Control and Divestiture Proceedings

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Subpart A—General Provisions

§ 225.2 Definitions.

(a) *Affiliate* means any company that controls, is controlled by, or is under common control with, another company.

(b)(1) *Bank* means:

(i) An insured bank as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)); or

(ii) An institution organized under the laws of the United States which both:

(A) Accepts demand deposits or deposits that the depositor may withdraw by check or similar means for payment to third parties or others; and

(B) Is engaged in the business of making commercial loans.

(2) *Bank* does not include those institutions qualifying under the exceptions listed in section 2(c)(2) of the BHC Act (12 U.S.C. 1841(c)(2)).

(c)(1) *Bank holding company* means any company (including a bank) that has direct or indirect control of a bank, other than control that results from the ownership or control of:

(i) Voting securities held in good faith in a fiduciary capacity (other than as provided in paragraphs (e)(2)(ii) and (iii) of this section) without sole discretionary voting authority, or as otherwise exempted under section 2(a)(5)(A) of the BHC Act;

(ii) Voting securities acquired and held only for a reasonable period of time in connection with the underwriting of securities, as provided in section 2(a)(5)(B) of the BHC Act;

(iii) Voting rights to voting securities acquired for the sole purpose and in the course of participating in a proxy solicitation, as provided in section 2(a)(5)(C) of the BHC Act;

(iv) Voting securities acquired in satisfaction of debts previously contracted in good faith, as provided in section 2(a)(5)(D) of the BHC Act, if the securities are divested within two years of acquisition (or such later period as the Board may permit by order); or

(v) Voting securities of certain institutions owned by a thrift institution or a trust company, as provided in sections 2(a)(5)(E) and (F) of the BHC Act.

(2) Except for the purposes of §225.4(b) of this subpart and subpart E of this part, or as otherwise provided in this regulation, *bank holding company* includes a foreign banking organization. For the purposes of subpart B of this part, *bank holding company* includes a foreign banking organization only if it owns or controls a bank in the United States.

(d)(1) *Company* includes any bank, corporation, general or limited partnership, association or similar organization, business trust, or any other trust unless by its terms it must terminate either within 25 years, or within 21 years and 10 months after the death of individuals living on the effective date of the trust.

(2) *Company* does not include any organization, the majority of the voting securities of which are owned by the United States or any state.

(3) *Testamentary trusts exempt.* Unless the Board finds that the trust is being operated as a business trust or company, a trust is presumed not to be a company if the trust:

(i) Terminates within 21 years and 10 months after the death of grantors or beneficiaries of the trust living on the effective date of the trust or within 25 years;

(ii) Is a testamentary or *inter vivos* trust established by an individual or individuals for the benefit of natural persons (or trusts for the benefit of natural persons) who are related by blood, marriage or adoption;

(iii) Contains only assets previously owned by the individual or individuals who established the trust;

(iv) Is not a Massachusetts business trust; and

(v) Does not issue shares, certificates, or any other evidence of ownership.

(4) *Qualified limited partnerships exempt.* Company does not include a qualified limited partnership, as defined in section 2(o)(10) of the BHC Act.

(e)(1) Control of a ~~bank or other~~ company means (except for the purposes of subpart E of this part):

(i) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting securities of the bank or other company, directly or indirectly or acting through one or more other persons;

(ii) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of the bank or other company;

(iii) The power to exercise, directly or indirectly, a controlling influence over the management or policies of the ~~bank or other~~ company, as determined by the Board after notice and opportunity for hearing in accordance with §225.31 of subpart D of this part; or

(iv) Conditioning in any manner the transfer of 25 percent or more of the outstanding shares of any class of voting securities of a ~~bank or other~~ company upon the transfer of 25 percent or more of the outstanding shares of any class of voting securities of another bank or other company.

(2) A ~~bank or other~~ company is deemed to control voting securities or assets owned, controlled, or held, directly or indirectly:

(i) By the ~~bank or other~~ company, or by any subsidiary of the ~~bank or other~~ company;

(ii) That the ~~bank or other~~ company has power to vote or to dispose of;

(iii) In a fiduciary capacity for the benefit of the company or any of its subsidiaries;

(~~iii~~iv) In a fiduciary capacity (including by pension and profit-sharing trusts) for the benefit of the shareholders, members, or employees (or individuals serving in similar capacities) of the ~~bank or other~~ company or any of its subsidiaries; or

~~(iv) In a fiduciary capacity for the benefit of the bank or other company or any of its subsidiaries; or~~

(v) According to the standards under section 225.9 of this part.

~~(vi) Notwithstanding paragraph (e)(2)(i) through (v), a bank or other company does not control any voting securities that are controlled by a company that is not a direct or indirect subsidiary of the bank or other company as a result of an investment by the bank or other company in the company that controls the voting securities.~~

(f) *Foreign banking organization* and *qualifying foreign banking organization* have the same meanings as provided in §211.21(n) and §211.23 of the Board's Regulation K (12 CFR 211.21(n) and 211.23).

(g) *Insured depository institution* includes an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)) and a savings association.

(h) *Lead insured depository institution* means the largest insured depository institution controlled by the bank holding company as of the quarter ending immediately prior to the proposed filing, based on a comparison of the average total risk-weighted assets controlled

during the previous 12-month period be each insured depository institution subsidiary of the holding company. For purposes of this paragraph (h), for a qualifying community banking organization (as defined in §217.12 of this chapter) that is subject to the community bank leverage ratio framework (as defined in §217.12 of this chapter), average total risk-weighted assets equal the qualifying community banking organization's average total consolidated assets (as used in §217.12 of this chapter).

(i) *Management official* means any officer, director (including honorary or advisory directors), partner, or trustee of a bank or other company, or any employee of the bank or other company with policy-making functions.

(j) *Nonbank bank* means any institution that:

(1) Became a bank as a result of enactment of the Competitive Equality Amendments of 1987 (Pub. L. 100-86), on the date of enactment (August 10, 1987); and

(2) Was not controlled by a bank holding company on the day before the enactment of the Competitive Equality Amendments of 1987 (August 9, 1987).

(k) *Outstanding shares* means any voting securities, but does not include securities owned by the United States or by a company wholly owned by the United States.

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

(m) *Savings association* means:

(1) Any federal savings association or federal savings bank;

(2) Any building and loan association, savings and loan association, homestead association, or cooperative bank if such association or cooperative bank is a member of the Savings Association Insurance Fund; and

(3) Any savings bank or cooperative that is deemed by the director of the Office of Thrift Supervision to be a savings association under section 10(l) of the Home Owners Loan Act.

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

(o) *Subsidiary* means a bank or other company that is controlled by another company, and refers to a direct or indirect subsidiary of a bank holding company. An indirect subsidiary is a bank or other company that is controlled by a subsidiary of the bank holding company.

(p) *United States* means the United States and includes any state of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, and the Virgin Islands.

(q)(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 securities*. Common shares, preferred shares, limited partnership interests, limited liability company interests, or similar interests are not voting securities if:

(i) Any voting rights associated with the securities 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, such as the issuance of additional amounts or classes of senior securities, the modification of the terms of the security, the dissolution of the issuing company, or the payment of dividends by the issuing company when preferred dividends are in arrears;

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

(iii) The securities 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; except that limited partnership interests or membership interests in limited liability companies are not voting securities due to voting rights that are limited solely to voting for the removal of a general partner or managing member (or persons

exercising similar functions at the company) for cause, to replace a general partner or managing member (or persons exercising similar functions at the company) due to incapacitation or following the removal of such person, or to continue or dissolve the company after removal of the general partner or managing member (or persons exercising similar functions at the 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 (o)(2)(i) of this section that affect solely the rights or preferences of the shares.

(r) *Well-capitalized*—(1) *Bank holding company.* In the case of a bank holding company, *well-capitalized* means that:

(i) On a consolidated basis, the bank holding company maintains a total risk-based capital ratio of 10.0 percent or greater, as defined in 12 CFR 217.10;

(ii) On a consolidated basis, the bank holding company maintains a tier 1 risk-based capital ratio of 6.0 percent or greater, as defined in 12 CFR 217.10; and

(iii) The bank 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) *Insured and uninsured depository institution*—(i) *Insured depository institution.* In the case of an insured depository institution, "well capitalized" means that the institution has and maintains at least the capital levels required to be well capitalized under the capital adequacy regulations or guidelines applicable to the institution that have been adopted by the appropriate Federal banking agency for the institution under section 38 of the Federal Deposit Insurance Act (12 U.S.C. 1831o).

(ii) *Uninsured depository institution.* In the case of a depository institution the deposits of which are not insured by the Federal Deposit Insurance Corporation, "well capitalized" means that the institution has and maintains at least the capital levels required for an insured depository institution to be well capitalized.

(3) *Foreign banks*—(i) *Standards applied.* For purposes of determining whether a foreign banking organization qualifies under paragraph (r)(1) of this section:

(A) A foreign banking organization whose home country supervisor, as defined in §211.21 of the Board's Regulation K (12 CFR 211.21), has adopted capital standards consistent

in all respects with the Capital Accord of the Basle Committee on Banking Supervision (Basle Accord) may calculate its capital ratios under the home country standard; and

(B) A foreign banking organization whose home country supervisor has not adopted capital standards consistent in all respects with the Basle Accord shall obtain a determination from the Board that its capital is equivalent to the capital that would be required of a U.S. banking organization under paragraph (r)(1) of this section.

(ii) *Branches and agencies.* For purposes of determining, under paragraph (r)(1) of this section, whether a branch or agency of a foreign banking organization is well-capitalized, the branch or agency shall be deemed to have the same capital ratios as the foreign banking organization.

(4) Notwithstanding paragraphs (r)(1) through (3) of this section:

(i) A bank holding company that is a qualifying community banking organization (as defined in §217.12 of this chapter) that is subject to the community bank leverage ratio framework (as defined in §217.12 of this chapter) is well capitalized if it satisfies the requirements of paragraph (r)(1)(iii) of this section.

(ii) A depository institution that is a qualifying community banking organization (as defined in §217.12 of this chapter) that is subject to the community bank leverage ratio framework (as defined in §217.12 of this chapter) is well capitalized.

(s) *Well managed*—(1) *In general.* Except as otherwise provided in this part, a company or depository institution is well managed if:

(i) At its most recent inspection or examination or subsequent review by the appropriate Federal banking agency for the company or institution (or the appropriate state banking agency in an examination described in section 10(d) of the Federal Deposit Insurance Act (12 U.S.C. 1820(d)), the company or institution received:

(A) At least a satisfactory composite rating; and

(B) At least a satisfactory rating for management, if such rating is given.

(ii) In the case of a company or depository institution that has not received an inspection or examination rating, the Board has determined, after a review of the managerial and other resources of the company or depository institution and after consulting with the appropriate Federal and state banking agencies, as applicable, for the company or institution, that the company or institution is well managed.

(2) *Merged depository institutions*—(i) *Merger involving well managed institutions.* A depository institution that results from the merger of two or more depository institutions that are well managed shall be considered to be well managed unless the Board determines otherwise after consulting with the appropriate Federal and state banking agencies, as applicable, for each depository institution involved in the merger.

(ii) *Merger involving a poorly rated institution.* A depository institution that results from the merger of a depository institution that is well managed with one or more depository institutions that are not well managed or have not been examined shall be considered to be well managed if the Board determines, after a review of the managerial and other resources of the resulting depository institution and after consulting with the appropriate Federal and state banking agencies for the institutions involved in the merger, as applicable, that the resulting institution is well managed.

(3) *Foreign banking organizations.* Except as otherwise provided in this part, a foreign banking organization is considered well managed if the combined operations of the foreign banking organization in the United States have received at least a satisfactory composite rating at the most recent annual assessment.

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

(u) *Voting percentage*. For purposes of this part, the percentage of a class of a company's voting securities controlled by a person is the greater of:

(1) The quotient, expressed as a percentage, of the number of shares of the class of voting securities controlled by the person, divided by the number of shares of the class of voting securities that are issued and outstanding, both as determined under section 225.9 of this part; and

(2) The quotient, expressed as a percentage, of the number of votes that may be cast by the person on the voting securities controlled by the person, divided by the total votes that are legally entitled to be cast by the issued and outstanding shares of the class of voting securities, both as determined under section 225.9 of this part.

* * * * *

§ 225.9 Control over securities.

(a) *Contingent rights, convertible securities, options, and warrants*. (1) A person that controls a ~~voting security, nonvoting~~ security, option, warrant, or other financial instrument that is convertible into, exercisable for, exchangeable for, or otherwise may become a ~~voting security or a nonvoting~~ security controls each ~~voting security or nonvoting~~ security that could be acquired as a result of such conversion, exercise, exchange, or similar occurrence.

(2) If a financial instrument of the type described in paragraph (a)(1) of this section is convertible into, exercisable for, exchangeable for, or otherwise may become a number of ~~voting securities or nonvoting~~ securities that varies according to a formula, rate, or other variable metric, the number of ~~voting securities or nonvoting~~ securities controlled under paragraph (a)(1) of this section is the maximum number of ~~voting~~ securities ~~or nonvoting securities~~ that the financial instrument could be converted into, be exercised for, be exchanged for, or otherwise become under the formula, rate, or other variable metric.

(3) Notwithstanding paragraph (a)(1) of this section, a person does not control voting securities due to controlling a financial instrument if the financial instrument:

(i) By its terms is not convertible into, is not exercisable for, is not exchangeable for, and may not otherwise become voting securities in the hands of the person or an affiliate of the person; and

(ii) By its terms the financial instrument is only ~~transferable~~convertible into, exercisable for, exchangeable for, or may otherwise become voting securities in the hands of a transferee after a transfer:

(A) In a widespread public distribution;

(B) To ~~an affiliate of the person or to~~ the issuing company;

(C) In transfers in which no transferee (or group of associated transferees) would receive 2 percent or more of the outstanding securities of any class of voting securities of the issuing company; or

(D) To a transferee that would control more than 50 percent of every class of ~~the~~ voting securities of the issuing company without any transfer from the person.

(4) Notwithstanding ~~any other~~ paragraph (a)(1) of this section, a person that has agreed to acquire ~~voting~~ securities~~, nonvoting securities,~~ or other financial instruments pursuant to a securities purchase agreement does not control such ~~voting~~ securities~~, nonvoting securities,~~ or

financial instruments until the person acquires the ~~voting~~ securities~~, nonvoting shares or other~~ or financial instruments.

(5) Notwithstanding ~~any other~~ paragraph (a)(1) of this section, a right that provides a person the ability to acquire securities in future issuances or to convert nonvoting securities into voting securities does not cause the person to control the ~~voting securities or nonvoting~~ securities that could be acquired under the right, so long as the right does not allow the person to acquire a higher percentage of the class of ~~voting~~ securities than the person controlled immediately prior to the future ~~issuance or conversion~~acquisition.

(6) Notwithstanding paragraph (a)(1) of this section, a preferred security that would be a nonvoting security but for a right to vote on directors that activates only after six or more quarters of unpaid dividends is not considered to be a voting security until the securityholder is entitled to exercise the voting right.

(~~6~~7) For purposes of determining the percentage of a class of voting securities or the total equity percentage of a company controlled by a person that controls a financial instrument of the type described in paragraph (a)(1) of this section:

(A) The ~~voting securities or nonvoting~~ securities controlled by the person under paragraphs (a)(1)~~-~~ through (~~5~~6) of this section are deemed to be issued and outstanding~~,~~; and

(B) Any ~~voting securities or nonvoting~~ securities controlled by anyone other than the person under paragraph (a)(1)~~-~~ through (~~5~~6) of this section are not deemed to be issued and outstanding, unless by the terms of the financial instruments the ~~voting securities or nonvoting~~ securities controlled by the other persons must be issued and outstanding in order for the ~~voting securities or nonvoting~~ securities of the person to be issued and outstanding.

(b) *Restriction on securities.* A person that enters into an agreement or understanding with a second person under which the rights of the second person are restricted in any manner with respect to securities that are controlled by the second person, controls the securities of the second person, unless the restriction is:

(1) A requirement that the second person offer the securities for sale to the first person for a reasonable period of time prior to transferring the securities to a third party;

(2) A requirement that, if the second person agrees to sell the securities, the second person provide the first person with the opportunity to participate in the sale of the securities by the second person;

(3) A requirement under which the second person agrees to sell its securities to a third party if a majority of ~~shareholders~~securityholders agree to sell their ~~shares~~securities to the third party;

(4) Incident to a bona fide loan transaction in which the securities serve as collateral;

(5) A short-term and revocable proxy;

(6) A restriction on transferability that continues only for a reasonable amount of time necessary to complete ~~a transaction to transfer the shares~~an acquisition by the first person of the securities from the second person, including the time necessary to obtain required approval from an appropriate government authority with respect to the acquisition~~ by the first person of the securities of the second person~~;

(7) A requirement that the second person vote the securities in favor of a specific acquisition of control of the issuing company, or against competing transactions, if the restriction continues only for a reasonable amount of time necessary to complete the transaction, including the time necessary to obtain required approval from an appropriate government authority with respect to an acquisition or merger; or

(8) An agreement among ~~shareholders~~securityholders of the issuing company intended to preserve the tax status or tax benefits of the company, such as qualification of the issuing company as a Subchapter S corporation, as defined in 26 U.S.C. ~~§~~ 1361(a)(1) or any successor statute, or prevention of events that could impair deferred tax assets, such as net operating loss carryforwards, as described in 26 U.S.C. ~~§~~ 382 or any successor statute.

(c) *Securities held by senior management officials or controlling equity holders of a company*. A company that controls 5 percent or more of ~~the~~any class of voting securities of another company controls all securities issued by the second company that are controlled by senior management officials, directors, or controlling shareholders of the first company, or by immediate family members of such persons~~.~~, unless the first company controls less than 15 percent of each class of voting securities of the second company and the senior management officials, directors, and controlling shareholders of the first company, and immediate family members of such persons, control 50 percent or more of each class of voting securities of the second company.

(d) *Reservation of authority*. Notwithstanding paragraphs (a) through (c) of this section, the Board may determine that securities are or are not controlled by a company based on the facts and circumstances presented. * * * * *

Subpart D—Control and Divestiture Proceedings

§ 225.31 Control proceedings.

(a) *Preliminary determination of control*. (1) The Board in its sole discretion may issue a preliminary determination of control under the procedures set forth in this section in any case in which the Board determines, based on consideration of the facts and circumstances presented, that a first company has the power to exercise a controlling influence over the management or policies of a second company.

(2) If the Board makes a preliminary determination of control under this section, the Board shall send notice to the first company containing a statement of the facts upon which the preliminary determination is based.

(b) *Response to preliminary determination of control*. (1) Within 30 calendar days after issuance by the Board of a preliminary determination of control or such longer period permitted by the Board in its discretion, the first company against whom the preliminary determination has been made shall:

(i) Consent to the preliminary determination of control and either:

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

(B) File an application or notice under this part, as applicable; or

(ii) 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.

(2) If the first company fails to respond to the preliminary determination of control within 30 days, the first company will be deemed to have waived its right to present additional information to the Board or to request a hearing or other proceeding regarding the preliminary determination of control.

(c) *Hearing and final determination*. (1) The Board shall order a hearing or other appropriate proceeding upon the petition of a first company that contests a preliminary determination of control if the Board finds that material facts are in dispute. The Board may, in its discretion, order a hearing or other appropriate proceeding without a petition for such a proceeding by the first company.

(2) At a hearing or other proceeding, any applicable presumptions established under this subpart 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 first company and other evidence, including the record of any hearing or other proceeding, the Board will issue a final order determining whether the first company has the power to exercise a controlling influence over the management or policies of the second company. If a controlling influence is found, the Board may direct the first company to terminate the control relationship or to file an application or notice for the Board's approval to retain the control relationship.

(d) ~~*Rebuttal of presumptions of control of a company*~~*Submission of evidence*. (1) In connection with contesting a preliminary determination of control under paragraph (b)(1)(ii) of this section, a first company may submit to the Board evidence or any other relevant information related to its control of a second company.

(2) Evidence or other relevant information submitted to the Board pursuant to paragraph (d)(1) must be in writing and may include a description of all current and proposed relationships between the first company and the second company, including relationships of the type that are identified under any of the rebuttable presumptions in sections 225.32 and 225.33 of this part, copies of any formal agreements related to such relationships, and a discussion regarding why the Board should not determine the first company to control the second company.

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

(1) *Board of directors* means the board of directors of a company or a set of individuals exercising similar functions at a company.

(2) *Director representative* means any individual that represents the interests of a first company through service on the board of directors of a second company. For purposes of this paragraph (e)(2), examples of persons who are directors of a second company and generally would be considered director representatives of a first company include:

~~(2) *Director representative* means, with respect to a first company,~~

~~(i) Any individual that serves on the board of directors of a second company and:~~

~~(A) Was nominated or proposed to serve by the first company;~~

(~~B) Is a~~i) A current officer, employee, or director~~, or agent~~ of the first company;

(~~C) Served as an~~ii) An individual who was an officer, employee, or director~~, or agent~~ of the first company ~~during~~within the ~~immediately preceding~~prior two years; ~~or~~and

(~~D) Is a member of the immediate family of any employee, director, or agent of~~iii) An individual who was nominated or proposed to be a director of the second company by the first company.

(~~ii~~D) A director representative does not include a nonvoting observer.

(3) *First company* means the company whose potential control of a second company is the subject of determination by the Board under this subpart.

(4) *Investment adviser* means a company that:

(i) Is registered as an investment adviser with the Securities and Exchange Commission under the Investment Advisers Act of 1940 (15 U.S.C. ~~§~~ 80b-1 et seq.);

(ii) Is registered as a commodity trading advisor with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. ~~§~~ 1 et seq.);

(iii) Is a foreign equivalent of an investment adviser or commodity trading advisor, as described in paragraph (e)(4)(i) ~~and~~or (ii) above; or

(iv) Engages in any of the activities set forth in section 225.28(b)(6)(i)~~-~~ through (iv) of this part.

(5) *Limiting contractual right* means a contractual right of the first company that would allow the first company to restrict significantly, directly or indirectly, the discretion of the second company, including its senior management officials and directors, over operational and policy decisions of the second company.

(i) ~~A~~Examples of limiting contractual ~~right includes~~rights may include, but ~~is~~are not limited to, a right that allows the first company to restrict or to exert significant influence over decisions related to:

(A) Activities in which the second company may engage, including a prohibition on entering into new lines of business, making substantial changes to or discontinuing existing lines of business, or entering into a contractual arrangement with a third party that imposes significant financial obligations on the second company;

(B) How the second company directs the proceeds of the first company's investment;

(C) Hiring, firing, or compensating one or more senior management officials of the second company, or modifying the second company's policies or budget concerning the salary, compensation, employment, or benefits plan for its employees;

(D) The second company's ability to merge or consolidate, or ~~on~~ its ability to acquire, sell, lease, transfer, spin-off, recapitalize, liquidate, dissolve, or dispose of subsidiaries or assets;

(E) The second company's ability to make investments or expenditures;

(F) The second company achieving or maintaining a financial target or limit, including, for example, a debt-to-equity ratio, a fixed charges ratio, a net worth requirement, a liquidity target, a working capital target, or a classified assets or nonperforming loans limit;

(G) The second company's payment of dividends on any class of securities, redemption of senior instruments, or voluntary prepayment of indebtedness;

(H) The second company's ability to authorize or issue additional junior equity or debt securities, or amend the terms of any equity or debt securities issued by the second company;

(I) The second company's ability to engage in a public offering or to list or de-list securities on an exchange, other than a right that allows the securities of the first company to have the same status as other securities of the same class;

(J) The second company's ability to amend its articles of incorporation or by-laws, other than in a way that is solely defensive for the first company;

(K) The removal or selection of any independent accountant, auditor, investment adviser, or investment banker employed by the second company;

(L) The second company's ability to significantly alter accounting methods and policies, or its regulatory, tax, or liability status (e.g., converting from a stock corporation to a limited liability company); and

(ii) A limiting contractual right does not include a contractual right that would not allow the first company to significantly restrict, directly or indirectly, the discretion of the second company over operational and policy decisions of the second company~~, such as~~. Examples of contractual rights that are not limiting contractual rights may include:

(A) A right that allows the first company to restrict or to exert significant influence over decisions relating to the second company's ability to issue securities senior to securities owned by the first company;

(B) A requirement that the first company receive financial reports or other information of the type ordinarily available to common stockholders;

(C) A requirement that the second company maintain its corporate existence;

(D) A requirement that the second company consult with the first company on a reasonable periodic basis;

(E) A requirement that the second company provide notices of the occurrence of material events affecting the second company;

(F) A requirement that the second company comply with applicable statutory and regulatory requirements;

(G) A market standard requirement that the first company receive similar contractual rights as those held by other investors in the second company;

(H) A requirement that the first company be able to purchase additional ~~shares~~securities issued by the second company in order to maintain the first company's percentage ownership in the second company;

(I) A requirement that the second company ensure that any ~~shareholder~~securityholder who intends to sell its ~~shares~~securities of the second company provide other ~~shareholders~~securityholders of the second company or the second company itself the opportunity to purchase the ~~shares~~securities before the ~~shares~~securities can be sold to a third party; or

(J) A requirement that the second company take reasonable steps to ensure the preservation of tax status or tax benefits, such as status of the second company as a Subchapter S corporation or the protection of the value of net operating loss carry-forwards.

(6) *Second company* means the company whose potential control by a first company is the subject of determination by the Board under this subpart.

(7) *Senior management official* means any person who participates or has the authority to participate (other than in the capacity as a director) in major policymaking functions of a company.

(f) *Reservation of authority*. Nothing in this subpart shall limit the authority of the ~~Federal Reserve~~Board to take any supervisory or enforcement action otherwise permitted by law, including an action to address unsafe or unsound practices or conditions, or violations of law.

§ 225.32 Rebuttable presumptions of control of a company.

(a) General. (1) In any proceeding under section 225.31(b)(2) or (c) of this part, a first company is presumed to control a second company in the situations described in subsections (b) through (i) of this section. The Board also may find that a first company controls a second company based on other facts and circumstances.

(2) For purposes of the presumptions in this section, any company that is a subsidiary of the first company and also a subsidiary of the second company is considered to be a subsidiary of the first company and not a subsidiary of the second company.

(b) *Management contract or similar agreement*. The first company enters into any agreement, understanding, or management contract (other than to serve as investment adviser) with the second company, under which the first company directs or exercises significant influence or discretion over the general management, overall operations, or core business or policy decisions of the second company. Examples of such agreements include where the first company is a managing member, trustee, or general partner of the second company, or exercises similar powers and functions.

(c) *Total equity*. The first company controls one third or more of the total equity of the second company.

(d) *Ownership or control of 5 percent or more of voting securities*. The first company controls 5 percent or more of the outstanding securities of any class of voting securities of the second company, and:

(1) (i) Director representatives of the first company or any of its subsidiaries comprise 25 percent or more of the board of directors of the second company or any of its subsidiaries; or

(ii) Director representatives of the first company or any of its subsidiaries are able to make or block the making of major operational or policy decisions of the second company or any of its subsidiaries;

(2) Two or more employees or directors of the first company or any of its subsidiaries serve as senior management officials of the second company or any of its subsidiaries;

(3) An employee or director of the first company or any of its subsidiaries serves as the chief executive officer, or serves in a similar capacity, of the second company or any of its subsidiaries;

(4) The first company or any of its subsidiaries enters into transactions or has business relationships with the second company or any of its subsidiaries that generate in the aggregate 10 percent or more of the total annual revenues or expenses of the ~~first company or the~~ second company, each on a consolidated basis; or

(5) The first company or any of its subsidiaries has any limiting contractual right with respect to the second company or any of its subsidiaries, unless such limiting contractual right is part of an agreement to merge with or make a controlling investment in the second company that is reasonably expected to close within one year and such limiting contractual right is designed to ensure that the second company continues to operate in the ordinary course until the merger or investment is consummated or such limiting contractual right requires the second company to take an action necessary for the merger or investment to be consummated~~; or~~.

~~(6) Senior management officials and directors of the first company and its subsidiaries, together with their immediate family members and the first company and its subsidiaries, own, control, or have power to vote 25 percent or more of any class of voting securities of the second company, unless the first company and its subsidiaries control less than 15 percent of each class of voting securities of the second company and the senior management officials and directors of the first company and its subsidiaries, together with their immediate family members, own, control, or have power to vote 50 percent or more of each class of voting securities of the second company.~~

(e) *Ownership or control of 10 percent or more of voting securities*. The first company controls 10 percent or more of the outstanding securities of any class of voting securities of the second company, and:

(1) The first company or any of its subsidiaries propose a number of director representatives to the board of directors of the second company or any of its subsidiaries in opposition to ~~the~~ nominees proposed by the management or board of directors of the second company or any of its subsidiaries that, together with any director representatives of the first company or any of its subsidiaries on the board of directors of the second company or any of its subsidiaries, ~~exceed the number of director representatives that the first company could have without being presumed to control~~ would comprise 25 percent or more of the board of directors of the second company ~~under section 225.32(d)(1)(i) of this part~~or any of its subsidiaries;

(2) Director representatives of the first company and its subsidiaries comprise more than 25 percent of any committee of the board of directors of the second company or any of its subsidiaries that can take ~~actions~~action that ~~bind~~binds the second company or any of its subsidiaries; or

(3) The first company or any of its subsidiaries enters into transactions or has business relationships with the second company or any of its subsidiaries that:

(i) Are not on market terms; or

(ii) Generate in the aggregate 5 percent or more of the total annual revenues or expenses of the ~~first company or the~~ second company, each on a consolidated basis.

(f) *Ownership or control of 15 percent or more of voting securities*. The first company controls 15 percent or more of the outstanding securities of any class of voting securities of the second company, and:

~~(1) The first company controls 25 percent or more of the total equity of the second company;~~

(~~2~~1) A director representative of the first company or of any of its subsidiaries serves as the chair of the board of directors of the second company or any of its subsidiaries;

(~~3~~2) One or more employees or directors of the first company or any of its subsidiaries serves as a senior management official of the second company or any of its subsidiaries; or

(~~4~~3) The first company or any of its subsidiaries enters into transactions or has business relationships with the second company or any of its subsidiaries that generate in the aggregate 2 percent or more of the total annual revenues or expenses of the ~~first company or the~~ second company, each on a consolidated basis.

(g) *Accounting consolidation*. The first company consolidates the second company on its financial statements prepared under U.S. generally accepted accounting principles.

(h) *Control of an investment fund*. (1) The first company serves as an investment adviser to the second company, the second company is an investment fund, and the first company, directly or indirectly, or acting through one or more other persons:

(i) Controls 5 percent or more of the outstanding securities of any class of voting securities of the second company; or

(ii) Controls 25 percent or more of the total equity of the second company.

(2) The presumption of control in paragraph (h)(1) of this section does not apply if the first company organized and sponsored the second company within the preceding 12 months.

(i) *Divestiture of control*. (1) The first company controlled the second company under paragraph (e)(1)(i) or (ii) of section 225.2 of this part at any time during the prior two years and the first company controls 15 percent or more of any class of voting securities of the second company.

(2) Notwithstanding paragraph (i)(1) of this section, a first company will not be presumed to control a second company under this paragraph if 50 percent or more of the outstanding securities of each class of voting securities of the second company is controlled by a person that is not a senior management official or director of the first company, or by a company that is not an affiliate of the first company.

~~(j) *Registered investment company*. The presumptions of control in this section do not apply if:~~

~~(1) The second company is an investment company registered with the Securities and Exchange Commission under the Investment Company Act of 1940 (15 U.S.C. § 80a et seq.);~~

~~(2) The business relationships between the first company and the second company are limited to investment advisory, custodian, transfer agent, registrar, administrative, distributor, and securities brokerage services provided by the first company to the second company;~~

~~(3) Director representatives of the first company or any of its subsidiaries comprise 25 percent or less of the board of directors or trustees of the second company; and~~

~~(4) (i) The first company controls less than 5 percent of the outstanding securities of each class of voting securities of the second company and less than 25 percent of the total equity of the second company, or~~

~~(ii) The first company organized and sponsored the second company within the preceding 12 months.~~

(~~k~~j) ~~*Shares*~~*Securities* *held in a fiduciary capacity*. ~~The~~For purposes of the presumptions of control in this section ~~do not apply to the extent that~~, the first company ~~or any of its subsidiaries~~does not control ~~the~~ securities of the second company ~~or any of its subsidiaries in a fiduciary~~that the first company holds in a fiduciary capacity, except that if the second company is a depository institution or a depository institution holding company, this paragraph (j) only applies to securities held in a fiduciary capacity without sole discretionary authority to exercise the voting rights of the securities.

§ 225.33 Rebuttable presumption of noncontrol of a company.

(a) In any proceeding under section 225.31(b)(2) or (c) of this part, a first company is presumed not to control a second company if:

(1) The first company controls less than 10 percent of the outstanding securities of each class of voting securities of the second company~~,~~; and

(2) The first company is not presumed to control the second company under section 225.32 of this part.

(b) In any proceeding under this subpart, or judicial proceeding under the Bank Holding Company Act, other than a proceeding in which the Board has made a preliminary determination that a first company has the power to exercise a controlling influence over the management or policies of a second company, a first company may not be held to have had control over a second company at any given time, unless the first company, at the time in question, controlled 5 percent or more of the outstanding securities of any class of voting securities of the second company, or had already been found to have control on the basis of the existence of a controlling influence relationship.

§ 225.34 Total Equity.

(a) *General*. For purposes of this subpart, the total equity controlled by a first company in a second company that is organized as a stock corporation and prepares financial statements pursuant to U.S. generally accepted accounting principles ~~is~~will be calculated as described in paragraph (b) of this section. With respect to a second company that is not organized as a stock corporation or that does not prepare financial statements pursuant to U.S. generally accepted accounting principles, the first company's total equity in the second company will be calculated so as to be reasonably consistent with the methodology described in paragraph (b) of this section, while taking into account the legal form of the second company and the accounting system used by the second company to prepare financial statements.

(b) *Calculation of total equity*. (1) Total Equity. The first company's total equity in the second company, expressed as a percentage, is equal to:

(i) The sum of Investor Common Equity and, for each class of preferred stock issued by the second company, Investor Preferred Equity, divided by

(ii) Issuer Shareholders' Equity.

(2) Investor Common Equity equals the greater of:

(i) Zero, and

(ii) The quotient of the number of shares of common stock of the second company that are controlled by the first company divided by the total number of shares of common stock of the second company that are issued and outstanding, multiplied by the amount of shareholders' equity of the second company not allocated to preferred stock under U.S. generally accepted accounting principles.

(3) Investor Preferred Equity equals, for each class of preferred stock issued by the second company, the greater of:

(i) Zero, and

(ii) The quotient of the number of shares of the class of preferred stock of the second company that are controlled by the first company divided by the total number of shares of the class of preferred stock that are issued and outstanding, multiplied by the amount of shareholders' equity of the second company allocated to the class of preferred stock under U.S. generally accepted accounting principles.

(c) *Consideration of debt instruments and other interests in total equity*. (1) For purposes of the total equity calculation in paragraph (b) of this section, a debt instrument or other interest issued by the second company that is ~~held~~controlled by the first company may be treated as an equity instrument if that debt instrument or other interest is functionally equivalent to equity.

(2) For purposes of paragraph (b)(1) of this section, the principal amount of all debt instruments and the market value of all other interests that are functionally equivalent to equity that are ~~owned or~~ controlled by the first company are added to the sum under paragraph (b)(1)(i) of this section, and the principal amount of all debt instruments and the market value of all other interests that are functionally equivalent to equity that are outstanding are added to Issuer Shareholders' Equity.

(3) For purposes of paragraph (~~b~~c)(1) of this section, a debt instrument issued by the second company may be considered functionally equivalent to equity if it has equity-like characteristics, such as:

(i) Extremely long-dated maturity;

(ii) Subordination to other debt instruments issued by the second company;

(ii) Qualification as regulatory capital under any regulatory capital rules applicable to the second company;

(iii) Qualification as equity under applicable tax law;

(iv) Qualification as equity under U.S. generally accepted accounting principles or other applicable accounting standards;

(v) Inadequacy of the equity capital underlying the debt at the time of the issuance of the debt; ~~and~~or

(vi) Issuance not on market terms.

(4) For purposes of paragraph (~~b~~c)(1) of this section, an interest that is not a debt instrument issued by the second company may be considered functionally equivalent to equity if it has equity-like characteristics, such as entitling its owner to a share of the profits of the second company.

(d) ~~*Investments in parent companies of a second company*. If a first company controls equity interests of one or more companies that directly or indirectly control~~ *Exclusion of certain equity instruments from total equity*. (1) For purposes of the total equity calculation in paragraph

(b) of this section, an equity instrument issued by the second company ~~(parent company), the total equity of~~that is controlled by the first company ~~in the second company is equal to:~~may be treated as not an equity instrument if that equity instrument is functionally equivalent to debt.

(2) For purposes of paragraph (d)(1) of this section, an equity instrument issued by the second company may be considered functionally equivalent to debt if it has debt-like characteristics, such as protections generally provided to creditors, a limited term, a fixed rate of return or a variable rate of return linked to a reference interest rate, classification as debt for tax purposes, or classification as debt for accounting purposes.

~~(1) The first company's total equity of the second company as calculated under paragraph (b) of this section, plus~~

~~(2) The product of the first company's total equity of each parent company, calculated in accordance with paragraph (b) of this section, multiplied by the parent company's total equity in the second company, as calculated under paragraph (b) of this section.~~

(e) *Frequency of total equity calculation*. The total equity of a first company in a second company is calculated each time the first company acquires control over ~~or ceases to control~~ equity instruments of the second company, including any debt instruments or other interests that are functionally equivalent to equity in accordance with paragraph (c) of this section.

* * * * *

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

Subpart A—General Provisions

§ 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;

(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; or

(5) Voting securities or assets owned, controlled, or held, directly or indirectly:

(i) By the ~~savings association or other~~ company, or by any subsidiary of the ~~savings association or other~~ company;

(ii) That the ~~savings association or other~~ company has power to vote or to dispose of;

(iii) In a fiduciary capacity for the benefit of the company or any of its subsidiaries;

(~~iii~~iv) In a fiduciary capacity (including by pension and profit-sharing trusts) for the benefit of the shareholders, members, or employees (or individuals serving in similar capacities) of the ~~savings association or other~~ company or any of its subsidiaries; or

~~(iv) In a fiduciary capacity for the benefit of the bank or other company or any of its subsidiaries; or~~

(v) According to the standards under section 238.10 of this part.

~~(vi) Notwithstanding paragraph (e)(5)(i) through (v), a savings association or other company does not control any voting securities that are controlled by a company that is not a direct or indirect subsidiary of the savings association or other company as a result of an investment by the savings association or other company in the company that controls the voting securities.~~

(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.

(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).

(l) *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) *Well-capitalized*—(1) *Bank holding company.* In the case of a bank holding company, *well-capitalized* means that:

(i) On a consolidated basis, the bank holding company maintains a total risk-based capital ratio of 10.0 percent or greater, as defined in 12 CFR 217.10;

(ii) On a consolidated basis, the bank holding company maintains a tier 1 risk-based capital ratio of 6.0 percent or greater, as defined in 12 CFR 217.10; and

(iii) The bank 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) *Nonvoting securities*. Common shares, preferred shares, limited partnership interests, limited liability company interests, or similar interests are not voting securities if:

(i) Any voting rights associated with the securities 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, such as the issuance of additional amounts or classes of senior securities, the modification of the terms of the security, the dissolution of the issuing company, or the payment of dividends by the issuing company when preferred dividends are in arrears;

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

(iii) The securities 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; except that limited partnership interests or membership interests in limited liability companies are not voting securities due to voting rights that are limited solely to voting for the removal of a general partner or managing member (or persons exercising similar functions at the company) for cause, to replace a general partner or managing member (or persons exercising similar functions at the company) due to incapacitation or following the removal of such person, or to continue or dissolve the company after removal of the general partner or managing member (or persons exercising similar functions at the company).

(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 management" 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)).

(v) *Applicable accounting standards* means GAAP, international financial reporting standards, or such other accounting standards that a company uses in the ordinary course of its business in preparing its consolidated financial statements.

(w) *Average cross-jurisdictional activity* means the average of cross-jurisdictional activity for the four most recent calendar quarters or, if the banking organization has not reported cross-jurisdictional activity for each of the four most recent calendar quarters, the cross-jurisdictional activity for the most recent calendar quarter or average of the most recent calendar quarters, as applicable.

(x) *Average off-balance sheet exposure* means the average of off-balance sheet exposure for the four most recent calendar quarters or, if the banking organization has not reported total exposure and total consolidated assets for each of the four most recent calendar quarters, the off-balance sheet exposure for the most recent calendar quarter or average of the most recent quarters, as applicable.

(y) *Average total consolidated assets* means the average of total consolidated assets for the four most recent calendar quarters or, if the banking organization has not reported total consolidated assets for each of the four most recent calendar quarters, the total consolidated assets for the most recent calendar quarter or average of the most recent calendar quarters, as applicable.

(z) *Average total nonbank assets* means the average of total nonbank assets for the four most recent calendar quarters or, if the banking organization has not reported total nonbank assets for each of the four most recent calendar quarters, the total nonbank assets for the most recent calendar quarter or average of the most recent calendar quarters, as applicable.

(aa) *Average weighted short-term wholesale funding* means the average of weighted short-term wholesale funding for each of the four most recent calendar quarters or, if the banking organization has not reported weighted short-term wholesale funding for each of the four most recent calendar quarters, the weighted short-term wholesale funding for the most recent quarter or average of the most recent calendar quarters, as applicable.

(bb) *Banking organization.* Banking organization means a covered savings and loan holding company that is:

(1) Incorporated in or organized under the laws of the United States or any State; and

(2) Not a consolidated subsidiary of a covered savings and loan holding company that is incorporated in or organized under the laws of the United States or any State.

(cc) *Category II savings and loan holding company* means a covered savings and loan holding company identified as a Category II banking organization pursuant to §238.10.

(dd) *Category III savings and loan holding company* means a covered savings and loan holding company identified as a Category III banking organization pursuant to §238.10.

(ee) *Category IV savings and loan holding company* means a covered savings and loan holding company identified as a Category IV banking organization pursuant to §238.10.

(ff) *Covered savings and loan holding company* means a savings and loan holding company other than:

(1) A top-tier savings and loan holding company that is:

(i) A grandfathered unitary savings and loan holding company as defined in section 10(c)(9)(C) of the Home Owners' Loan Act (12 U.S.C. 1461 *et seq.*); and

(ii) As of June 30 of the previous calendar year, derived 50 percent or more of its total consolidated assets or 50 percent of its total revenues on an enterprise-wide basis (as calculated under GAAP) from activities that are not financial in nature under section 4(k) of the Bank Holding Company Act (12 U.S.C. 1843(k));

(2) A top-tier depository institution holding company that is an insurance underwriting company; or

(3)(i) A top-tier depository institution holding company that, as of June 30 of the previous calendar year, held 25 percent or more of its total consolidated assets in subsidiaries that are insurance underwriting companies (other than assets associated with insurance for credit risk); and

(ii) For purposes of paragraph (ff)(3)(i) of this section, the company must calculate its total consolidated assets in accordance with GAAP, or if the company does not calculate its total consolidated assets under GAAP for any regulatory purpose (including compliance with applicable securities laws), the company may estimate its total consolidated assets, subject to review and adjustment by the Board of Governors of the Federal Reserve System.

(gg) *Cross-jurisdictional activity.* The cross-jurisdictional activity of a banking organization is equal to the cross-jurisdictional activity of the banking organization as reported on the FR Y-15.

(hh) *Foreign banking organization* has the same meaning as in §211.21(o) of this chapter.

(ii) *FR Y-9C* means the Consolidated Financial Statements for Holding Companies reporting form.

(jj) *FR Y-9LP* means the Parent Company Only Financial Statements of Large Holding Companies.

(kk) *FR Y-15* means the Systemic Risk Report.

(ll) *GAAP* means generally accepted accounting principles as used in the United States.

(mm) *Off-balance sheet exposure.* The off-balance sheet exposure of a banking organization is equal to:

(1) The total exposure of the banking organization, as reported by the banking organization on the FR Y-15; minus

(2) The total consolidated assets of the banking organization for the same calendar quarter.

(nn) *State* means any state, commonwealth, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, or the United States Virgin Islands.

(oo) *Total consolidated assets.* Total consolidated assets of a banking organization are equal to its total consolidated assets calculated based on the average of the balances as of the close of business for each day for the calendar quarter or an average of the balances as of the close of business on each Wednesday during the calendar quarter, as reported on the FR Y-9C.

(pp) *Total nonbank assets.* Total nonbank assets of a banking organization is equal to the total nonbank assets of such banking organization, as reported on the FR Y-9LP.

(qq) *U.S. government agency* means an agency or instrumentality of the United States whose obligations are fully and explicitly guaranteed as to the timely payment of principal and interest by the full faith and credit of the United States.

(rr) *U.S. government-sponsored enterprise* means an entity originally established or chartered by the U.S. government to serve public purposes specified by the U.S. Congress, but whose obligations are not explicitly guaranteed by the full faith and credit of the United States.

(ss) *Weighted short-term wholesale funding* is equal to the weighted short-term wholesale funding of a banking organization, as reported on the FR Y-15.

(tt) *Voting percentage*. For purposes of this part, the percentage of a class of a company's voting securities controlled by a person is the greater of:

(1) The quotient, expressed as a percentage, of the number of shares of the class of voting securities controlled by the person, divided by the number of shares of the class of voting securities that are issued and outstanding, both as determined under section 238.10 of this part; and

(2) The quotient, expressed as a percentage, of the number of votes that may be cast by the person on the voting securities controlled by the person, divided by the total votes that are legally entitled to be cast by the issued and outstanding shares of the class of voting securities, both as determined under section 238.10 of this part.

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

Subpart A—General Provisions

§ 238.10 Control over securities.

(a) *Contingent rights, convertible securities, options, and warrants*. (1) A person that controls a ~~voting security, nonvoting~~ security, option, warrant, or other financial instrument that is convertible into, exercisable for, exchangeable for, or otherwise may become a ~~voting security or a nonvoting~~ security controls each ~~voting security or nonvoting~~ security that could be acquired as a result of such conversion, exercise, exchange, or similar occurrence.

(2) If a financial instrument of the type described in paragraph (a)(1) of this section is convertible into, exercisable for, exchangeable for, or otherwise may become a number of ~~voting securities or nonvoting~~ securities that varies according to a formula, rate, or other variable metric, the number of ~~voting securities or nonvoting~~ securities controlled under paragraph (a)(1) of this section is the maximum number of ~~voting~~ securities ~~or nonvoting securities~~ that the financial instrument could be converted into, be exercised for, be exchanged for, or otherwise become under the formula, rate, or other variable metric.

(3) Notwithstanding paragraph (a)(1) of this section, a person does not control voting securities due to controlling a financial instrument if the financial instrument:

(i) By its terms is not convertible into, is not exercisable for, is not exchangeable for, and may not otherwise become voting securities in the hands of the person or an affiliate of the person; and

(ii) By its terms the financial instrument is only ~~transferable~~convertible into, exercisable for, exchangeable for, or may otherwise become voting securities in the hands of a transferee after a transfer:

(A) In a widespread public distribution;

(B) To ~~an affiliate of the person or to~~ the issuing company;

(C) In transfers in which no transferee (or group of associated transferees) would receive 2 percent or more of the outstanding securities of any class of voting securities of the issuing company; or

(D) To a transferee that would control more than 50 percent of every class of ~~the~~ voting securities of the issuing company without any transfer from the person.

(4) Notwithstanding ~~any other~~ paragraph (a)(1) of this section, a person that has agreed to acquire ~~voting~~ securities~~, nonvoting securities,~~ or other financial instruments pursuant to a securities purchase agreement does not control such ~~voting~~ securities~~, nonvoting securities,~~ or financial instruments until the person acquires the ~~voting~~ securities~~, nonvoting shares or other~~ or financial instruments.

(5) Notwithstanding ~~any other~~ paragraph (a)(1) of this section, a right that provides a person the ability to acquire securities in future issuances or to convert nonvoting securities into voting securities does not cause the person to control the ~~voting securities or nonvoting~~ securities that could be acquired under the right, so long as the right does not allow the person to acquire a higher percentage of the class of ~~voting~~ securities than the person controlled immediately prior to the future ~~issuance or conversion~~acquisition.

(6) Notwithstanding paragraph (a)(1) of this section, a preferred security that would be a nonvoting security but for a right to vote on directors that activates only after six or more quarters of unpaid dividends is not considered to be a voting security until the securityholder is entitled to exercise the voting right.

(~~6~~7) For purposes of determining the percentage of a class of voting securities or the total equity percentage of a company controlled by a person that controls a financial instrument of the type described in paragraph (a)(1) of this section:

(A) The ~~voting securities or nonvoting~~ securities controlled by the person under paragraphs (a)(1)~~-~~ through (~~5~~6) of this section are deemed to be issued and outstanding~~,~~;; and

(B) Any ~~voting securities or nonvoting~~ securities controlled by anyone other than the person under paragraph (a)(1)~~-~~ through (~~5~~6) of this section are not deemed to be issued and outstanding, unless by the terms of the financial instruments the ~~voting securities or nonvoting~~ securities controlled by the other persons must be issued and outstanding in order for the ~~voting securities or nonvoting~~ securities of the person to be issued and outstanding.

(b) *Restriction on securities.* A person that enters into an agreement or understanding with a second person under which the rights of the second person are restricted in any manner with respect to securities that are controlled by the second person, controls the securities of the second person, unless the restriction is:

(1) A requirement that the second person offer the securities for sale to the first person for a reasonable period of time prior to transferring the securities to a third party;

(2) A requirement that, if the second person agrees to sell the securities, the second person provide the first person with the opportunity to participate in the sale of the securities by the second person;

(3) A requirement under which the second person agrees to sell its securities to a third party if a majority of ~~shareholders~~securityholders agree to sell their ~~shares~~securities to the third party;

(4) Incident to a bona fide loan transaction in which the securities serve as collateral;

(5) A short-term and revocable proxy;

(6) A restriction on transferability that continues only for a reasonable amount of time necessary to complete ~~a transaction to transfer the shares~~an acquisition by the first person of the securities from the second person, including the time necessary to obtain required approval from an appropriate government authority with respect to the acquisition~~ by the first person of the securities of the second person~~;

(7) A requirement that the second person vote the securities in favor of a specific acquisition of control of the issuing company, or against competing transactions, if the restriction continues only for a reasonable amount of time necessary to complete the transaction, including the time necessary to obtain required approval from an appropriate government authority with respect to an acquisition or merger; or

(8) An agreement among ~~shareholders~~securityholders of the issuing company intended to preserve the tax status or tax benefits of the company, such as qualification of the issuing company as a Subchapter S corporation, as defined in 26 U.S.C. ~~§~~ 1361(a)(1) or any successor statute, or prevention of events that could impair deferred tax assets, such as net operating loss carryforwards, as described in 26 U.S.C. ~~§~~ 382 or any successor statute.

(c) *Securities held by senior management officials or controlling equity holders of a company*. A company that controls 5 percent or more of ~~the~~any class of voting securities of another company controls all securities issued by the second company that are controlled by senior management officials, directors, or controlling shareholders of the first company, or by immediate family members of such persons~~.~~, unless the first company controls less than 15 percent of each class of voting securities of the second company and the senior management officials, directors, and controlling shareholders of the first company, and immediate family members of such persons, control 50 percent or more of each class of voting securities of the second company.

(d) *Reservation of authority*. Notwithstanding paragraphs (a) through (c) of this section, the Board may determine that securities are or are not controlled by a company based on the facts and circumstances presented.

* * * * *

Subpart C—Control Proceedings

§ 238.21 Control proceedings.

(a) *Preliminary determination of control*. (1) The Board in its sole discretion may issue a preliminary determination of control under the procedures set forth in this section in any case in which the Board determines, based on consideration of the facts and circumstances presented, that a first company has the power to exercise a controlling influence over the management or policies of a second company.

(2) If the Board makes a preliminary determination of control under this section, the Board shall send notice to the first company containing a statement of the facts upon which the preliminary determination is based.

(b) *Response to preliminary determination of control*. (1) Within 30 calendar days after issuance by the Board of a preliminary determination of control or such longer period permitted by the Board in its discretion, the first company against whom the preliminary determination has been made shall:

(i) Consent to the preliminary determination of control and either:

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

(B) File an application or notice under this part, as applicable; or

(ii) 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.

(2) If the first company fails to respond to the preliminary determination of control within 30 days, the first company will be deemed to have waived its right to present additional information to the Board or to request a hearing or other proceeding regarding the preliminary determination of control.

(c) *Hearing and final determination*. (1) The Board shall order a hearing or other appropriate proceeding upon the petition of a first company that contests a preliminary determination of control if the Board finds that material facts are in dispute. The Board may, in its discretion, order a hearing or other appropriate proceeding without a petition for such a proceeding by the first company.

(2) At a hearing or other proceeding, any applicable presumptions established under this subpart 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 first company and other evidence, including the record of any hearing or other proceeding, the Board will issue a final order determining whether the first company has the power to exercise a controlling influence over the management or policies of the second company. If a controlling influence is found, the Board may direct the first company to terminate the control relationship or to file an application or notice for the Board's approval to retain the control relationship.

~~(d) *Rebuttal of presumptions of control of a company.*~~

(d) *Submission of evidence.* (1) In connection with contesting a preliminary determination of control under paragraph (b)(1)(ii) of this section, a first company may submit to the Board evidence or any other relevant information related to its control of a second company.

(2) Evidence or other relevant information submitted to the Board pursuant to paragraph (d)(1) must be in writing and may include a description of all current and proposed relationships between the first company and the second company, including relationships of the type that are identified under any of the rebuttable presumptions in sections 238.22 and 238.23 of this part, copies of any formal agreements related to such relationships, and a discussion regarding why the Board should not determine the first company to control the second company.

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

(1) *Board of directors* means the board of directors of a company or a set of individuals exercising similar functions at a company.

(2) *Director representative* means any individual that represents the interests of a first company through service on the board of directors of a second company. For purposes of this paragraph (e)(2), examples of persons who are directors of a second company and generally would be considered director representatives of a first company include:

~~(2) *Director representative* means, with respect to a first company,~~

~~(i) Any individual that serves on the board of directors of a second company and:~~

~~(A) Was nominated or proposed to serve by the first company;~~

(~~B) Is a~~i) A current officer, employee, or director~~, or agent~~ of the first company;

(~~C) Served as an~~ii) An individual who was an officer, employee, or director~~, or agent~~ of the first company ~~during~~within the ~~immediately preceding~~prior two years; ~~or~~and

(~~D) Is a member of the immediate family of any employee, director, or agent of~~iii) An individual who was nominated or proposed to be a director of the second company by the first company.

(~~ii~~D) A director representative does not include a nonvoting observer.

(3) *First company* means the company whose potential control of a second company is the subject of determination by the Board under this subpart.

(4) *Investment adviser* means a company that:

(i) Is registered as an investment adviser with the Securities and Exchange Commission under the Investment Advisers Act of 1940 (15 U.S.C. ~~§~~ 80b-1 et seq.);

(ii) Is registered as a commodity trading advisor with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. ~~§~~ 1 et seq.);

(iii) Is a foreign equivalent of an investment adviser or commodity trading advisor, as described in paragraph (e)(4)(i) ~~and~~or (ii) above; or

(iv) Engages in any of the activities set forth in 12 CFR 225.28(b)(6)(i)~~-~~ through (iv).

(5) *Limiting contractual right* means a contractual right of the first company that would allow the first company to restrict significantly, directly or indirectly, the discretion of the second company, including its senior management officials and directors, over operational and policy decisions of the second company.

(i) ~~A~~Examples of limiting contractual ~~right includes~~rights may include, but ~~is~~are not limited to, a right that allows the first company to restrict or to exert significant influence over decisions related to:

(A) Activities in which the second company may engage, including a prohibition on entering into new lines of business, making substantial changes to or discontinuing existing lines of business, or entering into a contractual arrangement with a third party that imposes significant financial obligations on the second company;

(B) How the second company directs the proceeds of the first company's investment;

(C) Hiring, firing, or compensating one or more senior management officials of the second company, or modifying the second company's policies or budget concerning the salary, compensation, employment, or benefits plan for its employees;

(D) The second company's ability to merge or consolidate, or ~~on~~ its ability to acquire, sell, lease, transfer, spin-off, recapitalize, liquidate, dissolve, or dispose of subsidiaries or assets;

(E) The second company's ability to make investments or expenditures;

(F) The second company achieving or maintaining a financial target or limit, including, for example, a debt-to-equity ratio, a fixed charges ratio, a net worth requirement, a liquidity target, a working capital target, or a classified assets or nonperforming loans limit;

(G) The second company's payment of dividends on any class of securities, redemption of senior instruments, or voluntary prepayment of indebtedness;

(H) The second company's ability to authorize or issue additional junior equity or debt securities, or amend the terms of any equity or debt securities issued by the second company;

(I) The second company's ability to engage in a public offering or to list or de-list securities on an exchange, other than a right that allows the securities of the first company to have the same status as other securities of the same class;

(J) The second company's ability to amend its articles of incorporation or by-laws, other than in a way that is solely defensive for the first company;

(K) The removal or selection of any independent accountant, auditor, investment adviser, or investment banker employed by the second company;

(L) The second company's ability to significantly alter accounting methods and policies, or its regulatory, tax, or liability status (e.g., converting from a stock corporation to a limited liability company); and

(ii) A limiting contractual right does not include a contractual right that would not allow the first company to significantly restrict, directly or indirectly, the discretion of the second company over operational and policy decisions of the second company~~, such as~~. Examples of contractual rights that are not limiting contractual rights may include:

(A) A right that allows the first company to restrict or to exert significant influence over decisions relating to the second company's ability to issue securities senior to securities owned by the first company;

(B) A requirement that the first company receive financial reports or other information of the type ordinarily available to common stockholders;

(C) A requirement that the second company maintain its corporate existence;

(D) A requirement that the second company consult with the first company on a reasonable periodic basis;

(E) A requirement that the second company provide notices of the occurrence of material events affecting the second company;

(F) A requirement that the second company comply with applicable statutory and regulatory requirements;

(G) A market standard requirement that the first company receive similar contractual rights as those held by other investors in the second company;

(H) A requirement that the first company be able to purchase additional ~~shares~~securities issued by the second company in order to maintain the first company's percentage ownership in the second company;

(I) A requirement that the second company ensure that any ~~shareholder~~securityholder who intends to sell its ~~shares~~securities of the second company provide other ~~shareholders~~securityholders of the second company or the second company itself the opportunity to purchase the ~~shares~~securities before the ~~shares~~securities can be sold to a third party; or

(J) A requirement that the second company take reasonable steps to ensure the preservation of tax status or tax benefits, such as status of the second company as a Subchapter S corporation or the protection of the value of net operating loss carry-forwards.

(6) *Second company* means the company whose potential control by a first company is the subject of determination by the Board under this subpart.

(7) *Senior management official* means any person who participates or has the authority to participate (other than in the capacity as a director) in major policymaking functions of a company.

(f) *Reservation of authority*. Nothing in this subpart shall limit the authority of the ~~Federal Reserve~~Board to take any supervisory or enforcement action otherwise permitted by law, including an action to address unsafe or unsound practices or conditions, or violations of law.

§ 238.22 Rebuttable presumptions of control of a company.

(a) *General*. (1) In any proceeding under section 238.21(b)(2) or (c) of this part, a first company is presumed to control a second company in the situations described in subsections (b) through (i) of this section. The Board also may find that a first company controls a second company based on other facts and circumstances.

(2) For purposes of the presumptions in this section, any company that is a subsidiary of the first company and also a subsidiary of the second company is considered to be a subsidiary of the first company and not a subsidiary of the second company.

(b) *Management contract or similar agreement*. The first company enters into any agreement, understanding, or management contract (other than to serve as investment adviser) with the second company, under which the first company directs or exercises ~~significant~~significant influence or discretion over the general management, overall operations, or core business or policy decisions of the second company. Examples of such agreements include where the first company is a managing member, trustee, or general partner of the second company, or exercises similar powers and functions.

~~(c) *Total equity*. The first company controls one third or more of the total equity of the second company.~~

(~~d~~c) *Ownership or control of 5 percent or more of voting securities*. The first company controls 5 percent or more of the outstanding securities of any class of voting securities of the second company, and:

(1) (i) Director representatives of the first company or any of its subsidiaries comprise 25 percent or more of the board of directors of the second company or any of its subsidiaries; or

(ii) Director representatives of the first company or any of its subsidiaries are able to make or block the making of major operational or policy decisions of the second company or any of its subsidiaries;

(2) Two or more employees or directors of the first company or any of its subsidiaries serve as senior management officials of the second company or any of its subsidiaries;

(3) An employee or director of the first company or any of its subsidiaries serves as the chief executive officer, or serves in a similar capacity, of the second company or any of its subsidiaries;

(4) The first company or any of its subsidiaries enters into transactions or has business relationships with the second company or any of its subsidiaries that generate in the aggregate 10 percent or more of the total annual revenues or expenses of the ~~first company or the~~ second company, each on a consolidated basis; or

(5) The first company or any of its subsidiaries has any limiting contractual right with respect to the second company or any of its subsidiaries, unless such limiting contractual right is part of an agreement to merge with or make a controlling investment in the second company that is reasonably expected to close within one year and such limiting contractual right is designed to ensure that the second company continues to operate in the ordinary course until the merger or investment is consummated or such limiting contractual right requires the second company to take an action necessary for the merger or investment to be consummated~~; or~~.

~~(6) Senior management officials and directors of the first company and its subsidiaries, together with their immediate family members and the first company and its subsidiaries, own, control, or have power to vote 25 percent or more of any class of voting securities of the second company, unless the first company and its subsidiaries control less than 15 percent of each class of voting securities of the second company and the senior management officials and directors of the first company and its subsidiaries, together with their immediate family members, own, control, or have power to vote 50 percent or more of each class of voting securities of the second company.~~

(~~e~~d) *Ownership or control of 10 percent or more of voting securities*. The first company controls 10 percent or more of the outstanding securities of any class of voting securities of the second company, and:

(1) The first company or any of its subsidiaries propose a number of director representatives to the board of directors of the second company or any of its subsidiaries in opposition to ~~the~~ nominees proposed by the management or board of directors of the second company or any of its subsidiaries that, together with any director representatives of the first company or any of its subsidiaries on the board of directors of the second company or any of its subsidiaries, ~~exceed the number of director representatives that the first company could have without being presumed to control~~ would comprise 25 percent or more of the board of directors of the second company ~~under section 238.22(d)(1)(i) of this part~~or any of its subsidiaries;

(2) Director representatives of the first company and its subsidiaries comprise more than 25 percent of any committee of the board of directors of the second company or any of its subsidiaries that can take ~~actions~~action that ~~bind~~binds the second company or any of its subsidiaries; or

(3) The first company or any of its subsidiaries enters into transactions or has business relationships with the second company or any of its subsidiaries that:

(i) Are not on market terms; or

(ii) Generate in the aggregate 5 percent or more of the total annual revenues or expenses of the ~~first company or the~~ second company, each on a consolidated basis.

(~~f~~e) *Ownership or control of 15 percent or more of voting securities*. The first company controls 15 percent or more of the outstanding securities of any class of voting securities of the second company, and:

~~(1) The first company controls 25 percent or more of the total equity of the second company;~~

(~~2~~1) A director representative of the first company or of any of its subsidiaries serves as the chair of the board of directors of the second company or any of its subsidiaries;

(~~3~~2) One or more employees or directors of the first company or any of its subsidiaries serves as a senior management official of the second company or any of its subsidiaries; or

(~~4~~3) The first company or any of its subsidiaries enters into transactions or has business relationships with the second company or any of its subsidiaries that generate in the aggregate 2 percent or more of the total annual revenues or expenses of the ~~first company or the~~ second company, each on a consolidated basis.

(~~g~~f) *Accounting consolidation*. The first company consolidates the second company on its financial statements prepared under U.S. generally accepted accounting principles.

(~~h~~g) *Control of an investment fund*. (1) The first company serves as an investment adviser to the second company, the second company is an investment fund, and the first company, directly or indirectly, or acting through one or more other persons:

(i) Controls 5 percent or more of the outstanding securities of any class of voting securities of the second company; or

(ii) Controls ~~twenty-five~~25 percent or more of the total equity of the second company.

(2) The presumption of control in paragraph (h)(1) of this section does not apply if the first company organized and sponsored the second company within the preceding ~~twelve~~12 months.

(~~i~~h) *Divestiture of control*. (1) The first company controlled the second company under paragraph (e)(1) or (2) of section 238.2 of this part at any time during the prior two years and the first company controls 15 percent or more of any class of voting securities of the second company.

(2) Notwithstanding paragraph (i)(1) of this section, a first company will not be presumed to control a second company under this paragraph if 50 percent or more of the outstanding securities of each class of voting securities of the second company is controlled by a person that is not a senior management official or director of the first company, or by a company that is not an affiliate of the first company.

~~(j) *Registered investment company*. The presumptions of control in this section do not apply if:~~

~~(1) The second company is an investment company registered with the Securities and Exchange Commission under the Investment Company Act of 1940 (15 U.S.C. § 80a et seq.);~~

~~(2) The business relationships between the first company and the second company are limited to investment advisory, custodian, transfer agent, registrar, administrative, distributor, and securities brokerage services provided by the first company to the second company;~~

~~(3) Director representatives of the first company or any of its subsidiaries comprise 25 percent or less of the board of directors or trustees of the second company; and~~

~~(4) (i) The first company controls less than 5 percent of the outstanding securities of each class of voting securities of the second company and less than 25 percent of the total equity of the second company, or~~

~~(ii) The first company organized and sponsored the second company within the preceding 12 months.~~

(~~k~~j) ~~*Shares*~~*Securities* *held in a fiduciary capacity*. ~~The~~For purposes of the presumptions of control in this section ~~do not apply to the extent that~~, the first company ~~or any of its subsidiaries~~does not control ~~the~~ securities of the second company ~~or any of its subsidiaries in a fiduciary~~that the first company holds in a fiduciary capacity, except that if the second company is a depository institution or a depository institution holding company, this paragraph (j) only applies to securities held in a fiduciary capacity without sole discretionary authority to exercise the voting rights of the securities.

§ 238.23 Rebuttable presumption of noncontrol of a company.

(a) In any proceeding under section 238.21(b)(2) or (c) of this part, a first company is presumed not to control a second company if:

(1) The first company controls less than 10 percent of the outstanding securities of each class of voting securities of the second company~~,~~; and

(2) The first company is not presumed to control the second company under section 238.22 of this part.

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

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

~~**Subpart C—Control Proceedings**~~

~~**§ 238.24 Total Equity**.~~

~~(a) *General*. For purposes of this subpart, the total equity controlled by a first company in a second company that is organized as a stock corporation and prepares financial statements pursuant to U.S. generally accepted accounting principles is calculated as described in paragraph (b) of this section. With respect to a second company that is not organized as a stock corporation or that does not prepare financial statements pursuant to U.S. generally accepted accounting principles, the first company's total equity in the second company will be calculated so as to be reasonably consistent with the methodology described in paragraph (b) of this section, while taking into account the legal form of the second company and the accounting system used by the second company to prepare financial statements.~~

~~(b) *Calculation of total equity*. (1) Total Equity. The first company's total equity in the second company, expressed as a percentage, is equal to:~~

~~(i) The sum of Investor Common Equity and, for each class of preferred stock issued by the second company, Investor Preferred Equity, divided by~~

(ii) Issuer Shareholders' Equity.

(2) *Investor Common Equity* equals the greater of:

(i) Zero, and

(ii) The quotient of the number of shares of common stock of the second company that are controlled by the first company divided by the total number of shares of common stock of the second company that are issued and outstanding, multiplied by the amount of shareholders' equity of the second company not allocated to preferred stock under U.S. generally accepted accounting principles.

(3) Investor Preferred Equity equals, for each class of preferred stock issued by the second company, the greater of:

(i) Zero, and

(ii) The quotient of the number of shares of the class of preferred stock of the second company that are controlled by the first company divided by the total number of shares of the class of preferred stock that are issued and outstanding, multiplied by the amount of shareholders' equity of the second company allocated to the class of preferred stock under U.S. generally accepted accounting principles.

(c) *Consideration of debt instruments and other interests in total equity.* (1) For purposes of the total equity calculation in paragraph (b) of this section, a debt instrument or other interest issued by the second company that is held by the first company may be treated as an equity instrument if that debt instrument or other interest is functionally equivalent to equity.

(2) For purposes of paragraph (b)(1) of this section, the principal amount of all debt instruments and the market value of all other interests that are functionally equivalent to equity that are owned or controlled by the first company are added to the sum under paragraph (b)(1)(i), and the principal amount of all debt instruments and the market value of all other interests that are functionally equivalent to equity that are outstanding are added to Issuer Shareholders' Equity.

(3) For purposes of paragraph (b)(1), a debt instrument issued by the second company may be considered functionally equivalent to equity if it has equity-like characteristics, such as:

(i) Extremely long-dated maturity;

(ii) Subordination to other debt instruments issued by the second company;

(ii) Qualification as regulatory capital under any regulatory capital rules applicable to the second company;

(iii) Qualification as equity under applicable tax law;

(iv) Qualification as equity under U.S. generally accepted accounting principles or other applicable accounting standards;

(v) Inadequacy of the equity capital underlying the debt at the time of the issuance of the debt; and

(vi) Issuance not on market terms.

(4) For purposes of paragraph (b)(1), an interest that is not a debt instrument issued by the second company may be considered functionally equivalent to equity if it has equity-like characteristics, such as entitling its owner to a share of the profits of the second company.

(d) Investments in parent companies of a second company. If a first company controls equity interests of one or more companies that directly or indirectly control the second company (parent company), the total equity of the first company in the second company is equal to:

(1) The first company's total equity of the second company as calculated under paragraph (b) of this section, plus

(2) The product of the first company's total equity of each parent company, calculated in accordance with paragraph (b) of this section, multiplied by the parent company's total equity in the second company, as calculated under paragraph (b) of this section.

(e) *Frequency of total equity calculation*. The total equity of a first company in a second company is calculated each time the first company acquires control over or ceases to control equity instruments of the second company, including any debt instruments or other interests that are functionally equivalent to equity in accordance with paragraph (c) of this section.