

savings association shall become subject to the provisions of section 38 of the FDI Act that restrict compensation paid to senior executive officers of the institution (section 38(f)(4)).

(4) *Additional provisions applicable to critically undercapitalized savings associations.* In addition to the provisions of section 38 of the FDI Act described in paragraphs (a)(2) and (a)(3) of this section, immediately upon receiving notice or being deemed to have notice, as provided in § 565.3 of this part, that the savings association is critically undercapitalized, the savings association shall become subject to the provisions of section 38 of the FDI Act:

(i) Restricting the activities of the savings association (section 38(h)(1)); and

(ii) Restricting payments on subordinated debt of the savings association (section 38(h)(2)).

(b) *Discretionary supervisory actions.* In taking any action under section 38 that is within the OTS's discretion to take in connection with: A savings association that is deemed to be undercapitalized, significantly undercapitalized or critically undercapitalized, or has been reclassified as undercapitalized, or significantly undercapitalized; an officer or director of such savings association; or a company that controls such savings association, the OTS shall follow the procedures for issuing directives under §§ 565.7 and 565.9 of this part unless otherwise provided in section 38 or this part.

§ 565.7 Directives to take prompt corrective action.

(a) *Notice of intent to issue a directive—*

(1) *In general.* The OTS shall provide an undercapitalized, significantly undercapitalized, or critically undercapitalized savings association or, where appropriate, any company that controls the savings association, prior written notice of the OTS's intention to issue a directive requiring such savings association or company to take actions or to follow proscriptions described in section 38 that are within the OTS's discretion to require or impose under section 38 of the FDI Act, including sections 38(e)(5), (f)(2), (f)(3), or (f)(5). The savings association shall have such time to respond to a proposed directive

as provided by the OTS under paragraph (c) of this section.

(2) *Immediate issuance of final directive.* If the OTS finds it necessary in order to carry out the purposes of section 38 of the FDI Act, the OTS may, without providing the notice prescribed in paragraph (a)(1) of this section, issue a directive requiring a savings association or any company that controls a savings association immediately to take actions or to follow proscriptions described in section 38 that are within the OTS's discretion to require or impose under section 38 of the FDI Act, including section 38(e)(5), (f)(2), (f)(3), or (f)(5). A savings association or company that is subject to such an immediately effective directive may submit a written appeal of the directive to the OTS. Such an appeal must be received by the OTS within 14 calendar days of the issuance of the directive, unless the OTS permits a longer period. The OTS shall consider any such appeal, if filed in a timely matter, within 60 days of receiving the appeal. During such period of review, the directive shall remain in effect unless the OTS, in its sole discretion, stays the effectiveness of the directive.

(b) *Contents of notice.* A notice of intention to issue a directive shall include:

(1) A statement of the savings association's capital measures and capital levels;

(2) A description of the restrictions, prohibitions or affirmative actions that the OTS proposes to impose or require;

(3) The proposed date when such restrictions or prohibitions would be effective or the proposed date for completion of such affirmative actions; and

(4) The date by which the savings association or company subject to the directive may file with the OTS a written response to the notice.

(c) *Response to notice—(1) Time for response.* A savings association or company may file a written response to a notice of intent to issue a directive within the time period set by the OTS. The date shall be at least 14 calendar days from the date of the notice unless

the OTS determines that a shorter period is appropriate in light of the financial condition of the savings association or other relevant circumstances.

(2) *Content of response.* The response should include:

(i) An explanation why the action proposed by the OTS is not an appropriate exercise of discretion under section 38;

(ii) Any recommended modification of the proposed directive; and

(iii) Any other relevant information, mitigating circumstances, documentation, or other evidence in support of the position of the savings association or company regarding the proposed directive.

(d) *OTS consideration of response.* After considering the response, the OTS may:

(1) Issue the directive as proposed or in modified form;

(2) Determine not to issue the directive and so notify the savings association or company; or

(3) Seek additional information or clarification of the response from the savings association or company, or any other relevant source.

(e) *Failure to file response.* Failure by a savings association or company to file with the OTS, within the specified time period, a written response to a proposed directive shall constitute a waiver of the opportunity to respond and shall constitute consent to the issuance of the directive.

(f) *Request for modification or rescission of directive.* Any savings association or company that is subject to a directive under this part may, upon a change in circumstances, request in writing that the OTS reconsider the terms of the directive, and may propose that the directive be rescinded or modified. Unless otherwise ordered by the OTS, the directive shall continue in place while such request is pending before the OTS.

§ 565.8 Procedures for reclassifying a savings association based on criteria other than capital.

(a) *Reclassification based on unsafe or unsound condition or practice—(1) Issuance of notice of proposed reclassification—(i) Grounds for reclassification.* (A) Pursuant to § 565.4(c) of this part, the OTS may reclassify a well capital-

ized savings association as adequately capitalized or subject an adequately capitalized or undercapitalized institution to the supervisory actions applicable to the next lower capital category if:

(1) The OTS determines that the savings association is in unsafe or unsound condition; or

(2) The OTS deems the savings association to be engaged in an unsafe or unsound practice and not to have corrected the deficiency.

(B) Any action pursuant to this paragraph (a)(1)(i) shall hereinafter be referred to as “reclassification.”

(ii) *Prior notice to institution.* Prior to taking action pursuant to § 565.4(c)(1), the OTS shall issue and serve on the savings association a written notice of the OTS’s intention to reclassify the savings association.

(2) *Contents of notice.* A notice of intention to reclassify a savings association based on unsafe or unsound condition shall include:

(i) A statement of the savings association’s capital measures and capital levels and the category to which the savings association would be reclassified;

(ii) The reasons for reclassification of the savings association;

(iii) The date by which the savings association subject to the notice of reclassification may file with the OTS a written appeal of the proposed reclassification and a request for a hearing, which shall be at least 14 calendar days from the date of service of the notice unless the OTS determines that a shorter period is appropriate in light of the financial condition of the savings association or other relevant circumstances.

(3) *Response to notice of proposed reclassification.* A savings association may file a written response to a notice of proposed reclassification within the time period set by the OTS. The response should include:

(i) An explanation of why the savings association is not in unsafe or unsound condition or otherwise should not be reclassified; and

(ii) Any other relevant information, mitigating circumstances, documentation, or other evidence in support of the position of the savings association