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Proposed Rules

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

FEDERAL RESERVE SYSTEM

12 CFR Part 250

[Miscellaneous Interpretations; Docket R–0977]

Applicability of Sections 23A and 23B of the Federal Reserve Act to Transactions Between a Member Bank and Its Subsidiaries

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice of proposed rulemaking.

SUMMARY: Sections 23A and 23B of the Federal Reserve Act restrict the ability of a member bank to fund an affiliate through direct investment, loans, or other transactions. The Board is proposing to apply sections 23A and 23B to transactions between a member bank and any subsidiary that engages in activities that are impermissible for the bank itself and that Congress has not previously exempted from coverage by section 23A. The proposed treatment is largely consistent with the existing treatment of these subsidiaries by the other banking agencies, which have applied sections 23A and 23B in some form to transactions between a bank and such subsidiaries.

DATES: Comments must be submitted on or before September 3, 1997.

ADDRESSES: Comments, which should refer to Docket No. R–0977, may be mailed to Mr. William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, N.W., Washington, D.C. 20551. Comments addressed to Mr. Wiles also may be delivered to the Board's mail room between 8:45 a.m. and 5:15 p.m. and to the security control room outside of those hours. Both the mail room and the security control room are accessible from the courtyard entrance on 20th Street between Constitution Avenue and C Street, N.W. Comments may be inspected in Room MP–500 between 9:00 a.m. and 5:00 p.m. weekdays, except as provided in § 261.8 of the Board's Rules Regarding Availability of Information, 12 CFR 261.8.

FOR FURTHER INFORMATION CONTACT: Gregory Baer, Managing Senior Counsel (202/452–3236), Pamela G. Nardolilli, Senior Attorney (202/452–3289), or Deborah M. Awai, Senior Attorney (202/452–3594), Legal Division or Roger T. Cole, Deputy Associate Director (202/452–2618), Banking Supervision and Regulation or Molly S. Wassom, Assistant Director, Banking Supervision and Regulation (202/452–2305), Board of Governors of the Federal Reserve System. For the hearing impaired *only*, Telecommunications Device of the Deaf (TDD), Diane Jenkins (202/452–3254).

SUPPLEMENTARY INFORMATION:

Background

Restrictions of Sections 23A and 23B

Sections 23A and 23B of the Federal Reserve Act are designed to protect a member bank from loss in transactions with its affiliates.[1] Although sections 23A and 23B originally applied only to member banks, Congress has since applied these sections to insured nonmember banks and savings associations in the same manner as they apply to member banks.[2] Section 23A protects these institutions in three major ways. First, the statute limits ''covered transactions'' with any single affiliate to no more than 10 percent of the bank's capital and surplus, and aggregate transactions with all affiliates to no more than 20 percent of capital and surplus.[3] Covered transactions include extensions of credit, investments, and other transactions exposing the member bank to risk. Second, all transactions between a member bank and its affiliate must be on terms and conditions consistent with safe and sound banking practices, and, in particular, a bank may not purchase low-quality assets from the bank's affiliate. Finally, the statute requires that all credit exposures to an affiliate be secured by a statutorily defined amount of collateral.

Section 23B of the Federal Reserve Act requires a member bank to engage in transactions with its affiliates only on terms and under circumstances that are substantially the same or at least as favorable as those prevailing at the time for comparable transactions with unaffiliated companies.[4] Section 23B applies this restriction to any covered transaction as defined by section 23A, as well as other transactions, such as a sale of securities or other assets to an affiliate and the payment of money or the furnishing of services to an affiliate.

Coverage of Subsidiaries of Banks

Section 23A defines an ''affiliate'' of a member bank to include any company that controls the member bank and any company that is under common control with the member bank.[5] (The definition is applied to insured nonmember banks and savings associations in the same way as member banks.) Section 23A excludes from the definition of ''affiliate'' any subsidiary of the bank, unless the Board determines by regulation or order that the subsidiary should be considered an affiliate. The statute also excludes from the definition of ''affiliate'' companies engaged solely in certain specified activities: holding the premises of the member bank, conducting a safe deposit business, or holding obligations issued or guaranteed by the United States or its agencies.[6]

When section 23A was originally enacted as part of the Banking Act of 1933, a majority-owned subsidiary of a member bank was included as an affiliate of the member bank.[7] In its 1982 redrafting of section 23A, Congress, at the Board's urging, amended the definition of ''affiliate'' in section 23A to exclude nonbank subsidiaries.[8] This statutory amendment was consistent with the law as it had developed since 1933. The 1933 version of section 23A already exempted from the definition of ''affiliate'' Edge Act subsidiaries, Agreement corporations, companies holding bank premises, companies

[1] 12 U.S.C. 371c, 371c–1.

[2] 12 U.S.C. 1828(j); 12 U.S.C. 1468.

[3] ''Capital and surplus'' has been defined by the Board as tier 1 and tier 2 capital plus the balance of an institution's allowance for loan and lease losses not included in tier 2 capital. 12 CFR 250.242.

[4] 12 U.S.C. 371c–1(a)(1). Section 23B also contains other provisions that apply in limited cases.

[5] 12 U.S.C. 371c(b)(1). The definition also includes other entities as an affiliate, including a bank subsidiary of a member bank.

[6] 12 U.S.C. 371c(b)(2). The statute temporarily excludes companies where control of the company results from the exercise of rights arising out of a bona fide debt previously contracted. The exception generally lasts for two years.

[7] Banking Act of 1933, Pub. L. 73–66, section 13, 48 Stat. 162, 183 (1933).

[8] Banking Affiliates Act of 1982, Pub. L. 97–320, section 410, 96 Stat. 1469, 1515 (1982) (codified at 12 U.S.C. 371c(b)(2)(A)).

conducting a safe deposit business, and certain other member bank subsidiaries that Congress had authorized. In 1970, the Board issued an interpretation that also excluded from section 23A any transaction between a member bank and its ''operations subsidiary,'' defined as ''a separately incorporated department of the bank, performing, at locations at which the bank is authorized to engage in business, functions that the bank is empowered to perform directly.''[9] Thus, in recommending that Congress exempt subsidiaries in 1982, the Board stated, ''It should be noted that this liberalization is much more limited than it might first appear * * *. [M]ember banks are generally prohibited from purchasing stock, and of the few types of companies whose stock is exempt from this prohibition, several are already exempt from the restriction of Section 23A.''[10]

Although Congress generally exempted transactions with a subsidiary from section 23A, it expressly granted the Board authority to reimpose sections 23A and 23B on any subsidiary that has ''a relationship with the member bank or any subsidiary or affiliate of the member bank, such that covered transactions by the member bank or its subsidiary with that company may be affected by the relationship to the detriment of the member bank or its subsidiary.''[11] The Board has had few occasions to exercise this authority, as subsidiaries of banks generally have continued to be limited in their activities to those on which the 1982 amendments were premised.[12]

Expansion of Subsidiary Activities

Increasingly, however, operating subsidiaries are being authorized to engage in activities impermissible for the bank. The Board recently expressed its belief that Congress did not intend, in the National Bank Act or elsewhere, to allow national banks to engage through subsidiaries in activities prohibited to the national bank itself.[13] Indeed, as noted above, the 1982 amendments to section 23A were based on the assumption that such activities were impermissible. However, Congress has allowed state banks and federal savings associations to engage through a subsidiary in some activities impermissible to the state bank or thrift itself. Thus, the issue of how a subsidiary engaged in activities impermissible for its parent institution should be treated for purposes of sections 23A and 23B arises regardless of the permissibility of those activities for national banks.

For example, as amended in 1991, section 24 of the Federal Deposit Insurance Act (FDI Act), although generally prohibiting insured state banks from engaging as principal through a subsidiary in an activity that is not permissible for a subsidiary of a national bank, allows a state bank to engage in such an activity provided certain conditions are met: The activity must be authorized by the bank's state chartering authority, the bank must meet relevant capital requirements, and the Federal Deposit Insurance Corporation (FDIC) must determine that the activity will not pose a significant risk to the deposit insurance fund.[14] Acting under that authority, the FDIC recently allowed by order some state chartered banks to invest in real estate through majority-owned subsidiaries as authorized by state law, and has issued a proposed rulemaking that would allow such activity by regulation when authorized by state law, subject to certain restrictions.[15]

As drafted, the FDIC's proposed rule would require the bank to comply with sections 23A and 23B in its transactions with a real estate subsidiary to the same extent as if the subsidiary were an affiliate, except that a bank's loan to finance the sale of real estate by the subsidiary to a third party would not be subject to the limits of section 23A provided that it complied with section 23B.[16]

The FDIC also has promulgated a rule establishing parameters pursuant to which state nonmember banks may, if authorized by their state chartering authority, underwrite and deal in securities. The FDIC generally applies the restrictions of section 23A of the Federal Reserve Act to extensions of credit to such a subsidiary, but does not include investments in the subsidiary toward the 23A limit and does not apply the attribution rule of section 23A. However, very few, if any, state nonmember banks have established a securities subsidiary pursuant to this rule.[17]

With respect to thrifts, section 5(c)(4)(B) of the Home Owners' Loan Act (HOLA) allows a savings association to invest up to three percent of its assets in the capital stock, obligations, and other securities of a ''service corporation.''[18] Under Office of Thrift Supervision (OTS) rules, a service corporation may conduct any activity ''reasonably related'' to the activities of financial institutions, even if that activity is not permitted to the parent savings association.[19] Pursuant to OTS rules, extensions of credit by a savings association to a majority-owned service corporation generally are not subject to funding restrictions akin to sections 23A and 23B, although other restrictions are applied by statute and regulation.

Finally, as noted above, the Office of the Comptroller of the Currency (OCC) recently amended its rules to allow a national bank to engage through an operating subsidiary in activities prohibited to the national bank. The OCC rule would subject transactions between national banks and such subsidiaries to sections 23A and 23B.[20]

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[9] 12 CFR 250.240 (1997).

[10] *A Discussion of Amendments to Section 23A of the Federal Reserve Act Proposed by the Board of Governors of the Federal Reserve System* 15 (September 1981) (hereafter, *Board's 23A Proposal*) (attached as appendix to correspondence from Chairman Paul Volcker to the Chairman and Ranking Members of the House and Senate Committees on Banking, Housing and Urban Affairs, October 2, 1981).

[11] 12 U.S.C. 371c(b)(1)(E).

[12] In one case, the Board concluded that transactions between a bank and a subsidiary that engaged in underwriting life insurance abroad should be limited by section 23A. *Citibank Overseas Investment Corporation*, 70 Fed. Res. Bull. 68 (1984). In another case, the Board determined that certain investment advisory subsidiaries of a national bank should be treated as affiliates of the bank. *Wells Fargo & Company*, 76 Fed. Res. Bull. 465,466 (1990).

In addition, in 1987, the Board solicited comment on a proposal regarding the real estate investment and development activities of subsidiaries of banks owned by bank holding companies. 52 FR 42301 (1987). As part of its rulemaking, the Board sought comment on whether to apply sections 23A and 23B to the subsidiaries of banks engaged in real estate activities. The Board never issued a final rule, as market conditions caused banks to curtail their real estate activities and thereby made such action unnecessary.

[13] *See, e.g.*, Comment Letter from Board to Comptroller of the Currency on Docket Numbers 97–06 and 97–07, May 5, 1997 (commenting on a national bank's proposal to engage in real estate development and leasing through a subsidiary).

[14] 12 U.S.C. 1831a.

[15] 61 FR 43486 (1996).

[16] *Id.* at 43499. If such credit were extended to a third party to purchase property from an *affiliate*, the credit would be subject to the ''attribution rule'' of sections 23A and 23B, whereby any transaction where the proceeds are used for the benefit of, or transferred to, an affiliate is considered a transaction with the affiliate. 12 U.S.C. 371c(a)(2), 371c-1(a)(3).

[17] *See General Accounting Office, Banks' Securities Activities: Oversight Differs Depending on Activity and Regulator* 65 (1995) (sampling found no state nonmember banks engaged in underwriting and dealing in bank-ineligible securities). FDIC staff is currently aware of only one such subsidiary.

[18] 12 U.S.C. 1464(c)(4)(B).

[19] 12 CFR 559.4. The OTS distinguishes service corporations from ''operating subsidiaries,'' which by definition may engage only in activities the savings association may conduct directly.

[20] 61 FR 60342 (1996) (codified at 5 CFR 5.34 (f)(3)(ii)).

Proposal

Coverage of Transactions Between Member Banks and Their Subsidiaries

The Board is proposing to designate a subsidiary of a member bank as an affiliate of the member bank if the subsidiary engages in functions that the member bank is not empowered to perform directly and that Congress has not previously exempted from sections 23A and 23B. Covered activities could include real estate development and underwriting and dealing in bank-ineligible securities. The Board believes, and proposes to find under the standard set forth in section 23A(b)(1)(E), that the relationship of such a subsidiary to its parent institution could result in funding of the subsidiary to the detriment of the bank.

Absent application of sections 23A and 23B, a bank would have a strong incentive to use its resources to prevent the failure of a subsidiary or affiliate. Such efforts could include lending below market rates, lending more than is prudent, or purchasing low quality assets from the subsidiary or affiliate. Indeed, the risks to an insured depository institution from a subsidiary (as well as the rewards) appear to be greater than those present when nonbanking activities are conducted in a holding company affiliate of the institution. Under generally accepted accounting principles and regulatory capital rules, losses of the subsidiary would generally be consolidated with the parent bank, thereby adversely affecting the capital position of the bank from both a market and regulatory perspective. Furthermore, because the bank owns and controls the management and operation of the subsidiary, its reputational stake is greater. Thus, in the Board's view, the incentive of bank management to prevent or defer losses through easy credit and other transactions is that much stronger.

The Board is also concerned that imposition of sections 23A and 23B on an *ad hoc* basis by different agencies could result in inconsistencies that would create confusion or competitive advantage by charter or structure. The Board believes that it was this result that Congress sought to avoid by authorizing the Board to write the regulations in this area.

Finally, the Board believes that imposition of sections 23A and 23B could help to ensure corporate separateness. The requirement of section 23B that transactions be on market terms, in particular, could help to prevent piercing of the bank's corporate veil. Nonetheless, the Board recognizes that in this area, and with respect to other safety and soundness concerns, imposition of sections 23A and 23B is not itself sufficient. Ensuring that banks observe appropriate principles of corporate separateness in dealing with their subsidiaries, and that the relationship of a subsidiary to its parent bank does not otherwise endanger the bank, will remain the responsibility of the bank's appropriate Federal banking agency, as would primary responsibility for monitoring compliance with sections 23A and 23B to the extent that they were applied.

The Board is not proposing to alter the statutory exemption from sections 23A and 23B for two types of subsidiaries. First, the Board's proposal would not affect the statutory exemption for subsidiaries that are engaged solely in activities in which the member bank could engage directly. Although concerns about imprudent funding by a bank exist with respect to these subsidiaries as well, they have traditionally been exempt from sections 23A and 23B, and it is these subsidiaries that Congress understood it was exempting in the 1982 amendments. More practically speaking, covering these subsidiaries could result in the activities simply being transferred back to the bank, thereby imposing costs with no corresponding benefit. Thus, the Board is not proposing to apply sections 23A and 23B to such subsidiaries.

The proposal also would not cover subsidiaries that Congress previously had exempted from sections 23A and 23B when those statutes generally applied to subsidiaries. In effect, Congress has determined that the benefits of allowing banks to assume financial exposure to these types of subsidiaries exceed the potential costs.

The proposed rule addresses such subsidiaries in two ways. As noted, the 1933 version of section 23A exempted subsidiaries engaged in certain specified activities from coverage by sections 23A and 23B. One group of activities could be performed by either an affiliate or a subsidiary; although these activities no longer required an exemption if performed in a subsidiary after 1982, section 23A continued to exempt them if performed in an affiliate.[21] These activities include conducting a safe deposit business or holding bank premises. Although the proposed rule would now treat a subsidiary conducting such activities as an affiliate under sections 23A and 23B, the subsidiary would also qualify for the exception that applies when such activities are conducted in an affiliate.[22] Thus, no language in the proposed rule is necessary to exclude this group of companies from coverage as subsidiaries by sections 23A and 23B.

The second group of subsidiaries exempt under the 1933 Act were Edge Act subsidiaries and Agreement corporations. Because those companies were almost always subsidiaries of a bank, Congress did not retain a specific exception for them after the 1982 amendments (because they, like all other subsidiaries, were already exempt). Similarly, when member banks were first authorized to invest directly in the stock of foreign banks in 1966, Congress specifically authorized the Board to exempt transactions with such foreign bank subsidiaries from section 23A.[23] The Board did so between 1967 and 1982, but discontinued the exemption as unnecessary after 1982. Thus, the proposed rule needs to contain specific language exempting these subsidiaries.

Application of Sections 23A and 23B to Insured Nonmember Banks and Savings Associations

As noted above, if the Board were to apply sections 23A and 23B to transactions between a member bank and its subsidiaries, then by operation of law such application would also extend to transactions between an insured nonmember bank and a subsidiary engaged in activities impermissible for its parent, and to transactions between a savings association and a subsidiary engaged in activities impermissible for its parent. However, especially in the savings association context, application of sections 23A and 23B raises certain policy issues. For example, in section 5 of the HOLA, Congress has expressly permitted a savings association to invest up to 3 percent of its assets in a service corporation—an amount greater than section 23A would allow.[24] The Board believes that if section 23A were applied to service corporations, any investment in a subsidiary expressly permitted by section 5 of the HOLA therefore should be exempt. Furthermore, section 11(a)(1) of the

[21] There were two other types of companies that could operate as either a subsidiary or an affiliate and that were exempt from the pre-1982 section 23A: agricultural credit corporations and livestock loan companies. However, on the Board's recommendation, Congress discontinued the affiliate exemption for these companies. *Board's 23A Proposal* at 26.

[22] 12 U.S.C. 371c(b)(2)(B–D).

[23] 12 U.S.C. 601 (Third).

[24] At least one-half of the investment in excess of one percent of a savings association's assets must be primarily used for community, inner-city and community development purposes. 12 U.S.C. 1464(c)(4)(B).

HOLA prohibits a savings association from making a loan or extension of credit to an affiliate if the affiliate is engaged in impermissible bank holding company activities. If the Board were to designate a subsidiary as an ''affiliate'' for purposes of sections 23A and 23B, then this lending prohibition arguably would be applied to savings associations subsidiaries. Subsidiaries of member banks are not subject to such a prohibition. Accordingly, the Board seeks comment on whether sections 23A and 23B should be applied to transactions between savings associations and their subsidiaries and, if so, in what manner.

Similarly, section 302(b) of the Small Business Investment Act of 1958 [25] allows member banks and non-member insured banks to invest up to 5 percent of their capital and surplus in small business investment companies. The Board does not propose to include any investment by a member or nonmember insured bank in a subsidiary that qualifies as a small business investment company towards the limitations of section 23A, and seeks comment on whether any additional transactions should be covered.

Transactions Between a Subsidiary and an Affiliate

Pursuant to sections 23A and 23B, transactions between a subsidiary of a bank and an affiliate of the bank are treated as if they are transactions between the parent bank and the affiliate. For example, a loan by a subsidiary of a bank to an affiliate of the bank is subject to the collateral and other qualitative restrictions of sections 23A and 23B, and the amount of the loan is counted toward the bank's quantitative limits. This treatment is consistent with such subsidiaries being considered departments of the bank.

However, when such subsidiaries engage in activities not permitted to the bank, and the bank would be limited by the proposed rule in its ability to fund such subsidiaries, this restriction may no longer be appropriate. If a subsidiary is no longer treated as a part of the bank when it borrows, it could be argued that the subsidiary should not be treated as part of the bank when lending to other affiliates. Accordingly, the Board seeks comment on whether transactions between a bank subsidiary and an affiliate of the bank should be exempt from section 23A or 23B when the subsidiary is limited by sections 23A and 23B in the funding it can receive from its parent bank.

Remaining Issues

The Board recognizes that application of sections 23A and 23B to bank subsidiaries may raise interpretive issues that the current application to affiliates has not. For example, under Generally Accepted Accounting Principles, retained earnings of a subsidiary are considered an investment in the subsidiary by its parent bank and would therefore be considered a covered transaction for purposes of sections 23A and 23B.[26] The Board seeks comment on whether additional interpretive issues should be addressed in the final rule.

Regulatory Flexibility Act Analysis

This proposal is not expected to have a significant economic impact on a substantial number of small business entities within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) because a substantial number of small insured depository institutions do not operate subsidiaries that are subject to the regulation. The Board recognizes that some small state banks have established subsidiaries engaged in real estate activities pursuant to section 24 of the FDI Act, and the proposal would apply sections 23A and 23B to transactions between the state banks and these subsidiaries. However, in its orders approving such subsidiaries, the FDIC generally has required compliance with sections 23A and 23B. The Board seeks comment on whether the proposal would impose any additional burden on these entities, and what relief would be appropriate.

Paperwork Reduction Act

No collection of information pursuant to section 3504(h) of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) is contained in this notice.

List of Subjects in 12 CFR Part 250

Banks, banking, Federal Reserve System.

For the reasons set forth in the preamble, the Board proposes to amend 12 CFR part 250 as follows:

PART 250—MISCELLANEOUS INTERPRETATIONS

1. The authority citation for part 250 continues to read as follows:

Authority: 12 U.S.C. 78, 248(i) and 371c(e).

2. Section 250.243 is added to read as follows:

§ 250.243 Applicability of sections 23A and 23B of the Federal Reserve Act to transactions between a member bank and its subsidiaries.

(a) *Covered transactions between an insured depository institution and its subsidiary*—(1) *In general.* For purposes of sections 23A(b)(1) and 23B(d)(1) of the Federal Reserve Act (12 U.S.C. 371c(b)(1) and 371c–1(d)(1)), ''affiliate'' with respect to a member bank includes any subsidiary of the member bank that engages, directly or through a subsidiary, in any activity in which its parent bank may not engage directly.

(2) *Exception for certain subsidiaries.* The following subsidiaries shall not be considered an affiliate for purposes of paragraph (a)(1) of this section:

(i) A corporation organized and operating under section 25A of the Federal Reserve Act (12 U.S.C. 611–631), and any subsidiary thereof;

(ii) A corporation operating under section 25 of the Federal Reserve Act (12 U.S.C. 601), and any subsidiary thereof; and

(iii) A foreign bank held under authority of section 25 of the Federal Reserve Act (12 U.S.C. 601), and any subsidiary thereof.

(3) *Exception for certain investments.* An investment in a small business investment company pursuant to section 302(b) of the Small Business Investment Act of 1958 (15 U.S.C. 682(b)) shall not be subject to the lending limit of section 23A(a)(1)(A) and shall not count towards the aggregate lending limit of section 23A(a)(1)(B) (12 U.S.C. 371c (a)(1)(A) and (a)(1)(B)).

(b) *Covered transactions between a subsidiary of an insured depository institution and an affiliate of the institution.* For purposes of sections 23A(a)(1), 23A(c), and 23B(a)–(c) of the Federal Reserve Act (12 U.S.C. 371c(a)(1), 371c(c), and 371c–1(a)–(c)), a subsidiary of a member bank shall not include any subsidiary that is considered an affiliate for purposes of paragraph (a)(1) of this section.

By order of the Board of Governors of the Federal Reserve System, July 3, 1997.

William W. Wiles,

Secretary of the Board.

[FR Doc. 97–18526 Filed 7–14–97; 8:45 am]

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[25] 15 U.S.C. 682(b).

[26] 12 U.S.C. 371c(b)(7)(B).