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DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Parts 563, 563c, 563g

[No. 2000-30]

RIN 1550-AB38

Transfer and Repurchase of Government Securities

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Direct final rule.

SUMMARY: The Office of Thrift Supervision (OTS) is removing its regulation on the transfer and repurchase of government securities. This regulation is unnecessary and is overly burdensome to savings associations.

DATES: The direct final rule is effective May 30, 2000 without further notice, unless OTS receives significant adverse comments by April 27, 2000. If OTS receives such comments, it will publish a timely withdrawal informing the public that this rule will not take effect.

ADDRESSES: Send comments to Manager, Dissemination Branch, Information Management & Services Division, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC **20552.** Attention Docket No. 2000-30. Hand deliver comments to Public Reference Room, 1700 G Street, NW., lower level, from 9:00 A.M. to 5:00 P.M. on business days. Send facsimile transmissions to PAX

(202) 906-7755 or (202) 906-6956 (if the comment is over 25 pages). Send e-mails to public.info@ots. treas.gov and include your name and telephone number. Interested persons may inspect comments at 1700 G Street, NW., from 9:00 A.M. until 4:00 P.M. on business days.

FOR FURTHER INFORMATION CONTACT: Ed O'Connell, (202) 906-5694, Manager, Supervision Policy: or Teresa Scott (202) 906-6478, Counsel (Banking and Finance), Regulations and Legislation Division, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington DC 20552.

SUPPLEMENTARY **INFORMATION:**

Background

OTS regulations at 12 CFR 563.84 govern the transfer and repurchase of government securities under certain circumstances where the savings association is obligated to repurchase.[1] This rule applies to repurchase obligations evidencing an indebtedness arising from a transfer of direct obligations of, or obligations which are fully guaranteed as to principal and interest by, the United States or any agency of the United States.

The rule prohibits savings associations from issuing repurchase agreement obligations in denominations under $100,000 and a maturity of 90 days or more,

[1] Under these repurchase obligations, a savings association obtains funds by selling government securities, and simultaneously agrees to buy back the securities at a specified price and date.

unless the savings association issues the obligation to an institution whose accounts or deposits are insured by the Federal Deposit Insurance Corporation ("FDIC") or to a broker or dealer registered with the Securities and Exchange Commission. Repurchase agreement obligations under $100,000 with a maturity of less than 90 days are subject to various consumer protection and other requirements. Specifically, the rule: (1) mandates that all such agreements, related advertisements and offering statements must include a legend indicating that the obligation is not a savings account or deposit and is not insured by the FDIC; (2) prohibits savings associations from making specified representations regarding deposit insurance, guarantees, etc.; (3) requires the purchaser under the repurchase agreement to obtain a perfected security interest in the securities under applicable state law; (4) requires that the value of the security underlying the repurchase agreement be maintained at a level at least equal to the principal amount of the repayment obligation; (5) requires that savings associations issuing repurchase agreements to the public make full and accurate disclosures of all material information regarding the repurchase agreement; (6) imposes additional requirements on certain renewals beyond 89 days; and (7) requires a savings association to provide additional safeguards and financial disclosures if it does not meet specified requirements regarding total capital."

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[2] Under this requirement, a savings association's total capital must equal one percent of its liabilities plus 20 Percent of its classified assets.

OTS is removing § 563.84 because it is unnecessary and imposes overly burdensome requirements on savings associations. One of the original purposes of the predecessor of § 563.84 was to ensure that savings associations would not use repurchase agreements as a method of offering small denomination accounts to avoid existing interest rate ceiling restrictions on deposit accounts.[3] In 1979, the Federal Home Loan Bank Board (FHLBB) issued a policy statement prohibiting savings associations from entering into any government securities repurchase agreements in amounts under $100,000, except with federally insured depository institutions or with broker dealers. Because the potential for circumvention of the maximum interest rate ceiling was reduced if the maturity of the agreement was less than 90 days, the FHLBB revised the policy statement to permit short term agreements in amounts under $100,000, subject to certain consumer protections.[4] The FHLBB codified the policy statement in its regulations in 1982 and expanded consumer protection requirements.'

It is no longer necessary to retain § 563.84 to prevent evasions of maximum interest rate ceilings on deposit accounts. Interest rate ceilings have not been in effect since March of 1986 when the FHLBB's authority to set these

[3] See 12 CFR 531.12, published 44 FR 33669 (June 12, 1979).
[4] 44 FR 46445 (August 6, 1979).
[5] 47 FR 23 140 (May 27, 1982).

ceilings expired.[6] Savings associations, of course, still may not pay interest on commercial checking accounts .[7] However, OTS has concluded that federal savings associations may offer various sweep accounts to transfer idle, non-interest bearing demand deposit account (DDA) checking funds to investment vehicles to generate earnings.[8] OTS has specifically stated that these sweep accounts, including sweep arrangements that use government security repurchase agreements, are permissible notwithstanding the prohibition on the payment of interest on DDAs.

To the extent that § 563.84 was designed to protect consumers who buy United States government securities under repurchase agreements, OTS believes that existing statutes, regulations and guidance already adequately serve this function. The commercial repurchase market is much more developed than when the regulation was adopted and is regulated now in other ways. The Government Securities Act of 1986 (the GSA),[9] for example, protects investors in government securities by establishing appropriate financial responsibility and custodial! standards. Under the Department of Treasury's implementing

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[6] As of March 31, 1986, the FHLBB's authority to regulate payment of interest under section 5B of the Federal Home Loan Bank Act expired. 12 U.S.C. 1425b (1980). The FHLBB amended its regulations to reflect these changes on March 31, 1986. See 51 FR 10810 (March 31, 1986).

[7] 12 U.S.C. § 1464(b)(l)(B)(i).

[8] Op. Chief Counsel (March 2, 1998). Typically, under these transactions, funds are swept out of a DDA at the end of a business day and into an investment vehicle, and swept back to the DDA the next morning to pay checks as needed. This process is repeated each business day.

[9] The Government Securities Act of 1986 (Pub L. 99-571,100 Stat 3208), *as amended by,* Pub. L.103-202, 107 Stat 2344.

regulations,[10] a thrift that holds government securities for another party to a hold-in-custody repurchase agreement must comply with requirements for safeguarding and custody of the securities. The savings association is also subject to other provisions requiring written agreements, confirmations and disclosures, including disclosures that the obligation is not a deposit and is not insured by the FDIC.[11] Moreover, Thrift Bulletin 23-2, Interagency Statement on Retail Sales of Non-deposit Investment Products (February 22, 1994) provides for certain customer protections, including disclosures, for retail sales of non-deposit investment products, including government securities repurchase agreements. In addition, OTS notes that state and federal anti-fraud provisions, which generally require the disclosure of facts that would be material to a decision to invest in a security, also apply to repurchase transactions.[12]

OTS also believes that § 563.84 may unduly restrict savings associations' ability to engage in certain types of transactions. Since none of the other federal banking agencies currently have similar provisions, OTS believes that the retention of this rule may have a negative impact on the ability of OTS-regulated institutions to compete on an equal footing.

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[10] 17 CFR pans 400 through 450.
[11] Savings associations that enter into repurchase agreements should pay particular attention to the requirements and required disclosures at 17 CFR 403.5.
[12] See The Federal Financial Institutions Examination Council's Policy Statement on Repurchase Agreements of Depository Institutions with Security Dealers and Others, 63 FR 6935 (February 11, 1998) and Thrift Bulletin 23-2.

For example, in a recent opinion letter, OTS clarified the authority of savings associations to offer various types of sweep accounts, including the use of repurchase agreements in sweep accounts. [13] Section 563.84, however, requires that the interest of a repurchase agreement purchaser in the security or securities underlying the repurchase agreement constitute a perfected security interest under applicable state law. Various state laws[14] no longer allow for the perfection of a security interest in a security through placement with a trustee, such as a Federal Home Loan Bank. Other perfection methods may be operationally impractical in the context of repurchase agreement sweep accounts that typically involve repeated collateralizations of varying dollar amounts. [15] As a result, this regulation may effectively bar savings associations' use of repurchase agreement sweep accounts to accommodate the cash management needs of their commercial customers. As noted above, other financial institutions are not subject to similar restrictions.

For these reasons, OTS is deleting § 563.84. In the absence of this provision, federal savings associations would continue to be authorized to engage in repurchase agreements. This authority would be subject to applicable statutes

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[13] Op. Chief Counsel (March 2, 1998).
[14] See Uniform Commercial Code, Article 8, as amended by the various states.
[15] Although this rule eliminates the requirement that the purchaser under the repurchase agreement obtain a perfected security interest in the securities under state law, 17 CFR 450.4 of the Treasury GSA regulations provides specific protections for safeguarding and custody of the securities.

and regulations, including the GSA, Treasury's implementing regulations, Thrift Bulletin 23-2, and state and federal securities laws. In addition, the Federal Financial Institutions Examination Council's Policy Statement on Repurchase Agreements of Depository Institutions with Securities Dealers and Others[16] provides safety and soundness guidance to depository institutions entering into repurchase agreements. The FFIEC Policy Statement cautions that institutions should have adequate policies and controls for their particular circumstances, provides explicit guidance for controlling collateral for securities sold under an agreement to repurchase, and contains other pertinent guidance.

Rulemaking Procedures

Direct final rulemaking is a technique for expediting the issuance of non-controversial rules. Under this procedure, an agency may publish a rule in the Federal Register with a statement that, unless a significant adverse comment is received within a specified time period, the rule will become effective as a final rule on a particular date. If a significant adverse comment is filed, however, the agency must withdraw the direct final rule and complete standard notice and comment procedures. This procedure permits an agency to issue final rules expeditiously, while at the same time offering the public the opportunity to challenge the **agency's** view that the rule is non-controversial. [17]

[16] 63 FR 6935 (February 11, 1998).

[17] Under current law, direct final rulemaking is supported by two rationales. First, it is justified by the Administrative Procedure Act's "good cause" exemption from notice-and-comment procedures where such

Several other federal agencies, including the Environmental Protection Agency, the Department of Agriculture, and the Department of Transportation, have used this procedure to expedite non-controversial rules. The primary advantage of the procedure is that it permits an agency to issue rules without having to go through internal and external review processes twice (i.e., at the proposed and final rule stage).

The Administrative Conference of the United States adopted Recommendation 95-4 encouraging the use of direct final rulemaking,[18] and recommending that agencies develop a direct final rulemaking process for issuing rules that are unlikely to result in significant adverse comments.

OTS has concluded that this rule is non-controversial and should elicit no significant adverse comment.[19] Accordingly, the agency has determined that it is appropriate to apply direct final rulemaking procedures. This preamble explains the procedures OTS intends to use for direct final rules. The agency welcomes any comments on how to make this process more useful.

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procedures are "unnecessary." The agency's solicitation of public comment does not undercut this argument, but rather is used to validate the agency's initial determination.

Alternatively, direct final rulemaking also complies with the basic notice-and-comment requirements in section 553 of the APA. The agency provides notice and opportunity to comment on the rule through its Federal Register notice; the publication requirements are met, although the information has been published earlier in the process than normal; and the requisite advance notice of the effective date required by the APA is provided.

[18] 60 Fed. Reg. 43 108 (Aug. 18, 1995). The National Performance Review has also endorsed the use of this process. See Office of the Vice President, Creating a Government that Works Better and Costs Less, Improving Regulatory Systems, National Performance Review, 42-44 (1993).

Consistent with the Administrative Conference's recommendations, OTS is applying the following procedures in this rulemaking:

OTS is publishing this notice of direct final rule in the final rule section of the Federal Register and is including an opportunity for public comment on the substance of the change (i.e., a 30-day public comment period). Consistent with the Administrative Conference recommendation, OTS has included a statement of basis and purpose for the rule and has discussed relevant substantive issues in the discussion above.

The direct final rule will automatically become effective in 60 days, unless OTS receives a significant adverse comment within the 30-day comment period. If a timely, significant adverse comment is received, OTS will withdraw the direct final rule before the stated effective date. To be a significant adverse comment, the comment must explain why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or why the rule would be ineffective or unacceptable without a change.

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[19] The rulemaking record includes a copy of a petition for rulemaking requesting OTS to initiate this proceeding.

To ensure that the promulgation of a final rule will not be delayed if significant adverse comments are submitted, OTS has published a related notice of proposed rulemaking (NPRM) elsewhere in today's Federal Register. This related notice cross-references the direct final rule. The related notice indicates that if a timely, significant adverse comment on the matter is received, OTS will address all public comments in subsequent final rule based on the NPRM. If no significant adverse comments are timely received, OTS will take no further action on the NPRM.

Effective Date

This direct final rule imposes no additional requirements on insured depository institutions. This rule is therefore exempt from the requirement found in section 302 of the Riegle Community Development and Regulatory Improvement Act of 1994[20] that regulations must not take effect before the first day of the quarter following publication.

Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act,[21] the Director certifies that this direct final rule will not have a significant economic impact on a substantial number of small entities. The rule merely removes an

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[20] Pub. L. No. 103-325, 12 U.S.C. 4802.
[21] Pub. L. No. 96-354, 5 U.S.C. 601.

unnecessary regulation that imposes overly burdensome requirements on all savings associations, including small savings associations.

Executive Order 12866

OTS has determined that this direct final rule is not a "significant regulatory action" for purposes of Executive Order 12866.

Unfunded Mandates Reform Act of 1995

OTS has determined that the requirements of this direct final rule will not result in expenditures by State, local, and tribal governments or by the private sector of $100 million or more in any one year. Accordingly, a budgetary impact statement is not required under section 202 of the Unfunded Mandates Reform. Act of 1995.

Federalism

Executive Order 13 132 imposes certain requirements on an agency when formulating and implementing polices that have federalism implications or taking actions that preempt state law. OTS has determined that this direct final rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, and will not preempt State law.

List of Subjects

12 CFR Part 563

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

12 CFR Part 563c

Accounting, Savings associations, Securities.

12 CFR Part 563g

Reporting and recordkeeping requirements, Savings associations, Securities.

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

PART 563 - OPERATIONS

1.. The authority citation for part 563 continues to read as follows:

Authority: 12 U.S.C. 375b, 1462, 1462a, 1463, 1464, 1467a, 1468, 1817, 1820, 1828, 1831i, 3806; 42 U.S.C. 4106.

§ 563.84 [Removed]

2. Section 563.84 is removed.

PART **563c -** ACCOUNTING REQUIREMENTS

3. The authority citation for part 563c continues to read as follows:

Authority: 12 U.S.C. 1462a, 1463, 1464; 15 U.S.C. 78c(b), 78m, 78n, 78w.

4. Section 563c. 101 is amended by revising paragraph (c) to read as follows:

§ 563c.101 Application of this subpart.

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(c) Any offering circular required to be used in connection with the issuance of mutual capital certificates under § 563.74 and debt securities under § 563.80 and 6 563.81 of this chapter.

PART 563g – SECURITIES OFFERINGS

5. The authority citation for part 563g continues to read as follows:

Authority: 12 U.S.C. 1462a, 1463, 1464; 15 U.S.C. 78c(b), 781, 78m, 78n, 78p, 78w.

§ 563g.3 [Amended]

6. Section 563g.3 is amended by removing and reserving paragraph (a).

DATED: March 21, 2000

By the Office of Thrift Supervision.

Ellen Seidman
Director