

is provided as part of the Paycheck Protection Program Lending Facility, announced by the Federal Reserve on April 7, 2020, from total leverage exposure, average total consolidated assets, advanced approaches total risk-weighted assets, and standardized total risk-weighted assets, as applicable. For the purpose of this section, an FDIC-supervised institution's liability under the facility must be reduced by the principal amount of the loans pledged as collateral for funds advanced under the facility.

[85 FR 20394, Apr. 13, 2020. Redesignated at 85 FR 32990, June 1, 2020]

§§ 324.306–324.399 [Reserved]

Subpart H—Prompt Corrective Action

§ 324.401 Authority, purpose, scope, other supervisory authority, disclosure of capital categories, and transition procedures.

(a) *Authority.* This subpart H is issued by the FDIC pursuant to section 38 of the Federal Deposit Insurance Act (FDI Act), as added by section 131 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (Pub. L. 102–242, 105 Stat. 2236 (1991)) (12 U.S.C. 1831o).

(b) *Purpose.* Section 38 of the FDI Act establishes a framework of supervisory actions for insured depository institutions that are not adequately capitalized. The principal purpose of this subpart is to define, for FDIC-supervised institutions, the capital measures and capital levels, and for insured branches of foreign banks, comparable asset-based measures and levels, that are used for determining the supervisory actions authorized under section 38 of the FDI Act. This subpart also establishes procedures for submission and review of capital restoration plans and for issuance and review of directives and orders pursuant to section 38 of the FDI Act.

(c) *Scope.* Until January 1, 2015, subpart B of part 325 of this chapter will continue to apply to banks and insured branches of foreign banks for which the FDIC is the appropriate Federal banking agency. Until January 1, 2015, subpart Y of part 390 of this chapter will

continue to apply to state savings associations. Beginning on, and thereafter, January 1, 2015, this subpart H implements the provisions of section 38 of the FDI Act as they apply to FDIC-supervised institutions and insured branches of foreign banks for which the FDIC is the appropriate Federal banking agency. Certain of these provisions also apply to officers, directors and employees of those insured institutions. In addition, certain provisions of this subpart apply to all insured depository institutions that are deemed critically undercapitalized.

(d) *Other supervisory authority.* Neither section 38 of the FDI Act nor this subpart H in any way limits the authority of the FDIC under any other provision of law to take supervisory actions to address unsafe or unsound practices, deficient capital levels, violations of law, unsafe or unsound conditions, or other practices. Action under section 38 of the FDI Act and this subpart H may be taken independently of, in conjunction with, or in addition to any other enforcement action available to the FDIC, including issuance of cease and desist orders, capital directives, approval or denial of applications or notices, assessment of civil money penalties, or any other actions authorized by law.

(e) *Disclosure of capital categories.* The assignment of an FDIC-supervised institution or an insured branch of a foreign bank for which the FDIC is the appropriate Federal banking agency under this subpart H within a particular capital category is for purposes of implementing and applying the provisions of section 38 of the FDI Act. Unless permitted by the FDIC or otherwise required by law, no FDIC-supervised institution or insured branch of a foreign bank for which the FDIC is the appropriate Federal banking agency may state in any advertisement or promotional material its capital category under this subpart H or that the FDIC or any other Federal banking agency has assigned it to a particular capital category.

(f) *Transition procedures—(1) Definitions applicable before January 1, 2015, for certain FDIC-supervised institutions.* Before January 1, 2015, notwithstanding any other requirement in this

subpart H and with respect to any FDIC-supervised institution that is not an advanced approaches FDIC-supervised institution:

(i) The definitions of leverage ratio, tangible equity, tier 1 capital, tier 1 risk-based capital, and total risk-based capital as calculated or defined under Appendix A to part 325 or Appendix B to part 325, as applicable, remain in effect for purposes of this subpart H; and

(ii) The term total assets shall have the meaning provided in 12 CFR 325.2(x).

(2) *Timing.* The calculation of the definitions of common equity tier 1 capital, the common equity tier 1 risk-based capital ratio, the leverage ratio, the supplementary leverage ratio, tangible equity, tier 1 capital, the tier 1 risk-based capital ratio, total assets, total leverage exposure, the total risk-based capital ratio, and total risk-weighted assets under this subpart H is subject to the timing provisions at 12 CFR 324.1(f) and the transitions at 12 CFR part 324, subpart G.

(g) For purposes of subpart H, as of January 1, 2015, total assets means quarterly average total assets as reported in an FDIC-supervised institution's Call Report, minus amounts deducted from tier 1 capital under § 324.22(a), (c), and (d). At its discretion, the FDIC may calculate total assets using an FDIC-supervised institution's period-end assets rather than quarterly average assets.

§ 324.402 Notice of capital category.

(a) *Effective date of determination of capital category.* An FDIC-supervised institution shall be deemed to be within a given capital category for purposes of section 38 of the FDI Act and this subpart H as of the date the FDIC-supervised institution is notified of, or is deemed to have notice of, its capital category, pursuant to paragraph (b) of this section.

(b) *Notice of capital category.* An FDIC-supervised institution shall be deemed to have been notified of its capital levels and its capital category as of the most recent date:

(1) A Call Report is required to be filed with the FDIC;

(2) A final report of examination is delivered to the FDIC-supervised institution; or

(3) Written notice is provided by the FDIC to the FDIC-supervised institution of its capital category for purposes of section 38 of the FDI Act and this subpart or that the FDIC-supervised institution's capital category has changed as provided in § 324.403(d).

(c) *Adjustments to reported capital levels and capital category—(1) Notice of adjustment by bank or state savings association.* An FDIC-supervised institution shall provide the appropriate FDIC regional director with written notice that an adjustment to the FDIC-supervised institution's capital category may have occurred no later than 15 calendar days following the date that any material event has occurred that would cause the FDIC-supervised institution to be placed in a lower capital category from the category assigned to the FDIC-supervised institution for purposes of section 38 of the FDI Act and this subpart H on the basis of the FDIC-supervised institution's most recent Call Report or report of examination.

(2) *Determination by the FDIC to change capital category.* After receiving notice pursuant to paragraph (c)(1) of this section, the FDIC shall determine whether to change the capital category of the FDIC-supervised institution and shall notify the bank or state savings association of the FDIC's determination.

§ 324.403 Capital measures and capital category definitions.

(a) *Capital measures.* (1) For purposes of section 38 of the FDI Act and this subpart H, the relevant capital measures are:

(i) Total Risk-Based Capital Measure: The total risk-based capital ratio;

(ii) Tier 1 Risk-Based Capital Measure: The tier 1 risk-based capital ratio;

(iii) Common Equity Tier 1 Capital Measure: The common equity tier 1 risk-based capital ratio; and

(iv) Leverage Measure:

(A) The leverage ratio; and

(B) With respect to an advanced approaches FDIC-supervised institutions, on January 1, 2018, and thereafter, the supplementary leverage ratio.

(2) For a qualifying community banking organization (as defined under § 324.12), that has elected to use the community bank leverage ratio framework (as defined under § 324.12), the leverage ratio calculated in accordance with § 324.12(b) is used to determine the well capitalized capital category under paragraph (b)(1)(i)(A) through (D) of this section.

(b) *Capital categories.* For purposes of section 38 of the FDI Act and this subpart, an FDIC-supervised institution shall be deemed to be:

(1)(i) “Well capitalized” if:

(A) Total Risk-Based Capital Measure: The FDIC-supervised institution has a total risk-based capital ratio of 10.0 percent or greater; and

(B) Tier 1 Risk-Based Capital Measure: The FDIC-supervised institution has a tier 1 risk-based capital ratio of 8.0 percent or greater; and

(C) Common Equity Tier 1 Capital Measure: The FDIC-supervised institution has a common equity tier 1 risk-based capital ratio of 6.5 percent or greater; and

(D) The FDIC-supervised institution has a leverage ratio of 5.0 percent or greater; and

(E) The FDIC-supervised institution is not subject to any written agreement, order, capital directive, or prompt corrective action directive issued by the FDIC pursuant to section 8 of the FDI Act (12 U.S.C. 1818), the International Lending Supervision Act of 1983 (12 U.S.C. 3907), or the Home Owners’ Loan Act (12 U.S.C. 1464(t)(6)(A)(ii)), or section 38 of the FDI Act (12 U.S.C. 1831o), or any regulation thereunder, to meet and maintain a specific capital level for any capital measure.

(ii) An FDIC-supervised institution that is a subsidiary of a global systemically important bank holding company will be deemed to be well capitalized if the FDIC-supervised institution satisfies paragraphs (b)(1)(i)(A) through (E) of this section and has a supplementary leverage ratio of 6.0 percent or greater. For purposes of this paragraph (b)(1)(ii), global systemically important bank holding company has the same meaning as in 12 CFR 217.402.

(iii) A qualifying community banking organization, as defined under § 324.12,

that has elected to use the community bank leverage ratio framework under § 324.12 shall be considered to have met the capital ratio requirements for the well capitalized capital category in paragraph (b)(1)(i)(A) through (D) of this section.

(2) “Adequately capitalized” if it:

(i) Has a total risk-based capital ratio of 8.0 percent or greater; and

(ii) Has a Tier 1 risk-based capital ratio of 6.0 percent or greater; and

(iii) Has a common equity tier 1 capital ratio of 4.5 percent or greater; and

(iv) Has a leverage ratio of 4.0 percent or greater; and

(v) Does not meet the definition of “well capitalized” in this section.

(vi) Beginning January 1, 2018, an advanced approaches or Category III FDIC-supervised institution will be deemed to be “adequately capitalized” if it satisfies paragraphs (b)(2)(i) through (v) of this section and has a supplementary leverage ratio of 3.0 percent or greater, as calculated in accordance with § 324.10.

(3) “Undercapitalized” if it:

(i) Has a total risk-based capital ratio that is less than 8.0 percent; or

(ii) Has a Tier 1 risk-based capital ratio that is less than 6.0 percent; or

(iii) Has a common equity tier 1 capital ratio that is less than 4.5 percent; or

(iv) Has a leverage ratio that is less than 4.0 percent.

(v) Beginning January 1, 2018, an advanced approaches or Category III FDIC-supervised institution will be deemed to be “undercapitalized” if it has a supplementary leverage ratio of less than 3.0 percent, as calculated in accordance with § 324.10.

(4) “Significantly undercapitalized” if it has:

(i) A total risk-based capital ratio that is less than 6.0 percent; or

(ii) A Tier 1 risk-based capital ratio that is less than 4.0 percent; or

(iii) A common equity tier 1 capital ratio that is less than 3.0 percent; or

(iv) A leverage ratio that is less than 3.0 percent.

(5) “Critically undercapitalized” if the insured depository institution has a ratio of tangible equity to total assets that is equal to or less than 2.0 percent.

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(c) *Capital categories for insured branches of foreign banks.* For purposes of the provisions of section 38 of the FDI Act and this subpart H, an insured branch of a foreign bank shall be deemed to be:

(1) “Well 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 108 percent or more of the preceding quarter’s average book value of the insured branch’s third-party liabilities; and

(iii) Has not received written notification from:

(A) The OCC to increase its capital equivalency deposit pursuant to 12 CFR 28.15, or to comply with asset maintenance requirements pursuant to 12 CFR 28.20; or

(B) The FDIC to pledge additional assets pursuant to §347.209 of this chapter or to maintain a higher ratio of eligible assets pursuant to §347.210 of this chapter.

(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 FDIC-supervised institution as adequately capitalized and may require an adequately capitalized FDIC-supervised institution or an undercapitalized FDIC-supervised institution to comply with certain mandatory or discretionary supervisory actions as if the FDIC-supervised institution were in the next lower capital category (except that the FDIC may not reclassify a significantly undercapitalized FDIC-supervised institution as critically undercapitalized) (each of these actions are hereinafter referred to generally as “reclassifications”) in the following circumstances:

(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 FDIC-supervised institution 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 FDIC-supervised institution, the FDIC-supervised institution received and has not corrected a less-than-satisfactory rating for any of the categories of asset quality, management, earnings, or liquidity.

[81 FR 22173, Apr. 15, 2016, as amended at 79 FR 24541, May 1, 2014; 83 FR 17617, Apr. 23, 2018; 84 FR 61803, Nov. 13, 2019; 85 FR 5303, Jan. 30, 2020; 85 FR 32990, June 1, 2020; 85 FR 74259, Nov. 20, 2020]

§ 324.404 Capital restoration plans.

(a) *Schedule for filing plan—(1) In general.* An FDIC-supervised institution shall file a written capital restoration plan with the appropriate FDIC regional director within 45 days of the date that the FDIC-supervised institution receives notice or is deemed to

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have notice that the FDIC-supervised institution is undercapitalized, significantly undercapitalized, or critically undercapitalized, unless the FDIC notifies the FDIC-supervised institution in writing that the plan is to be filed within a different period. An adequately capitalized FDIC-supervised institution that has been required pursuant to § 324.403(d) to comply with supervisory actions as if the FDIC-supervised institution were undercapitalized is not required to submit a capital restoration plan solely by virtue of the reclassification.

(2) *Additional capital restoration plans.* Notwithstanding paragraph (a)(1) of this section, an FDIC-supervised institution that has already submitted and is operating under a capital restoration plan approved under section 38 and this subpart H is not required to submit an additional capital restoration plan based on a revised calculation of its capital measures or a reclassification of the institution under § 324.403 unless the FDIC notifies the FDIC-supervised institution that it must submit a new or revised capital plan. An FDIC-supervised institution that is notified that it must submit a new or revised capital restoration plan shall file the plan in writing with the appropriate FDIC regional director within 45 days of receiving such notice, unless the FDIC notifies it in writing that the plan must be filed within a different period.

(b) *Contents of plan.* All financial data submitted in connection with a capital restoration plan shall be prepared in 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. An FDIC-supervised institution that is required to submit a capital restoration plan as a result of its reclassification pursuant to § 324.403(d) shall include a description of the steps the FDIC-supervised institution 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 FDIC-supervised institution.

(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 FDIC-supervised institution 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 FDIC-supervised institution 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 FDIC-supervised institution (as defined in § 324.403(b)) shall be subject to all of the provisions of section 38 of the FDI Act and this subpart H applicable to significantly undercapitalized institutions. These provisions shall be applicable until such time as a new or revised capital restoration plan submitted by the FDIC-supervised institution has been approved by the FDIC.

(e) *Failure to submit capital restoration plan.* An FDIC-supervised institution that is undercapitalized (as defined in § 324.403(b)) and that fails to submit a written capital restoration plan within the period provided in this section shall, upon the expiration of that period, 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 FDIC-supervised institution that fails in any material respect to implement a capital restoration plan shall be subject to all of the provisions of section 38 of the FDI Act and this subpart H applicable to significantly undercapitalized institutions.

(g) *Amendment of capital restoration plan.* An FDIC-supervised institution 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 FDIC-supervised institution shall implement the capital restoration plan

as approved prior to the proposed amendment.

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

(A) An amount equal to 5.0 percent of the FDIC-supervised institution's total assets at the time the FDIC-supervised institution was notified or deemed to have notice that the FDIC-supervised institution was undercapitalized; or

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

(ii) *Limit on duration*. The guarantee and limit of liability under section 38 of the FDI Act and this subpart H shall expire after the FDIC notifies the FDIC-supervised institution 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 FDIC-supervised institution after expiration of the first guarantee.

(iii) *Collection on guarantee*. Each company that controls a given FDIC-supervised institution shall be jointly and severally liable for the guarantee for such FDIC-supervised institution as required under section 38 and this subpart H, 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 an FDIC-supervised institution 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 FDIC-supervised institution shall, upon submission of the plan, be subject to the provisions of section 38 and this subpart H that are applicable to FDIC-supervised institutions that have not submitted an acceptable capital restoration plan.

(3) *Failure to perform guarantee*. Failure by any company that controls an FDIC-supervised institution 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 FDIC-supervised institution shall be subject to the provisions of section 38 and this subpart H that are applicable to FDIC-supervised institutions that have failed in a material respect to implement a capital restoration plan.

§ 324.405 Mandatory and discretionary supervisory actions.

(a) *Mandatory supervisory actions*—(1) *Provisions applicable to all FDIC-supervised institutions*. All FDIC-supervised institutions 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 FDIC-supervised institution*. Immediately upon receiving notice or being deemed to have notice, as provided in § 324.402, that the FDIC-supervised institution is undercapitalized, significantly undercapitalized, or critically undercapitalized, it 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) of the FDI Act);

(ii) Requiring that the FDIC monitor the condition of the FDIC-supervised institution (section 38(e)(1) of the FDI Act);

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

(iv) Restricting the growth of the FDIC-supervised institution's assets (section 38(e)(3) of the FDI Act); and

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

(3) *Additional provisions applicable to significantly undercapitalized, and critically undercapitalized FDIC-supervised institutions.* 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 §324.402, that the FDIC-supervised institution is significantly undercapitalized, or critically undercapitalized, or that the FDIC-supervised institution is subject to the provisions applicable to institutions that are significantly undercapitalized because the FDIC-supervised institution failed to submit or implement in any material respect an acceptable capital restoration plan, the FDIC-supervised institution 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) of the FDI Act).

(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 §324.402, 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 required to provide notice to the appropriate Federal banking agency;

(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;

(G) Paying interest on new or renewed liabilities at a rate that would increase the institution's weighted average cost of funds to a level significantly exceeding the prevailing rates of interest on insured deposits in the institution's normal market areas; and

(H) Making any principal or interest payment on subordinated debt beginning 60 days after becoming critically undercapitalized except that this restriction shall not apply, until July 15, 1996, with respect to any subordinated debt outstanding on July 15, 1991, and not extended or otherwise renegotiated after July 15, 1991.

(ii) In addition, the FDIC may further restrict the activities of any critically undercapitalized institution to carry out the purposes of section 38 of the FDI Act.

(iii) The FDIC-supervised institution must remain in compliance with the plan or is operating under a written agreement with the appropriate Federal banking agency.

(b) Discretionary supervisory actions. In taking any action under section 38 of the FDI Act that is within the FDIC's discretion to take in connection with:

(1) An insured depository institution that is deemed to be undercapitalized, significantly undercapitalized, or critically undercapitalized, or has been reclassified as undercapitalized, or significantly undercapitalized; or

(2) An officer or director of such institution, the FDIC shall follow the procedures for issuing directives under §§308.201 and 308.203 of this chapter, unless otherwise provided in section 38 of the FDI Act or this subpart H.

PART 325—STRESS TESTING

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