the acquiror;

(v) Knowingly making any written or oral statement to the Board or any predecessor agency (or its delegate) in connection with an application, notice or other filing under this part that is false or misleading with respect to a material fact or omits to state a material fact with respect to information furnished or requested in connection with such an application, notice or other filing;

(vi) Acquisition and retention at the time of submission of an application or notice, of stock in the savings association by the acquiror in violation of this part or its predecessor regulations.

(2) *Financial factors.* The following shall give rise to a rebuttable presumption that an acquiror may fail to satisfy the financial-resources and future-prospects tests of paragraph (c) of this section:

(i) Liability for amounts of debt which, in the opinion of the Board, create excessive risks of default and pressure on the savings association to be acquired; or

(ii) Failure to furnish a business plan or furnishing a business plan projecting activities which are inconsistent with economical home financing.

(d) *Competitive factor.* Before approving any such acquisition, except a transaction under section 13(k) of the Federal Deposit Insurance Act, the Board shall consider any report rendered by the Attorney General within 30 days of such request under § 238.14(f) on the competitive factors involved.

(e) *Expedited reorganizations.* An application by a savings association solely for the purpose of obtaining approval for the creation of a savings and loan holding company by such savings

Federal Reserve System

§ 238.21

association shall be eligible for expedited processing under § 238.14(g)(4) if it satisfies the following criteria:

(1) The holding company shall not be capitalized initially in an amount exceeding the amount the savings association is permitted to pay in dividends to its holding company as of the date of the reorganization pursuant to applicable regulations or, in the absence thereof, pursuant to the then current policy guidelines;

(2) The creation of the savings and loan holding company by the association is the sole transaction contained in the application, and there are no other transactions requiring approval incident to the creation of the holding company (other than the creation of an interim association that will disappear upon consummation of the reorganization and the merger of the savings association with such interim association to effect the reorganization), and the holding company is not also seeking any regulatory waivers, regulatory forbearances, or resolution of legal or supervisory issues;

(3) The board of directors and executive officers of the holding company are composed of persons who, at the time of acquisition, are executive officers and directors of the association;

(4) The acquisition raises no significant issues of law or policy;

(5) Prior to consummation of the reorganization transaction, the holding company shall enter into any dividend limitation, regulatory capital maintenance, or prenuptial agreement required by Board regulations, or in the absence thereof, required pursuant to policy guidelines issued by the Board; and

(f) *Conditional approvals.* The Board may impose conditions on any approval, including conditions to address competitive, financial, managerial, safety and soundness, convenience and needs, compliance or other concerns, to ensure that approval is consistent with the relevant statutory factors and other provisions of HOLA.

(g) No acquisition shall be approved by the Board pursuant to § 238.11 which would result in the formation by any company, through one or more subsidiaries or through one or more transactions, of a multiple savings and loan

holding company controlling savings associations in more than one state where the acquisition causes a savings association to become an affiliate of another savings association with which it was not previously affiliated unless:

(1) Such company, or a savings association subsidiary of such company, is authorized to acquire control of a savings association subsidiary, or to operate a home or branch office, in the additional state or states pursuant to section 13(k) of the Federal Deposit Insurance Act, 12 U.S.C. 1823(k) (or section 408(m) of the National Housing Act as in effect immediately prior to enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989);

(2) Such company controls a savings association subsidiary which operated a home or branch office in the additional state or states as of March 5, 1987; or

(3) The statute laws of the state in which the savings association, control of which is to be acquired, is located are such that a savings association chartered by such state could be acquired by a savings association chartered by the state where the acquiring savings association or savings and loan holding company is located (or by a holding company that controls such a state chartered savings association), and such statute laws specifically authorize such an acquisition by language to that effect and not merely by implication.

Subpart C—Control Proceedings

§ 238.21 Control proceedings.

(a) *Preliminary determination of control.* (1) The Board may issue a preliminary determination of control under the procedures set forth in this section in any case in which:

(i) Any of the presumptions of control set forth in paragraph (d) of this section is present; or

(ii) It otherwise appears that a company has the power to exercise a controlling influence over the management or policies of a savings association or other company.

(2) If the Board makes a preliminary determination of control under this section, the Board shall send notice to

the controlling company containing a statement of the facts upon which the preliminary determination is based.

(b) *Response to preliminary determination of control.* Within 30 calendar days of issuance by the Board of a preliminary determination of control or such longer period permitted by the Board, the company against whom the determination has been made shall:

(1) Submit for the Board's approval a specific plan for the prompt termination of the control relationship;

(2) File an application under this regulation to retain the control relationship; or

(3) Contest the preliminary determination by filing a response, setting forth the facts and circumstances in support of its position that no control exists, and, if desired, requesting a hearing or other proceeding.

(c) *Hearing and final determination.* (1) The Board shall order a formal hearing or other appropriate proceeding upon the request of a company that contests a preliminary determination that the company has the power to exercise a controlling influence over the management or policies of a savings association or other company, if the Board finds that material facts are in dispute. The Board may also in its discretion order a formal hearing or other proceeding with respect to a preliminary determination that the company controls voting securities of the savings association or other company under the presumptions in paragraph (d)(1) of this section.

(2) At a hearing or other proceeding, any applicable presumptions established by paragraph (d) of this section shall be considered in accordance with the Federal Rules of Evidence and the Board's Rules of Practice for Formal Hearings (12 CFR part 263).

(3) After considering the submissions of the company and other evidence, including the record of any hearing or other proceeding, the Board shall issue a final order determining whether the company controls voting securities, or has the power to exercise a controlling influence over the management or policies, of the savings association or other company. If a control relationship is found, the Board may direct the company to terminate the control relation-

ship or to file an application for the Board's approval to retain the control relationship under subpart B of this part.

(d) *Rebuttable presumptions of control.* The following rebuttable presumptions shall be used in any proceeding under this section:

(1) *Control of voting securities—(i) Securities convertible into voting securities.* A company that owns, controls, or holds securities that are immediately convertible, at the option of the holder or owner, into voting securities of a bank or other company, controls the voting securities.

(ii) *Option or restriction on voting securities.* A company that enters into an agreement or understanding under which the rights of a holder of voting securities of a savings association or other company are restricted in any manner controls the securities. This presumption does not apply where the agreement or understanding:

(A) Is a mutual agreement among shareholders granting to each other a right of first refusal with respect to their shares;

(B) Is incident to a *bona fide* loan transaction; or

(C) Relates to restrictions on transferability and continues only for the time necessary to obtain approval from the appropriate Federal supervisory authority with respect to acquisition by the company of the securities.

(2) *Control over company — (i) Management agreement.* A company that enters into any agreement or understanding with a savings association or other company (other than an investment advisory agreement), such as a management contract, under which the first company or any of its subsidiaries directs or exercises significant influence over the general management or overall operations of the savings association or other company controls the savings association or other company.

(ii) *Shares controlled by company and associated individuals.* A company that, together with its management officials or principal shareholders (including members of the immediate families of either), owns, controls, or holds with power to vote 25 percent or more of the outstanding shares of any class of voting securities of a savings association

or other company controls the savings association or other company, if the first company owns, controls, or holds with power to vote more than 5 percent of the outstanding shares of any class of voting securities of the savings association or other company.

(iii) *Common management officials.* A company that has one or more management officials in common with a savings association or other company controls the savings association or other company, if the first company owns, controls or holds with power to vote more than 5 percent of the outstanding shares of any class of voting securities of the savings association or other company, and no other person controls as much as 5 percent of the outstanding shares of any class of voting securities of the savings association or other company.

(e) *Presumption of non-control*— (1) In any proceeding under this section, there is a presumption that any company that directly or indirectly owns, controls, or has power to vote less than 5 percent of the outstanding shares of any class of voting securities of a savings association or other company does not have control over that savings association or other company.

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

Subpart D—Change in Bank Control

§ 238.31 Transactions requiring prior notice.

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

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

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

(2) *Acting in concert* includes knowing participation in a joint activity or parallel action towards a common goal of acquiring control of a savings and loan holding company whether or not pursuant to an express agreement.

(3) *Immediate family* includes a person's father, mother, stepfather, stepmother, brother, sister, stepbrother, stepsister, son, daughter, stepson, stepdaughter, grandparent, grandson, granddaughter, father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, the spouse of any of the foregoing, and the person's spouse.

(c) *Acquisitions requiring prior notice*—(1) *Acquisition of control.* The acquisition of voting securities of a savings and loan holding company constitutes the acquisition of control under the Bank Control Act, requiring prior notice to the Board, if, immediately after the transaction, the acquiring person (or persons acting in concert) will own, control, or hold with power to vote 25 percent or more of any class of voting securities of the institution.

(2) *Rebuttable presumption of control.* The Board presumes that an acquisition of voting securities of a savings and loan holding company constitutes the acquisition of control under the Bank Control Act, requiring prior notice to the Board, if, immediately after the transaction, the acquiring person (or persons acting in concert) will own,

§ 238.32

12 CFR Ch. II (1-1-16 Edition)

control, or hold with power to vote 10 percent or more of any class of voting securities of the institution, and if:

(i) The institution has registered securities under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l); or

(ii) No other person will own, control, or hold the power to vote a greater percentage of that class of voting securities immediately after the transaction.²

(d) *Rebuttable presumption of concerted action.* The following persons shall be presumed to be acting in concert for purposes of this subpart:

(1) A company and any principal shareholder, partner, trustee, or management official of the company, if both the company and the person own voting securities of the savings and loan holding company;

(2) An individual and the individual's immediate family;

(3) Companies under common control;

(4) Persons that are parties to any agreement, contract, understanding, relationship, or other arrangement, whether written or otherwise, regarding the acquisition, voting, or transfer of control of voting securities of a savings and loan holding company, other than through a revocable proxy as described in § 238.32(a)(5) of this subpart;

(5) Persons that have made, or propose to make, a joint filing under sections 13 or 14 of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78n), and the rules promulgated thereunder by the Securities and Exchange Commission; and

(6) A person and any trust for which the person serves as trustee.

(e) *Acquisitions of loans in default.* The Board presumes an acquisition of a loan in default that is secured by voting securities of a savings and loan holding company to be an acquisition of the underlying securities for purposes of this section.

(f) *Other transactions.* Transactions other than those set forth in paragraph (c) of this section resulting in a per-

son's control of less than 25 percent of a class of voting securities of a savings and loan holding company are not deemed by the Board to constitute control for purposes of the Bank Control Act.

(g) *Rebuttal of presumptions.* Prior notice to the Board is not required for any acquisition of voting securities under the presumption of control set forth in this section, if the Board finds that the acquisition will not result in control. The Board shall afford any person seeking to rebut a presumption in this section an opportunity to present views in writing or, if appropriate, orally before its designated representatives at an informal conference.

§ 238.32 Transactions not requiring prior notice.

(a) *Exempt transactions.* The following transactions do not require notice to the Board under this subpart:

(1) *Existing control relationships.* The acquisition of additional voting securities of a savings and loan holding company by a person who:

(i) Continuously since March 9, 1979 (or since the institution commenced business, if later), held power to vote 25 percent or more of any class of voting securities of the institution; or

(ii) Is presumed, under § 238.31(c)(2), to have controlled the institution continuously since March 9, 1979, if the aggregate amount of voting securities held does not exceed 25 percent or more of any class of voting securities of the institution or, in other cases, where the Board determines that the person has controlled the institution continuously since March 9, 1979;

(2) *Increase of previously authorized acquisitions.* Unless the Board or the Reserve Bank otherwise provides in writing, the acquisition of additional shares of a class of voting securities of a savings and loan holding company by any person (or persons acting in concert) who has lawfully acquired and maintained control of the institution (for purposes of § 238.31(c)), after complying with the procedures and receiving approval to acquire voting securities of the institution under this subpart, or in connection with an application approved under section 10(e) of HOLA (12 U.S.C. 1467a(e) and § 238.11 or

²If two or more persons, not acting in concert, each propose to acquire simultaneously equal percentages of 10 percent or more of a class of voting securities of the savings and loan holding company, each person must file prior notice to the Board.

Federal Reserve System

§ 238.33

section 18(c) of the Federal Deposit Insurance Act (Bank Merger Act, 12 U.S.C. 1828(c));

(3) *Acquisitions subject to approval under HOLA or Bank Merger Act.* Any acquisition of voting securities subject to approval under section 10(e) of HOLA (12 U.S.C. 1467a(e) and §238.11), or section 18(c) of the Federal Deposit Insurance Act (Bank Merger Act, 12 U.S.C. 1828(c));

(4) *Transactions exempt under HOLA.* Any transaction described in sections 10(a)(3)(A) or 10(e)(1)(B)(ii) of HOLA by a person described in those provisions;

(5) *Proxy solicitation.* The acquisition of the power to vote securities of a savings and loan holding company through receipt of a revocable proxy in connection with a proxy solicitation for the purposes of conducting business at a regular or special meeting of the institution, if the proxy terminates within a reasonable period after the meeting;

(6) *Stock dividends.* The receipt of voting securities of a savings and loan holding company through a stock dividend or stock split if the proportional interest of the recipient in the institution remains substantially the same; and

(7) *Acquisition of foreign banking organization.* The acquisition of voting securities of a qualifying foreign banking organization. (This exemption does not extend to the reports and information required under paragraphs 9, 10, and 12 of the Bank Control Act (12 U.S.C. 1817(j) (9), (10), and (12)) and §238.34.)

(b) *Prior notice exemption.* (1) The following acquisitions of voting securities of a savings and loan holding company, which would otherwise require prior notice under this subpart, are not subject to the prior notice requirements if the acquiring person notifies the appropriate Reserve Bank within 90 calendar days after the acquisition and provides any relevant information requested by the Reserve Bank:

(i) Acquisition of voting securities through inheritance;

(ii) Acquisition of voting securities as a *bona fide* gift; and

(iii) Acquisition of voting securities in satisfaction of a debt previously contracted (DPC) in good faith.

(2) The following acquisitions of voting securities of a savings and loan

holding company, which would otherwise require prior notice under this subpart, are not subject to the prior notice requirements if the acquiring person does not reasonably have advance knowledge of the transaction, and provides the written notice required under §238.33 to the appropriate Reserve Bank within 90 calendar days after the transaction occurs:

(i) Acquisition of voting securities resulting from a redemption of voting securities by the issuing savings and loan holding company; and

(ii) Acquisition of voting securities as a result of actions (including the sale of securities) by any third party that is not within the control of the acquiror.

(3) Nothing in paragraphs (b)(1) or (b)(2) of this section limits the authority of the Board to disapprove a notice pursuant to §238.33(h).

§238.33 Procedures for filing, processing, publishing, and acting on notices.

(a) *Filing notice.* (1) A notice required under this subpart shall be filed with the appropriate Reserve Bank and shall contain all the information required by paragraph 6 of the Bank Control Act (12 U.S.C. 1817(j)(6)), or prescribed in the designated Board form.

(2) The Board may waive any of the informational requirements of the notice if the Board determines that it is in the public interest.

(3) A notificant shall notify the appropriate Reserve Bank or the Board immediately of any material changes in a notice submitted to the Reserve Bank, including changes in financial or other conditions.

(4) When the acquiring person is an individual, or group of individuals acting in concert, the requirement to provide personal financial data may be satisfied by a current statement of assets and liabilities and an income summary, as required in the designated Board form, together with a statement of any material changes since the date of the statement or summary. The Reserve Bank or the Board, nevertheless, may request additional information, if appropriate.

(b) *Acceptance of notice.* The 60-day notice period specified in §238.31 of this

subpart begins on the date of receipt of a complete notice. The Reserve Bank shall notify the person or persons submitting a notice under this subpart in writing of the date the notice is or was complete and thereby accepted for processing. The Reserve Bank or the Board may request additional relevant information at any time after the date of acceptance.

(c) *Publication*—(1) *Newspaper Announcement*. Any person(s) filing a notice under this subpart shall publish, in a form prescribed by the Board, an announcement soliciting public comment on the proposed acquisition. The announcement shall be published in a newspaper of general circulation in the community in which the head office of the savings and loan holding company is located and in the community in which the head office of each of its subsidiary savings associations is located. The announcement shall be published no earlier than 15 calendar days before the filing of the notice with the appropriate Reserve Bank and no later than 10 calendar days after the filing date; and the publisher's affidavit of a publication shall be provided to the appropriate Reserve Bank.

(2) *Contents of newspaper announcement*. The newspaper announcement shall state:

(i) The name of each person identified in the notice as a proposed acquiror of the savings and loan holding company;

(ii) The name of the savings and loan holding company to be acquired, including the name of each of the savings and loan holding company's subsidiary savings association; and

(iii) A statement that interested persons may submit comments on the notice to the Board or the appropriate Reserve Bank for a period of 20 days, or such shorter period as may be provided, pursuant to paragraph (c)(5) of this section.

(3) *FEDERAL REGISTER Announcement*. The Board shall, upon filing of a notice under this subpart, publish announcement in the FEDERAL REGISTER of receipt of the notice. The FEDERAL REGISTER announcement shall contain the information required under paragraphs (c)(2)(i) and (c)(2)(ii) of this section and a statement that interested persons

may submit comments on the proposed acquisition for a period of 15 calendar days, or such shorter period as may be provided, pursuant to paragraph (c)(5) of this section. The Board may waive publication in the FEDERAL REGISTER if the Board determines that such action is appropriate.

(4) *Delay of publication*. The Board may permit delay in the publication required under paragraphs (c)(1) and (c)(3) of this section if the Board determines, for good cause shown, that it is in the public interest to grant such delay. Requests for delay of publication may be submitted to the appropriate Reserve Bank.

(5) *Shortening or waiving notice*. The Board may shorten or waive the public comment or newspaper publication requirements of this paragraph, or act on a notice before the expiration of a public comment period, if it determines in writing that an emergency exists, or that disclosure of the notice, solicitation of public comment, or delay until expiration of the public comment period would seriously threaten the safety or soundness of the savings and loan holding company to be acquired.

(6) *Consideration of public comments*. In acting upon a notice filed under this subpart, the Board shall consider all public comments received in writing within the period specified in the newspaper or FEDERAL REGISTER announcement, whichever is later. At the Board's option, comments received after this period may, but need not, be considered.

(7) *Standing*. No person (other than the acquiring person) who submits comments or information on a notice filed under this subpart shall thereby become a party to the proceeding or acquire any standing or right to participate in the Board's consideration of the notice or to appeal or otherwise contest the notice or the Board's action regarding the notice.

(d) *Time period for Board action*—(1) *Consummation of acquisition*—(i) The notificant(s) may consummate the proposed acquisition 60 days after submission to the Reserve Bank of a complete notice under paragraph (a) of this section, unless within that period the Board disapproves the proposed acquisition or extends the 60-day period, as

Federal Reserve System

§ 238.41

provided under paragraph (d)(2) of this section.

(ii) The notificant(s) may consummate the proposed transaction before the expiration of the 60-day period if the Board notifies the notificant(s) in writing of the Board's intention not to disapprove the acquisition.

(2) *Extensions of time period.* (i) The Board may extend the 60-day period in paragraph (d)(1) of this section for an additional 30 days by notifying the acquiring person(s).

(ii) The Board may further extend the period during which it may disapprove a notice for two additional periods of not more than 45 days each, if the Board determines that:

(A) Any acquiring person has not furnished all the information required under paragraph (a) of this section;

(B) Any material information submitted is substantially inaccurate;

(C) The Board is unable to complete the investigation of an acquiring person because of inadequate cooperation or delay by that person; or

(D) Additional time is needed to investigate and determine that no acquiring person has a record of failing to comply with the requirements of the Bank Secrecy Act, subchapter II of Chapter 53 of title 31, United States Code.

(iii) If the Board extends the time period under this paragraph, it shall notify the acquiring person(s) of the reasons therefor and shall include a statement of the information, if any, deemed incomplete or inaccurate.

(e) *Advice to bank supervisory agencies.* The Reserve Bank shall send a copy of any notice to the Comptroller of the Currency and the Federal Deposit Insurance Corporation.

(f) *Investigation and report.* (1) After receiving a notice under this subpart, the Board or the appropriate Reserve Bank shall conduct an investigation of the competence, experience, integrity, and financial ability of each person by and for whom an acquisition is to be made. The Board shall also make an independent determination of the accuracy and completeness of any information required to be contained in a notice under paragraph (a) of this section. In investigating any notice accepted under this subpart, the Board or Re-

serve Bank may solicit information or views from any person, including any savings and loan holding company involved in the notice, and any appropriate state, federal, or foreign governmental authority.

(2) The Board or the appropriate Reserve Bank shall prepare a written report of its investigation, which shall contain, at a minimum, a summary of the results of the investigation.

(g) *Factors considered in acting on notices.* In reviewing a notice filed under this subpart, the Board shall consider the information in the record, the views and recommendations of the appropriate bank supervisor, and any other relevant information obtained during any investigation of the notice.

(h) *Disapproval and hearing—*(1) *Disapproval of notice.* The Board may disapprove an acquisition if it finds adverse effects with respect to any of the factors set forth in paragraph 7 of the Bank Control Act (12 U.S.C. 1817(j)(7)) (*i.e.*, competitive, financial, managerial, banking, or incompleteness of information).

(2) *Disapproval notification.* Within three days after its decision to issue a notice of intent to disapprove any proposed acquisition, the Board shall notify the acquiring person in writing of the reasons for the action.

(3) *Hearing.* Within 10 calendar days of receipt of the notice of the Board's intent to disapprove, the acquiring person may submit a written request for a hearing. Any hearing conducted under this paragraph shall be in accordance with the Rules of Practice for Formal Hearings (12 CFR part 263). At the conclusion of the hearing, the Board shall, by order, approve or disapprove the proposed acquisition on the basis of the record of the hearing. If the acquiring person does not request a hearing, the notice of intent to disapprove becomes final and unappealable.

Subpart E—Qualified Stock Issuances

§238.41 Qualified stock issuances by undercapitalized savings associations or holding companies.

(a) *Acquisitions by savings and loan holding companies.* No savings and loan holding company shall be deemed to

§ 238.41

12 CFR Ch. II (1-1-16 Edition)

control a savings association solely by reason of the purchase by such savings and loan holding company of shares issued by such savings association, or issued by any savings and loan holding company (other than a bank holding company) which controls such savings association, in connection with a qualified stock issuance if prior approval of such acquisition is granted by the Board under this subpart, unless the acquiring savings and loan holding company, directly or indirectly, or acting in concert with 1 or more other persons, or through one or more subsidiaries, owns, controls, or holds with power to vote, or holds proxies representing, more than 15 percent of the voting shares of such savings association or holding company.

(b) *Qualification.* For purposes of this section, any issuance of shares of stock shall be treated as a qualified stock issuance if the following conditions are met:

(1) The shares of stock are issued by—

(i) An undercapitalized savings association, which for purposes of this paragraph (b)(1)(i) shall mean any savings association—

(A) The assets of which exceed the liabilities of such association; and

(B) Which does not comply with one or more of the capital standards in effect under section 5(t) of HOLA; or

(ii) A savings and loan holding company which is not a bank holding company but which controls an undercapitalized savings association if, at the time of issuance, the savings and loan holding company is legally obligated to contribute the net proceeds from the issuance of such stock to the capital of an undercapitalized savings association subsidiary of such holding company.

(2) All shares of stock issued consist of previously unissued stock or treasury shares.

(3) All shares of stock issued are purchased by a savings and loan holding company that is registered, as of the date of purchase, with the Board in accordance with the provisions of section 10(b) of the HOLA and the Board's regulations promulgated thereunder.

(4) Subject to paragraph (c) of this section, the Board approves the pur-

chase of the shares of stock by the acquiring savings and loan holding company.

(5) The entire consideration for the stock issued is paid in cash by the acquiring savings and loan holding company.

(6) At the time of the stock issuance, each savings association subsidiary of the acquiring savings and loan holding company (other than an association acquired in a transaction pursuant to section 13(c) or 13(k) of the Federal Deposit Insurance Act, or section 408(m) of the National Housing Act, as in effect immediately prior to enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989) has capital (after deducting any subordinated debt, intangible assets, and deferred, unamortized gains or losses) of not less than 6½ percent of the total assets of such savings association.

(7) Immediately after the stock issuance, the acquiring savings and loan holding company holds not more than 15 percent of the outstanding voting stock of the issuing undercapitalized savings association or savings and loan holding company.

(8) Not more than one of the directors of the issuing association or company is an officer, director, employee, or other representative of the acquiring company or any of its affiliates.

(9) Transactions between the savings association or savings and loan holding company that issues the shares pursuant to this section and the acquiring company and any of its affiliates shall be subject to the provisions of section 11 of HOLA and the Board's regulations promulgated thereunder.

(c) *Approval of acquisitions—(1) Criteria.* The Board, in deciding whether to approve or deny an application filed on the basis that it is a qualified stock issuance, shall apply the application criteria set forth in § 238.15(a), (b), and (c).

(2) *Additional capital commitments not required.* The Board shall not disapprove any application for the purchase of stock in connection with a qualified stock issuance on the grounds that the acquiring savings and loan holding company has failed to undertake to make subsequent additional capital contributions to maintain the

Federal Reserve System

§ 238.51

capital of the undercapitalized savings association at or above the minimum level required by the Board or any other Federal agency having jurisdiction.

(3) *Other conditions.* The Board shall impose such conditions on any approval of an application for the purchase of stock in connection with a qualified stock issuance as the Board determines to be appropriate, including—

(i) A requirement that any savings association subsidiary of the acquiring savings and loan holding company limit dividends paid to such holding company for such period of time as the Board may require; and

(ii) Such other conditions as the Board deems necessary or appropriate to prevent evasions of this section.

(4) *Application deemed approved if not disapproved within 90 days.* (i) An application for approval of a purchase of stock in connection with a qualified stock issuance shall be deemed to have been approved by the Board if such application has not been disapproved by the Board before the end of the 90-day period beginning on the date of submission to the Board of the complete record on the application as defined in § 238.14(g)(3)(ii).

(d) *No limitation on class of stock issued.* The shares of stock issued in connection with a qualified stock issuance may be shares of any class.

(e) *Application form.* A savings and loan holding company making application to acquire a qualified stock issuance pursuant to this subpart shall submit the appropriate form to the appropriate Reserve Bank.

Subpart F—Savings and Loan Holding Company Activities and Acquisitions

§ 238.51 Prohibited activities.

(a) *Evasion of law or regulation.* No savings and loan holding company or subsidiary thereof which is not a savings association shall, for or on behalf of a subsidiary savings association, engage in any activity or render any services for the purpose or with the effect of evading any law or regulation applicable to such savings association.

(b) *Unrelated business activity.* No savings and loan holding company or subsidiary thereof that is not a savings association shall commence any business activity at any time, or continue any business activity after the end of the two-year period beginning on the date on which such company received approval to become a savings and loan holding company that is subject to the limitations of this paragraph (b), except (in either case) the following:

(1) Furnishing or performing management services for a savings association subsidiary of such company;

(2) Conducting an insurance agency or an escrow business;

(3) Holding, managing, or liquidating assets owned by or acquired from a subsidiary savings association of such company;

(4) Holding or managing properties used or occupied by a subsidiary savings association of such company;

(5) Acting as trustee under deed of trust;

(6) Any other activity:

(i) That the Board of Governors of the Federal Reserve System has permitted for bank holding companies pursuant to regulations promulgated under section 4(c) of the Bank Holding Company Act; or

(ii) Is set forth in § 238.53, subject to the limitations therein; or

(7) (i) In the case of a savings and loan holding company, purchasing, holding, or disposing of stock acquired in connection with a qualified stock issuance if prior approval for the acquisition of such stock by such savings and loan holding company is granted by the Board pursuant to § 238.41.

(ii) Notwithstanding the provisions of this paragraph (b), any savings and loan holding company that, between March 5, 1987 and August 10, 1987, received approval pursuant to 12 U.S.C. 1730a(e), as then in effect, to acquire control of a savings association shall not continue any business activity other than those activities set forth in this paragraph (b) after August 10, 1987.

(c) *Treatment of certain holding companies.* If a director or officer of a savings and loan holding company, or an individual who owns, controls, or holds with the power to vote (or proxies representing) more than 25 percent of the

§ 238.52

voting shares of a savings and loan holding company, directly or indirectly controls more than one savings association, any savings and loan holding company controlled by such individual shall be subject to the activities limitations contained in paragraph (b) of this section, to the same extent such limitations apply to multiple savings and loan holding companies pursuant to §§ 238.51, 238.52, 238.53, and 238.54.

§ 238.52 Exempt savings and loan holding companies and grandfathered activities.

(a) *Exempt savings and loan holding companies.* (1) The following savings and loan holding companies are exempt from the limitations of § 238.51(b):

(i) Any savings and loan holding company (or subsidiary of such company) that controls only one savings association, if the savings association subsidiary of such company is a qualified thrift lender as defined in § 238.2(k).

(ii) Any savings and loan holding company (or subsidiary thereof) that controls more than one savings association if all, or all but one of the savings association subsidiaries of such company were acquired pursuant to an acquisition under section 13(c) or 13(k) of the Federal Deposit Insurance Act, or section 408(m) of the National Housing Act, as in effect immediately prior to the date of enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, and all of the savings association subsidiaries of such company are qualified thrift lenders as defined in § 238.2(k).

(2) Any savings and loan holding company whose subsidiary savings association(s) fails to qualify as a qualified thrift lender pursuant to 12 U.S.C. 1467a(m) may not commence, or continue, any service or activity other than those permitted under § 238.51(b) of this part, except that, the Board may allow, for good cause shown, such company (or subsidiary of such company which is not a savings association) up to 3 years to comply with the limitations set forth in § 238.51(b) of this part: *Provided*, That effective August 9, 1990, any company that controls a savings association that should have become or cease to be a qualified thrift lender, except a savings associa-

12 CFR Ch. II (1-1-16 Edition)

tion that requalified as a qualified thrift lender pursuant to section 10(m)(3)(D) of the Home Owners' Loan Act, shall within one year after the date on which the savings association fails to qualify as a qualified thrift lender, register as and be deemed to be a bank holding company, subject to all of the provisions of the Bank Holding Company Act, section 8 of the Federal Deposit Insurance Act, and other statutes applicable to bank holding companies in the same manner and to the same extent as if the company were a bank holding company and the savings association were a bank, as those terms are defined in the Bank Holding Company Act.

(b) *Grandfathered activities for certain savings and loan holding companies.* Notwithstanding § 238.51(b) and subject to paragraph (c) of this section, any savings and loan holding company that received approval prior to March 5, 1987 to acquire control of a savings association may engage, directly or indirectly or through any subsidiary (other than a subsidiary savings association of such company) in any activity in which it was lawfully engaged on March 5, 1987, *provided*, that:

(1) The holding company does not, after August 10, 1987, acquire control of a bank or an additional savings association, other than a savings association acquired pursuant to section 13(c) or 13(k) of the Federal Deposit Insurance Act, or section 406(f) or 408(m) of the National Housing Act, as in effect immediately prior to the date of enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989;

(2) Any savings association subsidiary of the holding company continues to qualify as a domestic building and loan association under section 7701(a)(19) of the Internal Revenue Code of 1986 after August 10, 1987;

(3) The holding company does not engage in any business activity other than those permitted under § 238.51(b) or in which it was engaged on March 5, 1987;

(4) Any savings association subsidiary of the holding company does not increase the number of locations from which such savings association conducts business after March 5, 1987,

Federal Reserve System

§ 238.53

other than an increase due to a transaction under section 13(c) or 13(k) of the Federal Deposit Insurance Act, or under section 408(m) of the National Housing Act, as in effect immediately prior to the date of enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989; and

(5) Any savings association subsidiary of the holding company does not permit any overdraft (including an intra-day overdraft) or incur any such overdraft in its account at a Federal Reserve bank, on behalf of an affiliate, unless such overdraft results from an inadvertent computer or accounting error that is beyond the control of both the savings association subsidiary and the affiliate.

(c) *Termination by the Board of grandfathered activities.* Notwithstanding the provisions of paragraph (b) of this section, the Board may, after opportunity for hearing, terminate any activity engaged in under paragraph (b) of this section upon determination that such action is necessary:

(1) To prevent conflicts of interest;

(2) To prevent unsafe or unsound practices; or

(3) To protect the public interest.

(d) *Foreign holding company.* Any savings and loan holding company organized under the laws of a foreign country as of June 1, 1984 (including any subsidiary thereof that is not a savings association) that controlled a single savings association on August 10, 1987, shall not be subject to the restrictions set forth in §238.51(b) with respect to any activities of such holding company that are conducted exclusively in a foreign country.

§ 238.53 Prescribed services and activities of savings and loan holding companies.

(a) *General.* For the purpose of §238.51(b)(6)(ii), the activities set forth in paragraph (b) of this section are, and were as of March 5, 1987, permissible services and activities for savings and loan holding companies or subsidiaries thereof that are neither savings associations nor service corporation subsidiaries of subsidiary savings associations. Services and activities of service corporation subsidiaries of savings and loan holding company subsidiary sav-

ings associations are prescribed by paragraph (d) of this section.

(b) *Prescribed services and activities.* Subject to the provisions of paragraph (c) of this section, a savings and loan holding company subject to restrictions on its activities pursuant to §238.51(b), or a subsidiary thereof which is neither a savings association nor a service corporation of a subsidiary savings association, may furnish or perform the following services and engage in the following activities to the extent that it has legal power to do so:

(1) Originating, purchasing, selling and servicing any of the following:

(i) Loans, and participation interests in loans, on a prudent basis and secured by real estate, including brokerage and warehousing of such real estate loans, except that such a company or subsidiary shall not invest in a loan secured by real estate as to which a subsidiary savings association of such company has a security interest;

(ii) Manufactured home chattel paper (written evidence of both a monetary obligation and a security interest of first priority in one or more manufactured homes, and any equipment installed or to be installed therein), including brokerage and warehousing of such chattel paper;

(iii) Loans, with or without security, for the altering, repairing, improving, equipping or furnishing of any residential real estate;

(iv) Educational loans; and

(v) Consumer loans, as defined in §160.3 of this title, *Provided*, That, no subsidiary savings association of such holding company or service corporation of such savings association shall engage directly or indirectly, in any transaction with any affiliate involving the purchase or sale, in whole or in part, of any consumer loan.

(2) Subject to the provisions of 12 U.S.C. 1468, furnishing or performing clerical accounting and internal audit services primarily for its affiliates;

(3) Subject to the provisions of 12 U.S.C. 1468, furnishing or performing the following services primarily for its affiliates, and for any savings association and service corporation subsidiary thereof, and for other multiple holding companies and affiliates thereof:

(i) Data processing;

§ 238.53

12 CFR Ch. II (1-1-16 Edition)

(ii) Credit information, appraisals, construction loan inspections, and abstracting;

(iii) Development and administration of personnel benefit programs, including life insurance, health insurance, and pension or retirement plans;

(iv) Research, studies, and surveys;

(v) Purchase of office supplies, furniture and equipment;

(vi) Development and operation of storage facilities for microfilm or other duplicate records; and

(vii) Advertising and other services to procure and retain both savings accounts and loans;

(4) Acquisition of unimproved real estate lots, and acquisition of other unimproved real estate for the purpose of prompt development and subdivision, for:

(i) Construction of improvements,

(ii) Resale to others for such construction, or

(iii) Use as mobile home sites;

(5) Development, subdivision and construction of improvements on real estate acquired pursuant to paragraph (b)(4) of this section, for sale or rental;

(6) Acquisition of improved real estate and mobile homes to be held for rental;

(7) Acquisition of improved real estate for remodeling, rehabilitation, modernization, renovation, or demolition and rebuilding for sale or for rental;

(8) Maintenance and management of improved real estate;

(9) Underwriting or reinsuring contract of credit life or credit health and accident insurance in connection with extensions of credit by the savings and loan holding company or any of its subsidiaries, or extensions of credit by any savings association or service corporation subsidiary thereof, or any other savings and loan holding company or subsidiary thereof;

(10) Preparation of State and Federal tax returns for accountholders or borrowers from (including immediate family members of such accountholders or borrowers but not including an accountholder or borrower which is a corporation operated for profit) an affiliated savings association;

(11) Purchase and sale of gold coins minted and issued by the United States Treasury pursuant to Public Law 99-185, 99 Stat. 1177 (1985), and activities reasonably incident thereto; and

(12) Any services or activities approved by order of the former Federal Savings and Loan Insurance Corporation prior to March 5, 1987, pursuant to its authority under section 408(c)(2)(F) of the National Housing Act, as in effect at the time.

(c) *Procedures for commencing services or activities.* A notice to engage in or acquire a company engaged in a service or activity prescribed by paragraph (b) of this section (other than purchase or sale of a government debt security) shall be filed by a savings and loan holding company (including a company seeking to become a savings and loan holding company) with the appropriate Reserve Bank in accordance with this paragraph and the Board's Rules of Procedure (12 CFR 262.3).

(1) *Engaging de novo in services or activities.* A savings and loan holding company seeking to commence or to engage de novo in a service or activity pursuant to this section, either directly or through a subsidiary, shall file a notice containing a description of the activities to be conducted and the identity of the company that will conduct the activity.

(2) *Acquiring company engaged in services or activities.* A savings and loan holding company seeking to acquire or control voting securities or assets of a company engaged in a service or activity pursuant to this section, shall file a notice containing the following:

(i) A description of the proposal, including a description of each proposed service or activity;

(ii) The identity of any entity involved in the proposal, and, if the notificant proposes to conduct the service or activity through an existing subsidiary, a description of the existing activities of the subsidiary;

(iii) If the savings and loan holding company has consolidated assets of \$150 million or more:

(A) Parent company and consolidated pro forma balance sheets for the acquiring savings and loan holding company as of the most recent quarter

Federal Reserve System

§ 238.53

showing credit and debit adjustments that reflect the proposed transaction;

(B) Consolidated pro forma risk-based capital and leverage ratio calculations for the acquiring savings and loan holding company as of the most recent quarter; and

(C) A description of the purchase price and the terms and sources of funding for the transaction;

(iv) If the savings and loan holding company has consolidated assets of less than \$150 million:

(A) A pro forma parent-only balance sheet as of the most recent quarter showing credit and debit adjustments that reflect the proposed transaction; and

(B) A description of the purchase price and the terms and sources of funding for the transaction and, if the transaction is debt funded, one-year income statement and cash flow projections for the parent company, and the sources and schedule for retiring any debt incurred in the transaction;

(v) For each insured depository institution whose Tier 1 capital, total capital, total assets or risk-weighted assets change as a result of the transaction, the total risk-weighted assets, total assets, Tier 1 capital and total capital of the institution on a pro forma basis; and

(vi) A description of the management expertise, internal controls and risk management systems that will be utilized in the conduct of the proposed service or activity; and

(vii) A copy of the purchase agreements, and balance sheet and income statements for the most recent quarter and year-end for any company to be acquired.

(d) *Notice provided to Board.* The Reserve Bank shall immediately send to the Board a copy of any notice received under paragraphs (c)(1) or (c)(2) of this section.

(e) *Notice to public*—(1) the Reserve Bank shall notify the Board for publication in the FEDERAL REGISTER immediately upon receipt by the Reserve Bank of:

(i) A notice under paragraph (c) of this section or

(ii) A written request that notice of a proposal under paragraph (c) of this section be published in the FEDERAL

REGISTER. Such a request may request that FEDERAL REGISTER publication occur up to 15 calendar days prior to submission of a notice under this subpart.

(2) The FEDERAL REGISTER notice published under this paragraph (e) shall invite public comment on the proposal, generally for a period of 15 days.

(f) *Action on notices*—(1) *Reserve Bank action*—(i) *In general.* Within 30 calendar days after receipt by the Reserve Bank of a notice filed pursuant to paragraphs (c)(1) or (c)(2) of this section, the Reserve Banks shall:

(A) Approve the notice; or

(B) Refer the notice to the Board for decision because action under delegated authority is not appropriate.

(ii) *Return of incomplete notice.* Within 7 calendar days of receipt, the Reserve Bank may return any notice as informationally incomplete that does not contain all of the information required by this section. The return of such a notice shall be deemed action on the notice.

(iii) *Notice of action.* The Reserve Bank shall promptly notify the savings and loan holding company of any action or referral under this paragraph.

(iv) *Close of public comment period.* The Reserve Bank shall not approve any notice under this paragraph (e)(1) of this section prior to the third business day after the close of the public comment period, unless an emergency exists that requires expedited or immediate action.

(2) *Board action; internal schedule.* The Board seeks to act on every notice referred to it for decision within 60 days of the date that the notice is filed with the Reserve Bank. If the Board is unable to act within this period, the Board shall notify the notificant and explain the reasons and the date by which the Board expects to act.

(3)(i) *Required time limit for System action.* The Board or the Reserve Bank shall act on any notice under this section within 60 days after the submission of a complete notice.

(ii) *Extension of required period for action.* The Board may extend the 60-day period required for Board action under paragraph (e)(3)(i) of this section for an additional 30 days upon notice to the notificant.

§ 238.54

(4) *Requests for additional information.* The Board or the Reserve Bank may modify the information requirements under this section or at any time request any additional information that either believes is needed for a decision on any notice under this section.

(5) *Tolling of period.* The Board or the Reserve Bank may at any time extend or toll the time period for action on a notice for any period with the consent of the notificant.

(g) *Modification or termination of service or activity.* The Board may require a savings and loan holding company or subsidiary thereof which has commenced a service or activity pursuant to this section to modify or terminate, in whole or in part, such service or activity as the Board finds necessary in order to ensure compliance with the provisions and purposes of this part and of section 10 of the Home Owners' Loan Act, as amended, or to prevent evasions thereof.

(h) *Alterations.* Except as may be otherwise provided in a resolution by or on behalf of the Board in a particular case, a service or activity commenced pursuant to this section shall not be altered in any material respect from that described in the notice filed under paragraph (c)(1) of this section, unless before making such alteration notice of intent to do so is filed in compliance with the appropriate procedures of said paragraph (c)(1) of this section.

(i) *Service corporation subsidiaries of savings associations.* The Board hereby approves without application the furnishing or performing of such services or engaging in such activities as permitted by the OTS pursuant to § 545.74 of this title, as in effect on March 5, 1987, if such service or activity is conducted by a service corporation subsidiary of a subsidiary savings association of a savings and loan holding company and if such service corporation has legal power to do so.

§ 238.54 Permissible bank holding company activities of savings and loan holding companies.

(a) *General.* For purposes of § 238.51(b)(6)(i), the services and activities permissible for bank holding companies pursuant to regulations that the Board has promulgated pursuant to

12 CFR Ch. II (1–1–16 Edition)

section 4(c) of the Bank Holding Company Act are permissible for savings and loan holding companies, or subsidiaries thereof that are neither savings associations nor service corporation subsidiaries of subsidiary savings associations: *Provided*, That no savings and loan holding company shall commence any activity described in this paragraph (a) without the prior approval of this Board pursuant to paragraph (b) of this section, unless—

(1) The holding company received a rating of satisfactory or above prior to January 1, 2008, or a composite rating of “1” or “2” thereafter, in its most recent examination, and is not in a troubled condition as defined in § 238.72, and the holding company does not propose to commence the activity by an acquisition (in whole or in part) of a going concern; or

(2) The activity is permissible under authority other than section 10(c)(2)(F)(i) of the HOLA without prior notice or approval. Where an activity is within the scope of both § 238.53 and this section, the procedures of § 238.53 shall govern.

(b) *Procedures for applications.* Applications to commence any activity prescribed under paragraph (a) of this section shall be filed with the appropriate Reserve Bank on the designated form. The Board must act upon such application according to the procedures of § 238.53(d), (e), and (f).

(c) *Factors considered in acting on applications.* In evaluating an application filed under paragraph (b) of this section, the Board shall consider whether the performance by the applicant of the activity can reasonably be expected to produce benefits to the public (such as greater convenience, increased competition, or gains in efficiency) that outweigh possible adverse effects (such as undue concentration of resources, decreased or unfair competition, conflicts of interest, or unsound financial practices). This consideration includes an evaluation of the financial and managerial resources of the applicant, including its subsidiaries, and of any company to be acquired, and the effect of the proposed transaction on those resources.

Subpart G—Financial Holding Company Activities

§ 238.61 Scope.

Section 10(c)(2)(H) of the HOLA (12 U.S.C. 1467a(c)(2)(H)) permits a savings and loan holding company to engage in activities that are permissible for a financial holding company if the savings and holding company meets the criteria to qualify as a financial holding company and complies with all of the requirements applicable to a financial holding company under sections 4(l) and 4(m) of the BHC Act as if the savings and loan holding company was a bank holding company. This subpart provides the requirements and restrictions for a savings and holding company to be treated as a financial holding company for the purpose of engaging in financial holding company activities. This subpart does not apply to savings and loan holding companies described in section 10(c)(9)(C) of the HOLA (12 U.S.C. 1467a(c)(9)(C)).

§ 238.62 Definitions.

For the purposes of this subpart:

(a) *Financial holding company activities* refers to activities permissible under section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)) and § 225.86 of this chapter.

(b) [Reserved]

§ 238.63 Requirements to engage in financial holding company activities.

(a) *In general.* In order for a savings and loan holding company to engage in financial holding company activities:

(1) The savings and loan holding company and all depository institutions controlled by the savings and loan holding company must be and remain well capitalized;

(2) The savings and loan holding company and all depository institutions controlled by the savings and loan company must be and remain well managed; and

(3) The savings and loan holding company must have made an effective election to be treated as a financial holding company.

§ 238.64 Election required.

(a) *In general.* Except as provided below, a savings and loan holding com-

pany that wishes to engage in financial holding company activities must have an effective election to be treated as a financial holding company.

(b) *Activities performed under separate HOLA authority.* A savings and loan holding company that conducts only the following activities is not required to elect to be treated as a financial holding company:

(1) *BHC Act section 4(c)(8) activities.* Activities permissible under section 10(c)(2)(F)(i) of the HOLA (12 U.S.C. 1467a(c)(2)(F)(i)).

(2) *Insurance agency or escrow business activities.* Activities permissible under section 10(c)(2)(B) of the HOLA (12 U.S.C. 1467a(c)(2)(B)).

(3) *“1987 List” activities.* Activities permissible under section 10(c)(2)(F)(ii) of the HOLA (12 U.S.C. 1467a(c)(2)(F)(ii)).

(c) *Existing requirements apply.* A savings and loan holding company that has not made an effective election to be treated as a financial holding company and that conducts the activities described in paragraphs (b)(1) through (3) of this section remains subject to any rules and requirements applicable to the conduct of such activities.

§ 238.65 Election procedures.

(a) *Filing requirement.* A savings and loan holding company may elect to be treated as a financial holding company by filing a written declaration with the appropriate Reserve Bank. A declaration by a savings and loan holding company is considered to be filed on the date that all information required by paragraph (b) of this section is received by the appropriate Reserve Bank.

(b) *Contents of declaration.* To be deemed complete, a declaration must:

(1) State that the savings and loan holding company elects to be treated as a financial holding company in order to engage in financial holding company activities;

(2) Provide the name and head office address of the savings and loan holding company and of each depository institution controlled by the savings and loan holding company;

(3) Certify that the savings and loan holding company and each depository institution controlled by the savings

§ 238.65

12 CFR Ch. II (1–1–16 Edition)

and loan holding company is well capitalized as of the date the savings and loan holding company submits its declaration;

(4) Certify that the savings and loan holding company and each savings association controlled by the savings and loan holding company is well managed as of the date the savings and loan holding company submits its declaration;

(c) *Effectiveness of election.* An election by a savings and loan holding company to be treated as a financial holding company shall not be effective if, during the period provided in paragraph (d) of this section, the Board finds that, as of the date the declaration was filed with the appropriate Reserve Bank:

(1) Any insured depository institution controlled by the savings and loan holding company (except an institution excluded under paragraph (d) of this section) has not achieved at least a rating of “satisfactory record of meeting community credit needs” under the Community Reinvestment Act at the savings association’s most recent examination; or

(2) Any depository institution controlled by the bank holding company is not both well capitalized and well managed.

(d) *Consideration of the CRA performance of a recently acquired savings association.* Except as provided in paragraph (f) of this section, a savings association will be excluded for purposes of the review of the Community Reinvestment Act rating provisions of paragraph (c)(1) of this section if:

(1) The savings and loan holding company acquired the savings association during the 12-month period preceding the filing of an election under paragraph (a) of this section;

(2) The savings and loan holding company has submitted an affirmative plan to the appropriate Federal banking agency for the savings association to take actions necessary for the institution to achieve at least a rating of “satisfactory record of meeting community credit needs” under the Community Reinvestment Act at the next examination of the savings association; and

(3) The appropriate Federal banking agency for the savings association has accepted the plan described in paragraph (d)(2) of this section.

(e) *Effective date of election—(1) In general.* An election filed by a savings and loan holding company under paragraph (a) of this section is effective on the 31st calendar day after the date that a complete declaration was filed with the appropriate Reserve Bank, unless the Board notifies the savings and loan holding company prior to that time that the election is ineffective.

(2) *Earlier notification that an election is effective.* The Board or the appropriate Reserve Bank may notify a savings and loan holding company that its election to be treated as a financial holding company is effective prior to the 31st day after the date that a complete declaration was filed with the appropriate Reserve Bank. Such a notification must be in writing.

(3) *Special effective date rules for the OTS transfer date—(i) Deadline for filing declaration.* For savings and loan holding companies that meet the requirements of §238.63 and that are engaged in financial holding company activities pursuant to existing authority as of July 21, 2011, an election under paragraph (a) must be filed with the appropriate Reserve Bank by December 31, 2011. The election must be accompanied by a description of the financial holding company activities conducted by the savings and loan holding company.

(ii) *Effective date of election.* An election filed under paragraph (e)(3)(i) of this section is effective on the 61st calendar day after the date that a complete declaration was filed with the appropriate Reserve Bank, unless the Board notifies the savings and loan holding company prior to that time that the election is ineffective.

(iii) *Earlier notification that an election is effective.* The Board or the appropriate Reserve Bank may notify a savings and loan holding company that its election under paragraph (e)(3)(i) of this section to be treated as a financial holding company is effective prior to the 61st day after the date that a complete declaration was filed with the appropriate Reserve Bank. Such notification must be in writing.

Federal Reserve System

§ 238.66

(iv) *Filings by savings and loan holding companies that do not meet requirements.* (A) For savings and loan holding companies that are engaged in financial holding company activities as of July 21, 2011 but do not meet the requirements of § 238.63, a declaration must be filed with the appropriate Reserve Bank by December 31, 2011, specifying:

(1) The name and head office address of the savings and loan holding company and of each depository institution controlled by the savings and loan holding company;

(2) The financial holding company activities that the savings and loan holding company is engaged in;

(3) The requirements of § 238.63 that the savings and loan holding company does not meet; and

(4) A description of how the savings and loan holding company will achieve compliance with § 238.63 prior to June 30, 2012.

(B) A savings and loan holding company covered by this subparagraph will be subject to:

(1) The notice, remediation agreement, divestiture, and any other requirements described in § 225.83 of this chapter; or

(2) The activities limitations and any other requirements described in § 225.84 of this chapter, depending on which requirements of § 238.63 the savings and loan holding company does not meet.

(f) *Requests to be treated as a financial holding company submitted as part of an application to become a savings and loan holding company.* A company that is not a savings and loan holding company and has applied for the Board's approval to become a savings and loan holding company under section 10(e) of the HOLA (12 U.S.C. 1467a(e)) may as part of that application submit a request to be treated as a financial holding company. Such requests shall be made and reviewed by the Board as described in § 225.82(f) of this chapter.

(g) *Board's authority to exercise supervisory authority over a savings and loan holding company treated as a financial holding company.* An effective election to be treated as a financial holding company does not in any way limit the Board's statutory authority under the HOLA, the Federal Deposit Insurance Act, or any other relevant Federal

statute to take appropriate action, including imposing supervisory limitations, restrictions, or prohibitions on the activities and acquisitions of a savings and loan holding company that has elected to be treated as a financial holding company, or enforcing compliance with applicable law.

§ 238.66 Ongoing requirements.

(a) *In general.* A savings and loan holding company with an effective election to be treated as a financial holding company is subject to the same requirements applicable to a financial holding company, under sections 4(l) and 4(m) of the Bank Holding Company Act and section 804(c) of the Community Reinvestment Act of 1977 (12 U.S.C. 2903(c)) as if the savings and loan holding company was a bank holding company.

(b) *Consequences of failing to continue to meet applicable capital and management requirements.* A savings and loan holding company with an effective election to be treated as a financial holding company that fails to meet applicable capital and management requirements at § 238.63 is subject to the notice, remediation agreement, divestiture, and any other requirements described in § 225.83 of this chapter.

(c) *Consequences of failing to continue to maintain a satisfactory or better rating under the Community Reinvestment Act at all insured depository institution subsidiaries.* A savings and loan holding company with an effective election to be treated as a financial holding company that fails to maintain a satisfactory or better rating under the Community Reinvestment Act at all insured deposit institution subsidiaries is subject to the activities limitations and any other requirements described in § 225.84 of this chapter.

(d) *Notice and approval requirements for conducting financial holding company activities; permissible activities.* A savings and loan holding company with an effective election to be treated as a financial holding company may conduct the activities listed in § 225.86 of this chapter subject to the notice, approval, and any other requirements described in §§ 225.85 through 225.89 of this chapter.

Subpart H—Notice of Change of Director or Senior Executive Officer

§ 238.71 Purpose.

This subpart implements 12 U.S.C. 1831i, which requires certain savings and loan holding companies to notify the Board before appointing or employing directors and senior executive officers.

§ 238.72 Definitions.

The following definitions apply to this subpart:

(a) *Director* means an individual who serves on the board of directors of a savings and loan holding company. This term does not include an advisory director who:

- (1) Is not elected by the shareholders;
- (2) Is not authorized to vote on any matters before the board of directors or any committee of the board of directors;
- (3) Provides only general policy advice to the board of directors or any committee of the board of directors; and
- (4) Has not been identified by the Board or Reserve Bank in writing as an individual who performs the functions of a director, or who exercises significant influence over, or participates in, major policymaking decisions of the board of directors.

(b) *Senior executive officer* means an individual who holds the title or performs the function of one or more of the following positions (without regard to title, salary, or compensation): president, chief executive officer, chief operating officer, chief financial officer, chief lending officer, or chief investment officer. *Senior executive officer* also includes any other person identified by the Board or Reserve Bank in writing as an individual who exercises significant influence over, or participates in, major policymaking decisions, whether or not hired as an employee.

(c) *Troubled condition* means:

- (1) A savings and loan holding company that has an unsatisfactory rating under the applicable holding company rating system, or that is informed in writing by the Board or Reserve Bank

that it has an adverse effect on its subsidiary savings association.

(2) A savings and loan holding company that is subject to a capital directive, a cease-and-desist order, a consent order, a formal written agreement, or a prompt corrective action directive relating to the safety and soundness or financial viability of the savings association, unless otherwise informed in writing by the Board or Reserve Bank; or

(3) A savings and loan holding company that is informed in writing by the Board or Reserve Bank that it is in troubled condition based on information available to the Board or Reserve Bank.

§ 238.73 Prior notice requirements.

(a) *Savings and loan holding company*. Except as provided under § 238.78, a savings and loan holding company must give the Board 30 days' written notice, as specified in § 238.74, before adding or replacing any member of its board of directors, employing any person as a senior executive officer, or changing the responsibilities of any senior executive officer so that the person would assume a different senior executive position if the savings and loan holding company is in troubled condition.

(b) *Notice by individual*. An individual seeking election to the board of directors of a savings and loan holding company described in paragraph (a) of this section that has not been nominated by management, must either provide the prior notice required under paragraph (a) of this section or follow the process under § 238.78(b).

§ 238.74 Filing and processing procedures.

(a) *Filing notice*—(1) *Content*. The notice required in § 238.73 shall be filed with the appropriate Reserve Bank and shall contain:

(i) The information required by paragraph 6(A) of the Change in Bank Control Act (12 U.S.C. 1817(j)(6)(A)) as may be prescribed in the designated Board form;

(ii) Additional information consistent with the Federal Financial Institutions Examination Council's Joint Statement of Guidelines on Conducting

Federal Reserve System

§ 238.76

Background Checks and Change in Control Investigations, as set forth in the designated Board form; and

(iii) Such other information as may be required by the Board or Reserve Bank.

(2) *Modification.* The Reserve Bank may modify or accept other information in place of the requirements of this section for a notice filed under this subpart.

(3) *Acceptance and processing of notice.* The 30-day notice period specified in section 238.73 shall begin on the date all information required to be submitted by the notificant pursuant to this section is received by the appropriate Reserve Bank. The Reserve Bank shall notify the savings and loan holding company or individual submitting the notice of the date on which all required information is received and the notice is accepted for processing, and of the date on which the 30-day notice period will expire. The Board or Reserve Bank may extend the 30-day notice period for an additional period of not more than 60 days by notifying the savings and loan holding company or individual filing the notice that the period has been extended and stating the reason for not processing the notice within the 30-day notice period.

(b) [Reserved]

§ 238.75 Standards for review.

(a) *Notice of disapproval.* The Board or Reserve Bank will disapprove a notice if, pursuant to the standard set forth in 12 U.S.C. 1831i(e), the Board or Reserve Bank finds that the competence, experience, character, or integrity of the proposed individual indicates that it would not be in the best interests of the depositors of the savings and loan holding company or of the public to permit the individual to be employed by, or associated with, the savings and loan holding company. If the Board or Reserve Bank disapproves a notice, it will issue a written notice that explains why the Board or Reserve Bank disapproved the notice. The Board or Reserve Bank will send the notice to the savings and loan holding company and the individual.

(b) *Appeal of a notice of disapproval.* (1) A disapproved individual or a regulated institution that has submitted a

notice that is disapproved under this section may appeal the disapproval to the Board within 15 days of the effective date of the notice of disapproval. An appeal shall be in writing and explain the reasons for the appeal and include all facts, documents, and arguments that the appealing party wishes to be considered in the appeal, and state whether the appealing party is requesting an informal hearing.

(2) Written notice of the final decision of the Board shall be sent to the appealing party within 60 days of the receipt of an appeal, unless the appealing party's request for an informal hearing is granted.

(3) The disapproved individual may not serve as a director or senior executive officer of the state member bank or bank holding company while the appeal is pending.

(c) *Informal hearing.* (1) An individual or regulated institution whose notice under this section has been disapproved may request an informal hearing on the notice. A request for an informal hearing shall be in writing and shall be submitted within 15 days of a notice of disapproval. The Board may, in its sole discretion, order an informal hearing if the Board finds that oral argument is appropriate or necessary to resolve disputes regarding material issues of fact.

(2) An informal hearing shall be held within 30 days of a request, if granted, unless the requesting party agrees to a later date.

(3) Written notice of the final decision of the Board shall be given to the individual and the regulated institution within 60 days of the conclusion of any informal hearing ordered by the Board, unless the requesting party agrees to a later date.

§ 238.76 Waiting period.

(a) *At expiration of period.* A proposed director or senior executive officer may begin service at the end of the 30-day period and any extension as provided under § 238.74 unless the Board or Reserve Bank notifies you that it has disapproved the notice before the end of the period.

(b) *Prior to expiration of period.* A proposed director or senior executive officer may begin service before the end of the 30-day period and any extension as

§ 238.77

provided under section 238.74 of this section, if the Board or the Reserve Bank notifies in writing the savings and loan holding company or individual submitting the notice of the Board's or Reserve Bank's intention not to disapprove the notice.

§ 238.77 Waiver of prior notice requirement.

(a) *Waiver request.* An individual may serve as a director or senior executive officer before filing a notice under this subpart if the Board or Reserve Bank finds that:

(1) Delay would threaten the safety or soundness of the savings and loan holding company;

(2) Delay would not be in the public interest; or

(3) Other extraordinary circumstances exist that justify waiver of prior notice.

(b) *Automatic waiver.* An individual may serve as a director upon election to the board of directors before filing a notice under this subpart, if the individual:

(1) Is not proposed by the management of the savings and loan holding company;

(2) Is elected as a new member of the board of directors at a meeting of the savings and loan holding company; and

(3) Provides to the appropriate Reserve Bank all the information required in § 238.74 within two (2) business days after the individual's election.

(c) *Subsequent Board or Reserve Bank action.* The Board or Reserve Bank may disapprove a notice within 30 days after the Board or Reserve Bank issues a waiver under paragraph (a) of this section or within 30 days after the election of an individual who has filed a notice and is serving pursuant to an automatic waiver under paragraph (b) of this section.

Subpart I—Prohibited Service at Savings and Loan Holding Companies

§ 238.81 Purpose.

This subpart implements section 19(e)(1) of the Federal Deposit Insurance Act (FDIA), which prohibits persons who have been convicted of certain criminal offenses or who have

12 CFR Ch. II (1–1–16 Edition)

agreed to enter into a pre-trial diversion or similar program in connection with a prosecution for such criminal offenses from occupying various positions with a savings and loan holding company. This part also implements section 19(e)(2) of the FDIA, which permits the Board to provide exemptions, by regulation or order, from the application of the prohibition. This subpart provides an exemption for savings and loan holding company employees whose activities and responsibilities are limited solely to agriculture, forestry, retail merchandising, manufacturing, or public utilities operations, and a temporary exemption for certain persons who held positions with respect to a savings and loan holding company as of October 13, 2006. The subpart also describes procedures for applying to the Board for an exemption.

§ 238.82 Definitions.

The following definitions apply to this subpart:

(a) *Institution-affiliated party* is defined at 12 U.S.C. 1813(u), except that the phrase “savings and loan holding company” is substituted for “insured depository institution” each place that it appears in that definition.

(b) *Enforcement Counsel* means any individual who files a notice of appearance to serve as counsel on behalf of the Board in the proceeding.

(c) *Person* means an individual and does not include a corporation, firm or other business entity.

(d) *Savings and loan holding company* is defined at § 238.2(m), but excludes a subsidiary of a savings and loan holding company that is not itself a savings and loan holding company.

§ 238.83 Prohibited actions.

(a) *Person.* If a person was convicted of a criminal offense described in § 238.84, or agreed to enter into a pre-trial diversion or similar program in connection with a prosecution for such a criminal offense, he or she may not:

(1) Become, or continue as, an institution-affiliated party with respect to any savings and loan holding company.

(2) Own or control, directly or indirectly, any savings and loan holding company. A person will own or control a savings and loan holding company if

Federal Reserve System

§ 238.86

he or she owns or controls that company under subpart D of this part.

(3) Otherwise participate, directly or indirectly, in the conduct of the affairs of any savings and loan holding company.

(b) *Savings and loan holding company.* A savings and loan holding company may not permit any person described in paragraph (a) of this section to engage in any conduct or to continue any relationship prohibited under that paragraph.

§ 238.84 Covered convictions or agreements to enter into pre-trial diversions or similar programs.

(a) *Covered convictions and agreements.* Except as described in § 238.85, this subpart covers:

(1) Any conviction of a criminal offense involving dishonesty, breach of trust, or money laundering. Convictions do not cover arrests, pending cases not brought to trial, acquittals, convictions reversed on appeal, pardoned convictions, or expunged convictions.

(2) Any agreement to enter into a pretrial diversion or similar program in connection with a prosecution for a criminal offense involving dishonesty, breach of trust or money laundering. A pretrial diversion or similar program is a program involving a suspension or eventual dismissal of charges or of a criminal prosecution based upon an agreement for treatment, rehabilitation, restitution, or other non-criminal or non-punitive alternative.

(b) *Dishonesty or breach of trust.* A determination whether a criminal offense involves dishonesty or breach of trust is based on the statutory elements of the crime.

(1) "Dishonesty" means directly or indirectly to cheat or defraud, to cheat or defraud for monetary gain or its equivalent, or to wrongfully take property belonging to another in violation of any criminal statute. Dishonesty includes acts involving a want of integrity, lack of probity, or a disposition to distort, cheat, or act deceitfully or fraudulently, and may include crimes which federal, state or local laws define as dishonest.

(2) "Breach of trust" means a wrongful act, use, misappropriation, or omis-

sion with respect to any property or fund which has been committed to a person in a fiduciary or official capacity, or the misuse of one's official or fiduciary position to engage in a wrongful act, use, misappropriation, or omission.

§ 238.85 Adjudications and offenses not covered.

(a) *Youthful offender or juvenile delinquent.* This subpart does not cover any adjudication by a court against a person as:

(1) A youthful offender under any youthful offender law; or

(2) A juvenile delinquent by a court with jurisdiction over minors as defined by state law.

(b) *De minimis criminal offense.* This subpart does not cover *de minimis* criminal offenses. A criminal offense is *de minimis* if:

(1) The person has only one conviction or pretrial diversion or similar program of record;

(2) The offense was punishable by imprisonment for a term of less than one year, a fine of less than \$1,000, or both, and the person did not serve time in jail.

(3) The conviction or program was entered at least five years before the date the person first held a position described in § 238.83(a); and

(4) The offense did not involve an insured depository institution, insured credit union, or other banking organization (including a savings and loan holding company, bank holding company, or financial holding company).

(5) The person must disclose the conviction or pretrial diversion or similar program to all insured depository institutions and other banking organizations the affairs of which he or she participates.

(6) The person must be covered by a fidelity bond to the same extent as others in similar positions with the savings and loan holding company.

§ 238.86 Exemptions.

(a) *Employees.* An employee of a savings and loan holding company is exempt from the prohibition in § 238.83, if all of the following conditions are met:

§ 238.87

(1) The employee's responsibilities and activities are limited solely to agriculture, forestry, retail merchandising, manufacturing, or public utilities operations.

(2) The savings and loan holding company maintains a list of all policymaking positions and reviews this list annually.

(3) The employee's position does not appear on the savings and loan holding company's list of policymaking positions, and the employee does not, in fact, exercise any policymaking function with the savings and loan holding company.

(4) The employee:

(i) Is not an institution-affiliated party of the savings and loan holding company other than by virtue of the employment described in paragraph (a) of this section.

(ii) Does not own or control, directly or indirectly, the savings and loan holding company; and

(iii) Does not participate, directly or indirectly, in the conduct of the affairs of the savings and loan holding company.

(b) *Temporary exemption.* (1) Any prohibited person who was an institution affiliated party with respect to a savings and loan holding company, who owned or controlled, directly or indirectly a savings and loan holding company, or who otherwise participated directly or indirectly in the conduct of the affairs of a savings and loan holding company on October 13, 2006, may continue to hold the position with the savings and loan holding company.

(2) This exemption expires on December 31, 2012, unless the savings and loan holding company or the person files an application seeking a case-by-case exemption for the person under § 238.87 by that date. If the savings and loan holding company or the person files such an application, the temporary exemption expires on:

(i) The date of issuance of a Board approval of the application under § 238.89(a);

(ii) The expiration of the 20-day period for filing a request for hearing under § 238.90(a) provided there is no timely request for hearing following the issuance by the Board of a denial of the application under that section;

12 CFR Ch. II (1-1-16 Edition)

(iii) The date that the Board denies a timely request for hearing under § 238.90(b) following the issuance of a Board denial of the application under § 238.89(b);

(iv) The date that the Board issues a decision under § 238.90(d); or

(v) The date an applicant withdraws the application.

§ 238.87 Filing procedures.

(a) *Who may file.* (1) A savings and loan holding company or a person who was convicted of a criminal offense described in § 238.84 or who has agreed to enter into a pre-trial diversion or similar program in connection with a prosecution for such a criminal offense may file an application with the Board seeking an exemption from the prohibitions in this subpart.

(2) A savings and loan holding company or a person may seek an exemption only for a designated position (or positions) with respect to a named savings and loan holding company.

(3) A savings and loan holding company or a person may not file an application less than one year after the latter of the date of a denial of the same exemption under § 238.89(b), § 238.90(a) or § 238.90(d).

(b) *Prohibition pending Board action.* Unless a savings and loan holding company or a person is exempt under § 238.86(b), the prohibitions in § 238.83 continue to apply pending Board action on the application.

§ 238.88 Factors for review.

(a) *Board review.* (1) In determining whether to approve an exemption application filed under § 238.87, the Board will consider the extent to which the position that is the subject of the application enables a person to:

(i) Participate in the major policymaking functions of the savings and loan holding company; or

(ii) Threaten the safety and soundness of any insured depository institution that is controlled by the savings and loan holding company, the interests of its depositors, or the public confidence in the insured depository institution.

(2) The Board will also consider whether the applicant has demonstrated the person's fitness to hold

Federal Reserve System

§ 238.90

the described position. Some positions may be approved without an extensive review of a person's fitness because the position does not enable a person to take the actions described in paragraph (a)(1) of this section.

(b) *Factors.* In making the determinations under paragraph (a) of this section, the Board will consider the following factors:

(1) The position;

(2) The amount of influence and control a person holding the position will be able to exercise over the affairs and operations of the savings and loan holding company and the insured depository institution;

(3) The ability of the management of the savings and loan holding company to supervise and control the activities of a person holding the position;

(4) The level of ownership that the person will have at the savings and loan holding company;

(5) The specific nature and circumstances of the criminal offense. The question whether a person who was convicted of a crime or who agreed to enter into a pretrial diversion or similar program for a crime was guilty of that crime is not relevant;

(6) Evidence of rehabilitation; and

(7) Any other relevant factor.

§ 238.89 Board action.

(a) *Approval.* The Board will notify an applicant if an application under this subpart is approved. An approval by the Board may include such conditions as the Board determines to be appropriate.

(b) *Denial.* If Board denies an application, the Board will notify an applicant promptly.

§ 238.90 Hearings.

(a) *Hearing requests.* Within 20 days of the date of issuance of a denial of an application filed under this subpart, a savings and loan holding company or a person whose application the Board has denied may file a written request demonstrating good cause for a hearing on the denial.

(b) *Board review of hearing request.* The Board will review the hearing request to determine if the savings and loan holding company or person has demonstrated good cause for a hearing

on the application. Within 30 days after the filing of a timely request for a hearing, the Board will notify the savings and loan holding company or person in writing of its decision to grant or deny the hearing request. If the Board grants the request for a hearing, it will order a hearing to be commenced within 60 days of the issuance of the notification. Upon the request of a party, the Board may at its discretion order a later hearing date.

(c) *Hearing procedures.* The following procedures apply to hearings under this subpart.

(1) The hearing shall be held in Washington, DC, or at another designated place, before a presiding officer designated by the Board.

(2) An applicant may elect in writing to have the matter determined on the basis of written submissions, rather than an oral hearing.

(3) The parties to the hearing are Enforcement Counsel and the applicant.

(4) The provisions of §§ 263.2, 263.4, 263.6 through 263.12, and 263.16 of this chapter apply to the hearing.

(5) Discovery is not permitted.

(6) A party may introduce relevant and material documents and make oral argument at the hearing.

(7) At the discretion of the presiding officer, witnesses may be presented within specified time limits, provided that a list of witnesses is furnished to the presiding officer and to all other parties prior to the hearing. Witnesses must be sworn, unless otherwise directed by the presiding officer. The presiding officer may ask questions of any witness. Each party may cross-examine any witness presented by the opposing party. The Board will furnish a transcript of the proceedings upon an applicant's request and upon the payment of the costs of the transcript.

(8) The presiding officer has the power to administer oaths and affirmations, to take or cause to be taken depositions of unavailable witnesses, and to issue, revoke, quash, or modify subpoenas and subpoenas *duces tecum*. If the presentation of witnesses is permitted, the presiding officer may require the attendance of witnesses from any state, territory, or other place subject to the jurisdiction of the United

§ 238.91

States at any location where the proceeding is being conducted. Witness fees are paid in accordance with section 263.14 of this chapter.

(9) Upon the request of a party, the record will remain open for five business days following the hearing for additional submissions to the record.

(10) Enforcement Counsel has the burden of proving a *prima facie* case that a person is prohibited from a position under section 19(e) of the FDIA. The applicant has the burden of proof on all other matters.

(11) The presiding officer must make recommendations to the Board, where possible, within 20 days after the last day for the parties to submit additions to the record.

(12) The presiding officer must forward his or her recommendation to the Board who shall promptly certify the entire record, including the presiding officer's recommendations. The Board's certification will close the record.

(d) *Decision.* After the certification of the record, the Board will notify the parties of its decision by issuing an order approving or denying the application.

(1) An approval order will require fidelity bond coverage for the position to the same extent as similar positions with the savings and loan holding company. The approval order may include such other conditions as may be appropriate.

(2) A denial order will include a summary of the relevant factors under § 238.88(b).

Subpart J—Management Official Interlocks

§ 238.91 Authority, purpose, and scope.

(a) *Authority.* This subpart is issued under the provisions of the Depository Institution Management Interlocks Act (Interlocks Act) (12 U.S.C. 3201 *et seq.*), as amended.

(b) *Purpose.* The purpose of the Interlocks Act and this subpart is to foster competition by generally prohibiting a management official from serving two nonaffiliated depository organizations in situations where the management interlock likely would have an anti-competitive effect.

12 CFR Ch. II (1–1–16 Edition)

(c) *Scope.* This subpart applies to management officials of savings and loan holding companies, and their affiliates.

§ 238.92 Definitions.

For purposes of this subpart, the following definitions apply:

(a) *Affiliate.* (1) The term *affiliate* has the meaning given in section 202 of the Interlocks Act (12 U.S.C. 3201). For purposes of that section 202, shares held by an individual include shares held by members of his or her immediate family. “Immediate family” means spouse, mother, father, child, grandchild, sister, brother, or any of their spouses, whether or not any of their shares are held in trust.

(2) For purposes of section 202(3)(B) of the Interlocks Act (12 U.S.C. 3201(3)(B)), an affiliate relationship involving a savings and loan holding company based on common ownership does not exist if the Board determines, after giving the affected persons the opportunity to respond, that the asserted affiliation was established in order to avoid the prohibitions of the Interlocks Act and does not represent a true commonality of interest between the depository organizations. In making this determination, the Board considers, among other things, whether a person, including members of his or her immediate family, whose shares are necessary to constitute the group owns a nominal percentage of the shares of one of the organizations and the percentage is substantially disproportionate to that person's ownership of shares in the other organization.

(b) *Area median income* means:

(1) The median family income for the metropolitan statistical area (MSA), if a depository organization is located in an MSA; or

(2) The statewide nonmetropolitan median family income, if a depository organization is located outside an MSA.

(c) *Community* means a city, town, or village, and contiguous or adjacent cities, towns, or villages.

(d) *Contiguous or adjacent cities, towns, or villages* means cities, towns, or villages whose borders touch each other or whose borders are within 10 road miles of each other at their closest

Federal Reserve System

§ 238.92

points. The property line of an office located in an unincorporated city, town, or village is the boundary line of that city, town, or village for the purpose of this definition.

(e) *Depository holding company* means a bank holding company or a savings and loan holding company (as more fully defined in section 202 of the Interlocks Act (12 U.S.C. 3201)) having its principal office located in the United States.

(f) *Depository institution* means a commercial bank (including a private bank), a savings bank, a trust company, a savings and loan association, a building and loan association, a homestead association, a cooperative bank, an industrial bank, or a credit union, chartered under the laws of the United States and having a principal office located in the United States. Additionally, a United States office, including a branch or agency, of a foreign commercial bank is a depository institution.

(g) *Depository institution affiliate* means a depository institution that is an affiliate of a depository organization.

(h) *Depository organization* means a depository institution or a depository holding company.

(i) *Low- and moderate-income areas* means census tracts (or, if an area is not in a census tract, block numbering areas delineated by the United States Bureau of the Census) where the median family income is less than 100 percent of the area median income.

(j) *Management official*. (1) The term *management official* means:

- (i) A director;
- (ii) An advisory or honorary director of a depository institution with total assets of \$100 million or more;
- (iii) A senior executive officer as that term is defined in §225.71(c) of this chapter;
- (iv) A branch manager;
- (v) A trustee of a depository organization under the control of trustees; and
- (vi) Any person who has a representative or nominee serving in any of the capacities in this paragraph (j)(1).

(2) The term *management official* does not include:

- (i) A person whose management functions relate exclusively to the business

of retail merchandising or manufacturing;

(ii) A person whose management functions relate principally to the business outside the United States of a foreign commercial bank; or

(iii) A person described in the provisos of section 202(4) of the Interlocks Act (12 U.S.C. 3201(4)) (referring to an officer of a State-chartered savings bank, cooperative bank, or trust company that neither makes real estate mortgage loans nor accepts savings).

(k) *Office* means a principal or branch office of a depository institution located in the United States. *Office* does not include a representative office of a foreign commercial bank, an electronic terminal, or a loan production office.

(l) *Person* means a natural person, corporation, or other business entity.

(m) *Relevant metropolitan statistical area (RMSA)* means an MSA, a primary MSA, or a consolidated MSA that is not comprised of designated Primary MSAs to the extent that these terms are defined and applied by the Office of Management and Budget.

(n) *Representative or nominee* means a natural person who serves as a management official and has an obligation to act on behalf of another person with respect to management responsibilities. The Board will find that a person has an obligation to act on behalf of another person only if the first person has an agreement, express or implied, to act on behalf of the second person with respect to management responsibilities. The Board will determine, after giving the affected persons an opportunity to respond, whether a person is a *representative or nominee*.

(o) *Savings association* means:

(1) Any Federal savings association (as defined in section 3(b)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(2)));

(2) Any state savings association (as defined in section 3(b)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(3))) the deposits of which are insured by the Federal Deposit Insurance Corporation; and

(3) Any corporation (other than a bank as defined in section 3(a)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(a)(1))) the deposits of which

§ 238.93

are insured by the Federal Deposit Insurance Corporation, that the Board of Directors of the Federal Deposit Insurance Corporation and the Comptroller of the Currency jointly determine to be operating in substantially the same manner as a savings association.

(p) *Total assets.* (1) The term *total assets* means assets measured on a consolidated basis and reported in the most recent fiscal year-end Consolidated Report of Condition and Income.

(2) The term *total assets* does not include:

(i) Assets of a diversified savings and loan holding company as defined by section 10(a)(1)(F) of the Home Owners' Loan Act (12 U.S.C. 1467a(a)(1)(F)) other than the assets of its depository institution affiliate;

(ii) Assets of a bank holding company that is exempt from the prohibitions of section 4 of the Bank Holding Company Act of 1956 pursuant to an order issued under section 4(d) of that Act (12 U.S.C. 1843(d)) other than the assets of its depository institution affiliate; or

(iii) Assets of offices of a foreign commercial bank other than the assets of its United States branch or agency.

(q) *United States* means the United States of America, any State or territory of the United States of America, the District of Columbia, Puerto Rico, Guam, American Samoa, and the Virgin Islands.

§ 238.93 Prohibitions.

(a) *Community.* A management official of a depository organization may not serve at the same time as a management official of an unaffiliated depository organization if the depository organizations in question (or a depository institution affiliate thereof) have offices in the same community.

(b) *RMSA.* A management official of a depository organization may not serve at the same time as a management official of an unaffiliated depository organization if the depository organizations in question (or a depository institution affiliate thereof) have offices in the same RMSA and each depository organization has total assets of \$50 million or more.

(c) *Major assets.* A management official of a depository organization with total assets exceeding \$2.5 billion (or

12 CFR Ch. II (1–1–16 Edition)

any affiliate of such an organization) may not serve at the same time as a management official of an unaffiliated depository organization with total assets exceeding \$1.5 billion (or any affiliate of such an organization), regardless of the location of the two depository organizations. The Board will adjust these thresholds, as necessary, based on the year-to-year change in the average of the Consumer Price Index for the Urban Wage Earners and Clerical Workers, not seasonally adjusted, with rounding to the nearest \$100 million. The Board will announce the revised thresholds by publishing a final rule without notice and comment in the FEDERAL REGISTER.

§ 238.94 Interlocking relationships permitted by statute.

The prohibitions of § 238.93 do not apply in the case of any one or more of the following organizations or to a subsidiary thereof:

(a) A depository organization that has been placed formally in liquidation, or which is in the hands of a receiver, conservator, or other official exercising a similar function;

(b) A corporation operating under section 25 or section 25A of the Federal Reserve Act (12 U.S.C. 601 *et seq.* and 12 U.S.C. 611 *et seq.*, respectively) (Edge Corporations and Agreement Corporations);

(c) A credit union being served by a management official of another credit union;

(d) A depository organization that does not do business within the United States except as an incident to its activities outside the United States;

(e) A State-chartered savings and loan guaranty corporation;

(f) A Federal Home Loan Bank or any other bank organized solely to serve depository institutions (a bankers' bank) or solely for the purpose of providing securities clearing services and services related thereto for depository institutions and securities companies;

(g) A depository organization that is closed or is in danger of closing as determined by the appropriate Federal depository institutions regulatory agency and is acquired by another depository organization. This exemption lasts for five years, beginning on the

Federal Reserve System

§ 238.96

date the depository organization is acquired;

(h)(1) A diversified savings and loan holding company (as defined in section 10(a)(1)(F) of the Home Owners' Loan Act (12 U.S.C. 1467a(a)(1)(F)) with respect to the service of a director of such company who also is a director of an unaffiliated depository organization if:

(i) Both the diversified savings and loan holding company and the unaffiliated depository organization notify their appropriate Federal depository institutions regulatory agency at least 60 days before the dual service is proposed to begin; and

(ii) The appropriate regulatory agency does not disapprove the dual service before the end of the 60-day period.

(2) The Board may disapprove a notice of proposed service if it finds that:

(i) The service cannot be structured or limited so as to preclude an anti-competitive effect in financial services in any part of the United States;

(ii) The service would lead to substantial conflicts of interest or unsafe or unsound practices; or

(iii) The notificant failed to furnish all the information required by the Board.

(3) The Board may require that any interlock permitted under this paragraph (h) be terminated if a change in circumstances occurs with respect to one of the interlocked depository organizations that would have provided a basis for disapproval of the interlock during the notice period; and

(i) Any savings association or any savings and loan holding company (as defined in section 10(a)(1)(D) of the Home Owners' Loan Act) which has issued stock in connection with a qualified stock issuance pursuant to section 10(q) of such Act, except that this paragraph (i) shall apply only with regard to service by a single management official of such savings association or holding company, or any subsidiary of such savings association or holding company, by a single management official of the savings and loan holding company which purchased the stock issued in connection with such qualified stock issuance, and shall apply only when the Board has determined that such service is consistent

with the purposes of the Interlocks Act and the Home Owners' Loan Act.

§ 238.95 Small market share exemption.

(a) *Exemption.* A management interlock that is prohibited by § 238.93 is permissible, if:

(1) The interlock is not prohibited by § 238.93(c); and

(2) The depository organizations (and their depository institution affiliates) hold, in the aggregate, no more than 20 percent of the deposits in each RMSA or community in which both depository organizations (or their depository institution affiliates) have offices. The amount of deposits shall be determined by reference to the most recent annual Summary of Deposits published by the FDIC for the RMSA or community.

(b) *Confirmation and records.* Each depository organization must maintain records sufficient to support its determination of eligibility for the exemption under paragraph (a) of this section, and must reconfirm that determination on an annual basis.

§ 238.96 General exemption.

(a) *Exemption.* The Board may by agency order exempt an interlock from the prohibitions in § 238.93 if the Board finds that the interlock would not result in a monopoly or substantial lessening of competition and would not present safety and soundness concerns. A depository organization may apply to the Board for an exemption.

(b) *Presumptions.* In reviewing an application for an exemption under this section, the Board will apply a rebuttable presumption that an interlock will not result in a monopoly or substantial lessening of competition if the depository organization seeking to add a management official:

(1) Primarily serves low- and moderate-income areas;

(2) Is controlled or managed by persons who are members of a minority group, or women;

(3) Is a depository institution that has been chartered for less than two years; or

(4) Is deemed to be in "troubled condition" as defined in § 238.72.

§ 238.97

(c) *Duration.* Unless a shorter expiration period is provided in the Board approval, an exemption permitted by paragraph (a) of this section may continue so long as it does not result in a monopoly or substantial lessening of competition, or is unsafe or unsound. If the Board grants an interlock exemption in reliance upon a presumption under paragraph (b) of this section, the interlock may continue for three years, unless otherwise provided by the Board in writing.

§ 238.97 Change in circumstances.

(a) *Termination.* A management official shall terminate his or her service or apply for an exemption if a change in circumstances causes the service to become prohibited. A change in circumstances may include an increase in asset size of an organization, a change in the delineation of the RMSA or community, the establishment of an office, an increase in the aggregate deposits of the depository organization, or an acquisition, merger, consolidation, or reorganization of the ownership structure of a depository organization that causes a previously permissible interlock to become prohibited.

(b) *Transition period.* A management official described in paragraph (a) of this section may continue to serve the depository organization involved in the interlock for 15 months following the date of the change in circumstances. The Board may shorten this period under appropriate circumstances.

§ 238.98 Enforcement.

Except as provided in this section, the Board administers and enforces the Interlocks Act with respect to savings and loan holding companies and its affiliates, and may refer any case of a prohibited interlocking relationship involving these entities to the Attorney General of the United States to enforce compliance with the Interlocks Act and this part. If an affiliate of a savings and loan holding company is subject to the primary regulation of another Federal depository organization supervisory agency, then the Board does not administer and enforce the Interlocks Act with respect to that affiliate.

12 CFR Ch. II (1–1–16 Edition)

§ 238.99 Interlocking relationships permitted pursuant to Federal Deposit Insurance Act.

A management official or prospective management official of a depository organization may enter into an otherwise prohibited interlocking relationship with another depository organization for a period of up to 10 years if such relationship is approved by the Federal Deposit Insurance Corporation pursuant to section 13(k)(1)(A)(v) of the Federal Deposit Insurance Act, as amended (12 U.S.C. 1823(k)(1)(A)(v)).

**Subpart K—Dividends by
Subsidiary Savings Associations**

§ 238.101 Authority and purpose.

This subpart implements section 10(f) of HOLA which requires savings associations with holding companies to provide the Board not less than 30 days' notice of a proposed declaration of a dividend. This subpart applies to all declarations of dividends by a subsidiary savings association of a savings and loan holding company.

§ 238.102 Definitions.

The following definitions apply to this subpart:

(a) *Appropriate Federal banking agency* has the same meaning as in 12 U.S.C. 1813(q) and includes, with respect to agreements entered into and conditions imposed prior to July 21, 2011, the Office of Thrift Supervision.

(b) *Dividend* means:

(1) A distribution of cash or other property to owners of a savings association made on account of their ownership, but not any dividend consisting only of shares or rights to purchase shares; or

(2) Any transaction that the Board determines, by order or regulation, to be in substance a dividend.

(c) *Shares* means common and preferred stock, and any options, warrants, or other rights for the acquisition of such stock. The term "share" also includes convertible securities upon their conversion into common or preferred stock. The term does not include convertible debt securities prior to their conversion into common or preferred stock or other securities that

Federal Reserve System

§ 238.112

are not equity securities at the time of a dividend.

§ 238.103 Filing requirement.

(a) *Filing.* A subsidiary savings association of a savings and loan holding company must file a notice with the appropriate Reserve Bank on the designated form at least 30 days before the proposed declaration of a dividend by its board of directors.

(b) *Schedules.* A notice may include a schedule proposing dividends over a specified period, not to exceed 12 months.

§ 238.104 Board action and criteria for review.

(a) *Board action.* (1) A subsidiary savings association of a savings and loan holding company may declare a proposed dividend after the end of a 30-day review period commencing on the date of submission to the Federal Reserve System of the complete record on the notice, unless the Board or Reserve Bank disapproves the notice before the end of the period.

(2) A subsidiary savings association of a savings and loan holding company may declare a proposed dividend before the end of the 30-day period if the Board or Reserve Bank notifies the applicant in writing of the Board's or Reserve Bank's intention not to disapprove the notice.

(b) *Criteria.* The Board or Reserve Bank may disapprove a notice, in whole or in part, if the Board or Reserve Bank makes any of the following determinations.

(1) Following the dividend the subsidiary savings association will be undercapitalized, significantly undercapitalized, or critically undercapitalized as set forth in applicable regulations under 12 U.S.C. 1831o.

(2) The proposed dividend raises safety or soundness concerns.

(3) The proposed dividend violates a prohibition contained in any statute, regulation, enforcement action, or agreement between the subsidiary savings association or any savings and loan holding company of which it is a subsidiary and an appropriate Federal banking agency, a condition imposed on the subsidiary savings association or any savings and loan holding com-

pany of which it is a subsidiary in an application or notice approved by an appropriate Federal banking agency, or any formal or informal enforcement action involving the subsidiary savings association or any savings and loan holding company of which it is a subsidiary. If so, the Board will determine whether it may permit the dividend notwithstanding the prohibition, condition, or enforcement action.

Subpart L—Investigative Proceedings and Formal Examination Proceedings

§ 238.111 Scope.

This part prescribes rules of practice and procedure applicable to the conduct of investigative proceedings under section 10(g)(2) of the Home Owners' Loan Act, as amended, 12 U.S.C. 1467a(g)(2) ("HOLA") and to the conduct of formal examination proceedings with respect to savings and loan holding companies and their affiliates under section 5(d)(1)(B) of the HOLA, as amended, 12 U.S.C. 1464(d)(1)(B) or section 7(j)(15) of the Federal Deposit Insurance Act, as amended, 12 U.S.C. 1817(j)(15) ("FDIA"), section 8(n) of the FDIA, 12 U.S.C. 1818(n), or section 10(c) of the FDIA, 12 U.S.C. 1820(c). This part does not apply to adjudicatory proceedings as to which hearings are required by statute, the rules for which are contained in part 262 of this chapter.

§ 238.112 Definitions.

As used in this part:

(a) *Investigative proceeding* means an investigation conducted under section 10(g)(2) of the HOLA;

(b) *Formal examination proceeding* means the administration of oaths and affirmations, taking and preserving of testimony, requiring the production of books, papers, correspondence, memoranda, and all other records, the issuance of subpoenas, and all related activities in connection with examination of savings and loan holding companies and their affiliates conducted pursuant to section 5(d)(1)(B) of the HOLA, section 7(j)(15) of the FDIA, section 8(n) of the FDIA or section 10(c) of the FDIA; and

§ 238.113

(c) *Designated representative* means the person or persons empowered by the Board to conduct an investigative proceeding or a formal examination proceeding.

§ 238.113 Confidentiality of proceedings.

All formal examination proceedings shall be private and, unless otherwise ordered by the Board, all investigative proceedings shall also be private. Unless otherwise ordered or permitted by the Board, or required by law, and except as provided in §§ 238.114 and 238.115, the entire record of any investigative proceeding or formal examination proceeding, including the resolution of the Board or its delegate(s) authorizing the proceeding, the transcript of such proceeding, and all documents and information obtained by the designated representative(s) during the course of said proceedings shall be confidential.

§ 238.114 Transcripts.

Transcripts or other recordings, if any, of investigative proceedings or formal examination proceedings shall be prepared solely by an official reporter or by any other person or means authorized by the designated representative. A person who has submitted documentary evidence or given testimony in an investigative proceeding or formal examination proceeding may procure a copy of his own documentary evidence or transcript of his own testimony upon payment of the cost thereof; *provided*, that a person seeking a transcript of his own testimony must file a written request with the Board stating the reason he desires to procure such transcript, and the Board may for good cause deny such request. In any event, any witness (or his counsel) shall have the right to inspect the transcript of the witness' own testimony.

§ 238.115 Rights of witnesses.

(a) Any person who is compelled or requested to furnish documentary evidence or give testimony at an investigative proceeding or formal examination proceeding shall have the right to examine, upon request, the Board resolution authorizing such proceeding. Copies of such resolution shall be fur-

12 CFR Ch. II (1-1-16 Edition)

nished, for their retention, to such persons only with the written approval of the Board.

(b) Any witness at an investigative proceeding or formal examination proceeding may be accompanied and advised by an attorney personally representing that witness.

(1) Such attorney shall be a member in good standing of the bar of the highest court of any state, Commonwealth, possession, territory, or the District of Columbia, who has not been suspended or debarred from practice by the bar of any such political entity or before the Board in accordance with the provisions of part 263 of this chapter and has not been excluded from the particular investigative proceeding or formal examination proceeding in accordance with paragraph (b)(3) of this section.

(2) Such attorney may advise the witness before, during, and after the taking of his testimony and may briefly question the witness, on the record, at the conclusion of his testimony, for the sole purpose of clarifying any of the answers the witness has given. During the taking of the testimony of a witness, such attorney may make summary notes solely for his use in representing his client. All witnesses shall be sequestered, and, unless permitted in the discretion of the designated representative, no witness or accompanying attorney may be permitted to be present during the taking of testimony of any other witness called in such proceeding. Neither attorney(s) for the association(s) that are the subjects of the investigative proceedings or formal examination proceedings, nor attorneys for any other interested persons, shall have any right to be present during the testimony of any witness not personally being represented by such attorney.

(3) The Board, for good cause, may exclude a particular attorney from further participation in any investigation in which the Board has found the attorney to have engaged in dilatory, obstructionist, egregious, contemptuous or contumacious conduct. The person conducting an investigation may report to the Board instances of apparently dilatory, obstructionist, egregious, contemptuous or contumacious conduct on the part of an attorney.

After due notice to the attorney, the Board may take such action as the circumstances warrant based upon a written record evidencing the conduct of the attorney in that investigation or such other or additional written or oral presentation as the Board may permit or direct.

§ 238.116 Obstruction of proceedings.

The designated representative shall report to the Board any instances where any witness or counsel has engaged in dilatory, obstructionist, or contumacious conduct or has otherwise violated any provision of this part during the course of an investigative proceeding or formal examination proceeding; and the Board may take such action as the circumstances warrant, including the exclusion of counsel from further participation in such proceeding.

§ 238.117 Subpoenas.

(a) *Service.* Service of a subpoena in connection with any investigative proceeding or formal examination proceeding shall be effected in the following manner:

(1) *Service upon a natural person.* Service of a subpoena upon a natural person may be effected by handing it to such person; by leaving it at his office with the person in charge thereof, or, if there is no one in charge, by leaving it in a conspicuous place therein; by leaving it at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein; by mailing it to him by registered or certified mail or by an express delivery service at his last known address; or by any method whereby actual notice is given to him.

(2) *Service upon other persons.* When the person to be served is not a natural person, service of the subpoena may be effected by handing the subpoena to a registered agent for service, or to any officer, director, or agent in charge of any office of such person; by mailing it to any such representative by registered or certified mail or by an express delivery service at his last known address; or by any method whereby actual notice is given to such person.

(b) *Motions to quash.* Any person to whom a subpoena is directed may,

prior to the time specified therein for compliance, but in no event more than 10 days after the date of service of such subpoena, apply to the Board or its designee to quash or modify such subpoena, accompanying such application with a statement of the reasons therefore. The Board or its designee, as appropriate, may:

- (1) Deny the application;
- (2) Quash or revoke the subpoena;
- (3) Modify the subpoena; or

(4) Condition the granting of the application on such terms as the Board or its designee determines to be just, reasonable, and proper.

(c) *Attendance of witnesses.* Subpoenas issued in connection with an investigative proceeding or formal examination proceeding may require the attendance and/or testimony of witnesses from any State or territory of the United States and the production by such witnesses of documentary or other tangible evidence at any designated place where the proceeding is being (or is to be) conducted. Foreign nationals are subject to such subpoenas if such service is made upon a duly authorized agent located in the United States.

(d) *Witness fees and mileage.* Witnesses summoned in any proceeding under this part shall be paid the same fees and mileage that are paid witnesses in the district courts of the United States. Such fees and mileage need not be tendered when the subpoena is issued on behalf of the Board by any of its designated representatives.

PART 239—MUTUAL HOLDING COMPANIES (REGULATION MM)

Subpart A—General Provisions

Sec.

239.1 Authority, purpose, and scope.

239.2 Definitions.

Subpart B—Mutual Holding Companies

239.3 Mutual holding company reorganizations.

239.4 Grounds for disapproval of reorganizations.

239.5 Membership rights.

239.6 Contents of Reorganization Plans.

239.7 Acquisition and disposition of savings associations, savings and loan holding