§ 325.4 Inadequate capital as an unsafe or unsound practice or condition.

(a) General. As a condition of federal deposit insurance, all insured depository institutions must remain in a safe and sound condition.

(b) Unsafe or unsound practice. Any bank which has less than its minimum leverage capital requirement is deemed to be engaged in an unsafe or unsound practice pursuant to section 8(b)(1) and/or 8(c) of the Federal Deposit Insurance Act (12 U.S.C. 1818(b)(1) and/or 1818(c)). Except that such a bank which has entered into and is in compliance with a written agreement with the FDIC or has submitted to the FDIC and is in compliance with a plan approved by the FDIC to increase its Tier 1 leverage capital ratio to such level as the FDIC deems appropriate and to take such other action as may be necessary for the bank to be operated so as not to be engaged in such an unsafe or unsound practice will not be deemed to be engaged in an unsafe or unsound practice pursuant to section 8(b)(1) and/or 8(c) of the Federal Deposit Insurance Act (12 U.S.C. 1818(b)(1) and/or 1818(c)) on account of its capital ratios. The FDIC is not precluded from taking section 8(b)(1), section 8(c) or any other enforcement action against a bank with capital above the minimum requirement if the specific circumstances deem such action to be appropriate. Under the conditions set forth in section 8(t) of the Federal Deposit Insurance Act (12 U.S.C. 1818(t)), the FDIC also may take section 8(b)(1) and/or 8(c) enforcement action against any savings association that is deemed to be engaged in an unsafe or unsound practice on account of its inadequate capital structure.

(c) Unsafe or unsound condition. Any insured depository institution with a ratio of Tier 1 capital to total assets that is less than two percent is deemed to be operating in an unsafe or unsound condition pursuant to section 8(a) of the Federal Deposit Insurance Act (12 U.S.C. 1818(a)).

(1) A bank with a ratio of Tier 1 capital to total assets of less than two percent which has entered into and is in compliance with a written agreement with the FDIC (or any other insured depository institution with a ratio of
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§ 325.5 Miscellaneous.

(a) Intangible assets. Any intangible assets that were explicitly approved by the FDIC as part of the bank’s regulatory capital on a specific case basis will be included in capital under the terms and conditions that were approved by the FDIC, provided that the intangible asset is being amortized over a period not to exceed 15 years or its estimated useful life, whichever is shorter. However, pursuant to section 18(n) of the Federal Deposit Insurance Act (12 U.S.C. 1828(n)), an unidentifiable intangible asset such as goodwill, if acquired after April 12, 1989, cannot be included in calculating regulatory capital under this part.

(b) Reservation of authority. Notwithstanding the definition of Tier 1 capital in §325.2(t) of this subpart and the risk-based capital definitions of Tier 1 and Tier 2 capital in appendix A to this subpart, the Director of the Division of Supervision and Consumer Protection (DSC) may, if the Director finds that a newly developed or modified capital instrument or a particular balance sheet entry or account to be the functional equivalent of a component of Tier 1 or Tier 2 capital, permit one or more insured depository institutions to include all or a portion of such instrument, entry, or account as Tier 1 or Tier 2 capital, permanently, or on a temporary basis, for purposes of this part.

(d) Depository institution subsidiary. Any domestic depository institution subsidiary that is not consolidated in the “Reports of Condition and Income” (Call Report) of its insured parent bank shall be consolidated with the insured parent bank for purposes of this part. The financial statements of the subsidiary that are to be used for this consolidation must be prepared in the same manner as the “Reports of Condition and Income” (Call Report). A domestic depository institution subsidiary of a savings association shall be consolidated for purposes of this part if such consolidation also is required pursuant to the capital requirements of the association’s primary federal regulator.

(c) Securities subsidiary. For purposes of this part, any securities subsidiary subject to 12 CFR 337.4 shall not be consolidated with its bank parent and any investment therein shall be deducted from the bank parent’s Tier 1 capital and total assets.

(e) Restrictions relating to capital components. To qualify as Tier 1 capital under this part or Tier 1 or Tier 2 capital under appendix A to this part, a capital instrument must not contain or be subject to any conditions, covenants, terms, restrictions, or provisions that are inconsistent with safe and sound banking practices. A condition, covenant, term, restriction, or provision is inconsistent with safe and sound banking practices if it:

(1) Unduly interferes with the ability of the issuer to conduct normal banking operations;

(2) An insured depository institution with a ratio of Tier 1 capital to total assets that is equal to or greater than two percent may be operating in an unsafe or unsound condition. The FDIC is not precluded from bringing an action pursuant to 12 U.S.C. 1818(a) where an insured depository institution has a ratio of Tier 1 capital to total assets that is equal to or greater than two percent.

§ 325.5 Miscellaneous.

(a) Intangible assets. Any intangible assets that were explicitly approved by the FDIC as part of the bank’s regulatory capital on a specific case basis will be included in capital under the terms and conditions that were approved by the FDIC, provided that the intangible asset is being amortized over a period not to exceed 15 years or its estimated useful life, whichever is shorter. However, pursuant to section 18(n) of the Federal Deposit Insurance Act (12 U.S.C. 1828(n)), an unidentifiable intangible asset such as goodwill, if acquired after April 12, 1989, cannot be included in calculating regulatory capital under this part.

(b) Reservation of authority. Notwithstanding the definition of Tier 1 capital in §325.2(t) of this subpart and the risk-based capital definitions of Tier 1 and Tier 2 capital in appendix A to this subpart, the Director of the Division of Supervision and Consumer Protection (DSC) may, if the Director finds that a newly developed or modified capital instrument or a particular balance sheet entry or account to be the functional equivalent of a component of Tier 1 or Tier 2 capital, permit one or more insured depository institutions to include all or a portion of such instrument, entry, or account as Tier 1 or Tier 2 capital, permanently, or on a temporary basis, for purposes of this part. Similarly, the Director of the Division of Supervision and Consumer Protection (DSC) may, if the Director finds that a particular Tier 1 or Tier 2 capital component or balance sheet entry or account has characteristics or terms that diminish its contribution to an insured depository institution’s ability to absorb losses, require the deduction of all or a portion of such component, entry, or account from Tier 1 or Tier 2 capital.

(c) Securities subsidiary. For purposes of this part, any securities subsidiary subject to 12 CFR 337.4 shall not be consolidated with its bank parent and any investment therein shall be deducted from the bank parent’s Tier 1 capital and total assets.

(d) Depository institution subsidiary. Any domestic depository institution subsidiary that is not consolidated in the “Reports of Condition and Income” (Call Report) of its insured parent bank shall be consolidated with the insured parent bank for purposes of this part. The financial statements of the subsidiary that are to be used for this consolidation must be prepared in the same manner as the “Reports of Condition and Income” (Call Report). A domestic depository institution subsidiary of a savings association shall be consolidated for purposes of this part if such consolidation also is required pursuant to the capital requirements of the association’s primary federal regulator.

(e) Restrictions relating to capital components. To qualify as Tier 1 capital under this part or Tier 1 or Tier 2 capital under appendix A to this part, a capital instrument must not contain or be subject to any conditions, covenants, terms, restrictions, or provisions that are inconsistent with safe and sound banking practices. A condition, covenant, term, restriction, or provision is inconsistent with safe and sound banking practices if it:

(1) Unduly interferes with the ability of the issuer to conduct normal banking operations;