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paid or accruing to the officer during the 12 month period;

(g) Comply with §1229.6(a)(4) and (a)(5) of this subpart; and

(h) Comply with any on-going restrictions or obligations that were imposed on the Bank by the Director under §1229.7 of this subpart.

[74 FR 5604, Jan. 30, 2009, as amended at 74 FR 38513, Aug. 4, 2009]

§ 1229.9 Discretionary actions applicable to significantly undercapitalized Banks.

(a) *Actions by the Director.* The Director shall carry out this section by taking, at any time, one or more of the following actions with respect to a significantly undercapitalized Bank:

(1) Limit the increase in any obligations or class of obligations of the Bank, including any off-balance sheet obligations. Such limitation may be stated in an absolute dollar amount, as a percentage of current obligations or in any other form chosen by the Director;

(2) Reduce the amount of any obligations or class of obligations held by the Bank, including any off-balance sheet obligations. Such reduction may be stated in an absolute dollar amount, as a percentage of current obligations or in any other form chosen by the Director;

(3) Limit the increase in, or prohibit the growth of any asset or class of assets held by the Bank. Such limitation may be stated in an absolute dollar amount, as a percentage of current assets or in any other form chosen by the Director;

(4) Reduce the amount of any asset or class of asset held by the Bank. Such reduction may be stated in an absolute dollar amount, as a percentage of current obligations or in any other form chosen by the Director;

(5) Acquire new capital in the form and amount determined by the Director, which specifically may include requiring a Bank to increase its level of retained earnings;

(6) Modify, limit or terminate any activity of the Bank that the Director determines creates excessive risk;

(7) Take steps to improve the management at the Bank by:

(i) Ordering a new election for the Bank's board of directors in accordance with procedures established by the Director;

(ii) Dismissing particular directors or executive officers, in accordance with section 1366(b)(5)(B) of the Safety and Soundness Act (12 U.S.C. 4616(b)(5)(B)), who held office for more than 180 days immediately prior to the date on which the Bank became undercapitalized, provided further that such dismissals shall not be considered removal pursuant to an enforcement action under section 1377 of the Safety and Soundness Act (12 U.S.C. 4636a) and shall not be subject to the requirements necessary to remove an officer or director under that section; or

(iii) Ordering the Bank to hire qualified executive officers, the hiring of whom, prior to employment by the Bank and at the option of the Director, may be subject to review and approval by the Director; or

(8)(i) Reclassify a significantly undercapitalized Bank as critically undercapitalized if:

(A) The Bank does not submit a capital restoration plan that is substantially in compliance with §1229.11 of this part and within the time frame required;

(B) The Director does not approve the capital restoration plan submitted by the Bank; or

(C) The Director determines that the Bank has failed to make reasonable, good faith efforts to comply with its approved capital restoration plan and fulfill any schedule established by that plan.

(ii) Subject to paragraph (c) of this section, the Director may reclassify a significantly undercapitalized Bank under paragraph (a)(8)(i) of this section at any time the grounds for such action exist, notwithstanding the fact that such grounds had formed the basis on which the Director reclassified a Bank from undercapitalized to significantly undercapitalized.

(b) *Additional safeguards.* The Director may require a significantly undercapitalized Bank to take any other action not specifically listed in this section if the Director determines such action will help ensure the safe and sound operation of the Bank and the Bank's

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compliance with its risk-based and minimum capital requirements in a reasonable period of time more than any action specifically authorized under paragraph (a) of this section.

(c) *Procedures.* Before finalizing any action under this section, the Director shall provide a Bank written notice describing the proposed action or actions and an opportunity to submit information that the Bank considers relevant to the Director's decision to take such action in accordance with § 1229.12 of this subpart.

§ 1229.10 Actions applicable to critically undercapitalized Banks.

(a) *Appointment of conservator or receiver.* Notwithstanding any other provision of federal or state law, the Director may appoint the FHFA as conservator or receiver of any Bank at any time after the Director determines that the Bank is, or the Director otherwise exercises authority to reclassify the Bank as, critically undercapitalized.

(b) *Periodic determination*—(1) *Determination.* Not later than 30 calendar days after the Director first determines that a Bank is, or the Director otherwise exercises authority to reclassify the Bank as, critically undercapitalized, and at least once during each succeeding 30-day calendar period, the Director make a determination in writing as to whether:

(i) The assets of the Bank are, and during the preceding 60 calendar days have been, less than its obligations to its creditors and others, provided that the Director shall consider as an obligation only that amount of outstanding consolidated obligations for which the Bank is primary obligor or for which the Bank has been ordered to make payments of principal or interest on behalf of another Bank, or is actually making payments of principal or interest on behalf of another Bank; or

(ii) The Bank is not, and during the previous 60 calendar days has not been paying its debts on a regular basis as such debts become due, provided that this provision does not apply to any unpaid debts that are the subject of a *bona fide* dispute.

(2) *Mandatory receivership.* If the Director determines that the conditions

described in either paragraph (b)(1)(i) or (b)(1)(ii) of this section applies to a Bank, the Director shall appoint the FHFA as receiver for the Bank. The appointment of the FHFA as receiver under this paragraph shall immediately terminate any conservatorship established for the Bank.

(3) *Determination not required.* A determination under paragraph (b)(1) of this section shall not be required during any period in which the FHFA serves as receiver for a Bank.

(c) *Judicial review.* If the Director appoints the FHFA as conservator or receiver of a Bank under paragraph (a) or (b)(2) of this section, the Bank may within 30 days of such appointment bring an action in the United States district court for the judicial district in which the Bank was established pursuant to section 3 of the Bank Act (12 U.S.C. 1423) or in the United States District Court for the District of Columbia, for an order requiring the FHFA to remove itself as conservator or receiver.

(d) *Other applicable actions.* Until such time as FHFA is appointed as conservator or receiver for a critically undercapitalized Bank, a critically undercapitalized Bank shall be subject to all mandatory restrictions or obligations applicable to a significantly undercapitalized Bank under § 1229.8 of this subpart and will remain subject to any on-going restrictions or obligations that the Director imposed on the Bank under § 1229.7 or § 1229.9 of this subpart, or any restrictions or obligations that are applicable to the Bank under the terms of an approved capital restoration plan.

[74 FR 5604, Jan. 30, 2009, as amended at 74 FR 38513, Aug. 4, 2009]

§ 1229.11 Capital restoration plans.

(a) *Contents.* Each capital restoration plan submitted by a Bank shall set forth a plan to restore its permanent and total capital to levels sufficient to fulfill its risk-based and minimum capital requirements within a reasonable period of time. Such plan must be feasible given general market conditions and the conditions of the Bank and, at a minimum, shall:

(1) Describe the actions the Bank will take, including any changes that the