

(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 State savings association'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 State savings associations.* 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 § 390.452 or § 390.454, that the State savings association is significantly undercapitalized, or critically undercapitalized, or that the State savings association is subject to the provisions applicable to institutions that are significantly undercapitalized because the State savings association failed to submit or implement in any material respect an acceptable capital restoration plan, the State 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 State 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 § 390.452 that the State savings association is critically undercapitalized, the State savings association shall become subject to the provisions of section 38 of the FDI Act:

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

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

(b) *Discretionary supervisory actions.* In taking any action under section 38 that is within the FDIC's discretion to take in connection with: A State savings association that is deemed to be undercapitalized, significantly undercapitalized or critically undercapital-

ized, or has been reclassified as undercapitalized, or significantly undercapitalized; an officer or director of such State savings association; or a company that controls such State savings association, the FDIC shall follow the procedures for issuing directives under §§ 390.456 and 390.458 unless otherwise provided in section 38 or this subpart.

**§ 390.456 Directives to take prompt corrective action.**

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

(1) *In general.* The FDIC shall provide an undercapitalized, significantly undercapitalized, or critically undercapitalized State savings association or, where appropriate, any company that controls the State savings association, prior written notice of the FDIC's intention to issue a directive requiring such State savings association or company to take actions or to follow proscriptions described in section 38 that are within the FDIC'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 State savings association shall have such time to respond to a proposed directive as provided by the FDIC under paragraph (c) of this section.

(2) *Immediate issuance of final directive.* If the FDIC finds it necessary in order to carry out the purposes of section 38 of the FDI Act, the FDIC may, without providing the notice prescribed in paragraph (a)(1) of this section, issue a directive requiring a State savings association or any company that controls a State savings association immediately to take actions or to follow proscriptions described in section 38 that are within the FDIC'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 State savings association or company that is subject to such an immediately effective directive may submit a written appeal of the directive to the FDIC. Such an appeal must be received by the FDIC within 14 calendar days of the issuance of the directive, unless the FDIC permits a longer period. The FDIC 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 FDIC, 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 State savings association's capital measures and capital levels;

(2) A description of the restrictions, prohibitions or affirmative actions that the FDIC 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 State savings association or company subject to the directive may file with the FDIC a written response to the notice.

(c) *Response to notice*—(1) *Time for response.* A State 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 FDIC. The date shall be at least 14 calendar days from the date of the notice unless the FDIC determines that a shorter period is appropriate in light of the financial condition of the State savings association or other relevant circumstances.

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

(i) An explanation why the action proposed by the FDIC 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 State savings association or company regarding the proposed directive.

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

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

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

(3) Seek additional information or clarification of the response from the

State savings association or company, or any other relevant source.

(e) *Failure to file response.* Failure by a State savings association or company to file with the FDIC, 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 State savings association or company that is subject to a directive under this subpart, upon a change in circumstances, request in writing that the FDIC reconsider the terms of the directive, and may propose that the directive be rescinded or modified. Unless otherwise ordered by the FDIC, the directive shall continue in place while such request is pending before the FDIC.

**§ 390.457 Procedures for reclassifying a State 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 § 390.453(c), the FDIC may reclassify a well capitalized State 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 FDIC determines that the State savings association is in unsafe or unsound condition; or

(2) The FDIC deems the State 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 § 390.453(c)(1), the FDIC shall issue and serve on the State savings association a written notice of the FDIC's intention to reclassify the State savings association.

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