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**DEPARTMENT OF THE TREASURY**

**Office of Thrift Supervision**

**12 CFR Parts 563, 563c, 563g**

**[No. 2000-3 1]**

**RIN 1550-AB38**

**Transfer and Repurchase of Government Securities**

**AGENCY:** Office of Thrift Supervision, Treasury.

**ACTION:** Notice of proposed rulemaking.

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

**DATES:** Comments must be received on or before April 27, 2000.

**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. 2000-3 1. 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 FAX (202) 906-7755 or (202) 906-6956 (if the comment is over 25 pages). Send e-

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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.<sup>1</sup> 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,

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<sup>1</sup> 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 .<sup>2</sup>

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<sup>2</sup>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 proposing to remove § 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.<sup>3</sup> 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.<sup>4</sup> The FHLBB codified the policy statement in its regulations in 1982 and expanded consumer protection requirements.<sup>5</sup>

It is no longer necessary to retain § 563.84 to prevent evasions of maximum interest rate ceilings on deposit accounts. Interest rate ceilings have

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<sup>3</sup> See 12 CFR 531.12, published 44 FR 33669 (June 12, 1979).

<sup>4</sup> 44 FR 46445 (August 6, 1979).

not been in effect since March of 1986 when the FHLBB's authority to set these ceilings expired.<sup>6</sup> Savings associations, of course, still may not pay interest on commercial checking accounts.<sup>7</sup> 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.<sup>8</sup> 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),<sup>9</sup> for example, protects investors

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<sup>5</sup> 47 FR 23 140 (May 27, 1982).

<sup>6</sup> 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 108 10 (March 31, 1986).

<sup>7</sup> 12 U.S.C. § 1464(b)(1)(B)(i).

<sup>8</sup> *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.

<sup>9</sup> The Government Securities Act of 1986 (Pub L. 99-571, 100 Stat 3208), as amended by, Pub. L. 103-202, 107 Stat 2344.

in government securities by establishing appropriate financial responsibility and custodial standards. Under the Department of Treasury's implementing regulations,<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

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

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<sup>10</sup> 17 CFR parts 400 through 450.

<sup>11</sup> Savings associations that enter into repurchase agreements should pay particular attention to the requirements and required disclosures at 17 CFR 403.5.

retention of this rule may have a negative impact on the ability of OTS-regulated institutions to compete on an equal footing.

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.<sup>13</sup> 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<sup>14</sup> 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.<sup>15</sup> 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.

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<sup>12</sup> 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.

<sup>13</sup> Op. Chief Counsel (March 2, 1998).

<sup>14</sup> See Uniform Commercial Code, Article 8, as amended by the various states.

<sup>15</sup> 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.

For these reasons, OTS is proposing to delete § 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 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<sup>16</sup> 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,

#### **Comments; Accompanying Direct Final Rule**

If no significant adverse comments are timely received, no further activity is contemplated relative to this proposed rule. Rather, the related direct final rule published elsewhere in this issue of the Federal Register will automatically go into effect on the date specified in that rule. If significant adverse comments

are timely received, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule. Because OTS will not institute a second comment period for this proposed rule, any parties interested in commenting should do so during this comment period.

#### Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act,<sup>17</sup> the Director certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities. The rule would merely remove an unnecessary regulation that imposes overly burdensome requirements on all savings associations, including small savings associations.

#### Executive Order **12866**

OTS has determined that this proposed 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 proposed rule will not result in expenditures by State, local, and tribal governments or by the private

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<sup>16</sup> 63 FR 6935 (February 11, 1998).

<sup>17</sup> Pub. L. No. 96-354, 5 U.S.C. 601.

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 policies that have federalism implications or taking actions that preempt state law. OTS has determined that this proposed 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 proposes to amend  
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 § 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

**§ 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 § 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), 78l, 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