(2) Adequately capitalized if the insured branch:
   (i) Maintains the pledge of assets required under §347.209 of this chapter; and
   (ii) Maintains the eligible assets prescribed under §347.210 of this chapter at 106 percent or more of the preceding quarter’s average book value of the insured branch’s third-party liabilities; and
   (iii) Does not meet the definition of a well capitalized insured branch.

(3) Undercapitalized if the insured branch:
   (i) Fails to maintain the pledge of assets required under §347.209 of this chapter; or
   (ii) Fails to maintain the eligible assets prescribed under §347.210 of this chapter at 106 percent or more of the preceding quarter’s average book value of the insured branch’s third-party liabilities.

(4) Significantly undercapitalized if it fails to maintain the eligible assets prescribed under §347.210 of this chapter at 104 percent or more of the preceding quarter’s average book value of the insured branch’s third-party liabilities.

(5) Critically undercapitalized if it fails to maintain the eligible assets prescribed under §347.210 of this chapter at 102 percent or more of the preceding quarter’s average book value of the insured branch’s third-party liabilities.

(d) Reclassifications based on supervisory criteria other than capital. The FDIC may reclassify a well capitalized bank as adequately capitalized and may require an adequately capitalized bank or an undercapitalized bank to comply with certain mandatory or discretionary supervisory actions as if the bank were undercapitalized and is not required to submit a capital restoration plan solely by virtue of the reclassification.

(1) Unsafe or unsound condition. The FDIC has determined, after notice and opportunity for hearing pursuant to §308.202(a) of this chapter, that the bank is in unsafe or unsound condition; or

(2) Unsafe or unsound practice. The FDIC has determined, after notice and opportunity for hearing pursuant to §308.202(a) of this chapter, that, in the most recent examination of the bank, the bank received and has not corrected a less-than-satisfactory rating for any of the categories of asset quality, management, earnings, or liquidity.
accordance with the instructions provided on the Call Report, unless the FDIC instructs otherwise. The capital restoration plan shall include all of the information required to be filed under section 38(e)(2) of the FDI Act. A bank that is required to submit a capital restoration plan as a result of a reclassification of the bank pursuant to §325.103(d) of this subpart shall include a description of the steps the bank will take to correct the unsafe or unsound condition or practice. No plan shall be accepted unless it includes any performance guarantee described in section 38(e)(2)(C) of the FDI Act by each company that controls the bank.

(c) Review of capital restoration plans. Within 60 days after receiving a capital restoration plan under this subpart, the FDIC shall provide written notice to the bank of whether the plan has been approved. The FDIC may extend the time within which notice regarding approval of a plan shall be provided.

(d) Disapproval of capital plan. If a capital restoration plan is not approved by the FDIC, the bank shall submit a revised capital restoration plan within the time specified by the FDIC. Upon receiving notice that its capital restoration plan has not been approved, any undercapitalized bank (as defined in §325.103(b) of this subpart) shall be subject to all of the provisions of section 38 and this subpart applicable to significantly undercapitalized institutions. These provisions shall be applicable until such time as a new or revised capital restoration plan submitted by the bank has been approved by the FDIC.

(e) Failure to submit capital restoration plan. A bank that is undercapitalized (as defined in §325.103(b) of this subpart) and that fails in any material respect to implement a capital restoration plan shall be subject to all of the provisions of section 38 and this subpart applicable to significantly undercapitalized institutions.

(f) Failure to implement capital restoration plan. Any undercapitalized bank that fails in any material respect to implement a capital restoration plan shall be subject to all of the provisions of section 38 and this subpart applicable to significantly undercapitalized institutions.

(g) Amendment of capital restoration plan. A bank that has filed an approved capital restoration plan may, after prior written notice to and approval by the FDIC, amend the plan to reflect a change in circumstance. Until such time as a proposed amendment has been approved, the bank shall implement the capital restoration plan as approved prior to the proposed amendment.

(h) Performance guarantee by companies that control a bank—(1) Limitation on liability—(i) Amount limitation. The aggregate liability under the guarantee provided under section 38 and this subpart for all companies that control a specific bank that is required to submit a capital restoration plan under this subpart shall be limited to the lesser of:

(A) An amount equal to 5.0 percent of the bank’s total assets at the time the bank was notified or deemed to have notice that the bank was undercapitalized; or

(B) The amount necessary to restore the relevant capital measures of the bank to the levels required for the bank to be classified as adequately capitalized, as those capital measures and levels are defined at the time that the bank initially fails to comply with a capital restoration plan under this subpart.

(ii) Limit on duration. The guarantee and limit of liability under section 38 and this subpart shall expire after the FDIC notifies the bank that it has remained adequately capitalized for each of four consecutive calendar quarters. The expiration or fulfillment by a company of a guarantee of a capital restoration plan shall not limit the liability of the company under any guarantee required or provided in connection with any capital restoration plan filed by the same bank after expiration of the first guarantee.

(iii) Collection on guarantee. Each company that controls a given bank shall be jointly and severally liable for the guarantee for such bank as required under section 38 and this subpart, and the FDIC may require and collect payment of the full amount of
that guarantee from any or all of the companies issuing the guarantee.

(2) Failure to provide guarantee. In the event that a bank that is controlled by any company submits a capital restoration plan that does not contain the guarantee required under section 38(e)(2) of the FDI Act, the bank shall, upon submission of the plan, be subject to the provisions of section 38 and this subpart that are applicable to banks that have not submitted an acceptable capital restoration plan.

(3) Failure to perform guarantee. Failure by any company that controls a bank to perform fully its guarantee of any capital plan shall constitute a material failure to implement the plan for purposes of section 38(f) of the FDI Act. Upon such failure, the bank shall be subject to the provisions of section 38 and this subpart that are applicable to banks that have failed in a material respect to implement a capital restoration plan.

§ 325.105 Mandatory and discretionary supervisory actions under section 38.

(a) Mandatory supervisory actions—(1) Provisions applicable to all banks. All banks are subject to the restrictions contained in section 38(d) of the FDI Act on payment of capital distributions and management fees.

(2) Provisions applicable to undercapitalized, significantly undercapitalized, and critically undercapitalized banks. Immediately upon receiving notice or being deemed to have notice, as provided in §325.102 of this subpart, that the bank is undercapitalized, significantly undercapitalized, or critically undercapitalized, the bank shall become subject to the provisions of section 38 of the FDI Act:

(i) Restricting payment of capital distributions and management fees (section 38(d));

(ii) Requiring that the FDIC monitor the condition of the bank (section 38(e)(1));

(iii) Requiring submission of a capital restoration plan within the schedule established in this subpart (section 38(e)(2));

(iv) Restricting the growth of the bank’s assets (section 38(e)(3)); and

(v) Requiring prior approval of certain expansion proposals (section 38(e)(4)).

(3) Additional provisions applicable to significantly undercapitalized, and critically undercapitalized banks. In addition to the provisions of section 38 of the FDI Act described in paragraph (a)(2) of this section, immediately upon receiving notice or being deemed to have notice, as provided in §325.102 of this subpart, that the bank is significantly undercapitalized, or critically undercapitalized, or that the bank is subject to the provisions applicable to institutions that are significantly undercapitalized because the bank failed to submit or implement in any material respect an acceptable capital restoration plan, the bank 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 institutions. (i) 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 §325.102 of this subpart, that the insured depository institution is critically undercapitalized, the institution is prohibited from doing any of the following without the FDIC’s prior written approval:

(A) Entering into any material transaction other than in the usual course of business, including any investment, expansion, acquisition, sale of assets, or other similar action with respect to which the depository institution is critically undercapitalized, the institution is prohibited from doing any of the following without the FDIC’s prior written approval:

(B) Extending credit for any highly leveraged transaction;

(C) Amending the institution’s charter or bylaws, except to the extent necessary to carry out any other requirement of any law, regulation, or order;

(D) Making any material change in accounting methods;

(E) Engaging in any covered transaction (as defined in section 23A(b) of the Federal Reserve Act (12 U.S.C. 371c(b));

(F) Paying excessive compensation or bonuses;