



BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM  
WASHINGTON, DC 20551

OFFICE OF THE SECRETARY

July 14, 2023

Mr. Benjamin W. McDonough  
Senior Deputy Comptroller and Chief Counsel  
Office of the Comptroller of the Currency  
400 7th Street SW  
Washington, DC 20219

Dear Mr. McDonough:

This letter concerns the request by Forcht Bank, N.A. (“Bank”), Lexington, Kentucky, for an exemption from certain requirements of section 23A of the Federal Reserve Act<sup>1</sup> to purchase 100 percent of the membership interests of its affiliate, Old Rosebud, LLC (“Old Rosebud”), Corbin, Kentucky. Old Rosebud engages solely in holding real property primarily leased to Bank and certain affiliates of Bank.

Section 23A and the Board’s Regulation W limit the amount of covered transactions between a bank and any single affiliate to 10 percent of the bank’s capital stock and surplus and limit the amount of covered transactions between a bank and all of its affiliates to 20 percent of the bank’s capital stock and surplus.<sup>2</sup> Section 23A defines a covered transaction to include, among other things, “a purchase of assets from the affiliate.”<sup>3</sup> Regulation W specifies that the acquisition by a bank of the shares of a company that is an affiliate constitutes a purchase of assets if (i) as a result of the transaction, the company becomes an operating subsidiary of the bank and (ii) the company has liabilities, or the bank gives cash or any other consideration in exchange for the security.<sup>4</sup> Accordingly,

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<sup>1</sup> 12 U.S.C. § 371c.

<sup>2</sup> 12 U.S.C. § 371c(a)(1); 12 CFR 223.11.

<sup>3</sup> 12 U.S.C. § 371c(b)(7)(C); 12 CFR 223.3(h)(2).

<sup>4</sup> 12 CFR 223.31(a).

Bank's proposed acquisition of the outstanding membership interests of Old Rosebud is a purchase of assets subject to section 23A.

Section 23A defines affiliate to include "any company that is controlled directly or indirectly, by a trust or otherwise, by or for the benefit of shareholders who beneficially or otherwise control, directly or indirectly, by trust or otherwise, the member bank or any company that controls the member bank."<sup>5</sup> Bank and Old Rosebud are affiliates for purposes of section 23A because Old Rosebud and Bank's holding company are controlled by the same shareholder.<sup>6</sup>

Bank would pay \$ [REDACTED] for the transaction. Bank has committed to pay \$ [REDACTED] of this amount directly to Old Rosebud's creditors to extinguish the existing liabilities of Old Rosebud. The remaining amount would be paid to Old Rosebud's current members. The purchase amount would exceed 10 percent of the Bank's capital stock and surplus and, when combined with the amount of Bank's other covered transactions with affiliates, would exceed 20 percent of the Bank's capital stock and surplus. Accordingly, Bank seeks an exemption from the quantitative limits to engage in the transaction.

Because Bank is a national bank, the Office of the Comptroller of the Currency ("OCC") may, by order, exempt the proposed asset purchase from the requirements of section 23A if the Board and OCC jointly find the exemption to be (i) in the public interest and (ii) consistent with the purposes of section 23A.<sup>7</sup> In addition, the FDIC must not object to the exemption in writing based on a determination that the exemption presents an unacceptable risk to the Deposit Insurance Fund within 60 days of being notified of the OCC's and Board's joint findings.<sup>8</sup>

The Board previously has stated that the dual purposes of section 23A are to protect against a depository institution suffering losses in transactions with affiliates and to limit the ability of the depository institution to transfer to its affiliates the subsidy arising from the institution's access to the federal safety net.<sup>9</sup>

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<sup>5</sup> 12 U.S.C. § 371c(b)(1)(C)(i); 12 CFR 223.2(a)(3).

<sup>6</sup> A shareholder "controls" a company if the shareholder owns, controls, or has power to vote 25 percent or more of the company. 12 U.S.C. § 371c(b)(3)(A)(i); 12 CFR 223.3(g). Further, because Old Rosebud leases some of its real estate to affiliates that are not insured depository institutions that are considered sister banks for purposes of Regulation W, as well as approximately 5 percent of the real estate to nonaffiliates, Old Rosebud does not qualify for any exception from the definition of "affiliate." See 12 U.S.C. § 371c(b)(1)–(2); 12 CFR 223.2(a)–(b).

<sup>7</sup> 12 U.S.C. § 371c(f)(2)(B)(i)(I).

<sup>8</sup> 12 U.S.C. § 371c(f)(2)(B)(i)(II).

<sup>9</sup> 67 FR 76,560 (Dec. 12, 2002).

The Board has approved exemptions under section 23A for one-time purchases of property of this nature by a bank.<sup>10</sup> As noted in previous cases, the purchase of a building appears to be the type of transaction that Congress anticipated would be exempted from the limits of the statute.<sup>11</sup> Bank also asserts that purchasing Old Rosebud would be in the public interest because it would save Bank \$ [REDACTED] in annual rental expenses and generate lease income for the spaces not used by Bank. Bank asserts that its improved financial condition would enable it to better serve its customers and communities and that owning the leased properties would give Bank access to additional space should Bank expand in the future.

In light of these considerations and all the facts presented, the Director of the Division of Supervision and Regulation, acting pursuant to authority delegated by the Board, and with the concurrence of the General Counsel, hereby finds that the proposed exemption is in the public interest and consistent with the purposes of section 23A. Board staff has consulted with FDIC staff, which has not indicated any objection to these findings on the basis of a determination that the requested exemption would present an unacceptable risk to the Deposit Insurance Fund.

This action is specifically conditioned on compliance by Bank with all the commitments and representations it has made to the Board in connection with this exemption request. These commitments constitute conditions imposed in writing in connection with this action and, as such, may be enforced in proceedings under applicable law. This action also is based on the specific facts and circumstances described in Bank's correspondence and this letter. Any change in the facts or circumstances may result in a different conclusion or revocation of the findings in this letter.

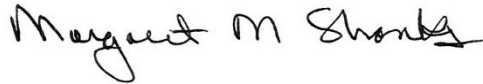
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<sup>10</sup> *E.g.*, Letter from Ann E. Misback, Board Secretary, to Paul A. Adams (June 6, 2018), <https://www.federalreserve.gov/supervisionreg/legalinterpretations/fedreserseactint20180606.pdf>.

<sup>11</sup> *See* S. Rep. No. 536, 97th Cong., 2d Sess. 32 (1982) (noting that purchases of computers or buildings “are not the type of transactions that section 23A is designed to cover.”).

This action also is specifically conditioned on receipt by Bank of all regulatory approvals required by the proposal and compliance with any conditions imposed in connection with such approvals.

Very truly yours,

A handwritten signature in black ink that reads "Margaret M Shanks". The signature is written in a cursive style with a large initial 'M' and a long, sweeping underline.

Margaret McCloskey Shanks  
Deputy Secretary of the Board

cc: Federal Deposit Insurance Corporation  
Cynthia W. Young, Esq.