

The savings association shall have such time to respond to a proposed directive as provided by the OTS under paragraph (c) of this section.

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

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

(c) *Response to notice—(1) Time for response.* A 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 OTS. The date shall be at least 14 calendar days from the date of the notice unless the OTS determines that a shorter pe-

riod is appropriate in light of the financial condition of the savings association or other relevant circumstances.

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

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

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

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

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

(3) Seek additional information or clarification of the response from the savings association or company, or any other relevant source.

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

**§ 565.8 Procedures for reclassifying a 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 § 565.4(c) of this part, the OTS may reclassify a well capitalized savings association as adequately

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capitalized or subject an adequately capitalized or undercapitalized institution to the supervisory actions applicable to the next lower capital category if:

(1) The OTS determines that the savings association is in unsafe or unsound condition; or

(2) The OTS deems the 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 § 565.4(c)(1), the OTS shall issue and serve on the savings association a written notice of the OTS's intention to reclassify the savings association.

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

(i) A statement of the savings association's capital measures and capital levels and the category to which the savings association would be reclassified;

(ii) The reasons for reclassification of the savings association;

(iii) The date by which the savings association subject to the notice of reclassification may file with the OTS a written appeal of the proposed reclassification and a request for a hearing, which shall be at least 14 calendar days from the date of service of the notice unless the OTS determines that a shorter period is appropriate in light of the financial condition of the savings association or other relevant circumstances.

(3) *Response to notice of proposed reclassification.* A savings association may file a written response to a notice of proposed reclassification within the time period set by the OTS. The response should include:

(i) An explanation of why the savings association is not in unsafe or unsound condition or otherwise should not be reclassified; and

(ii) Any other relevant information, mitigating circumstances, documentation, or other evidence in support of the position of the savings association

or company regarding the reclassification.

(4) *Failure to file response.* Failure by a savings association to file, within the specified time period, a written response with the OTS to a notice of proposed reclassification shall constitute a waiver of the opportunity to respond and shall constitute consent to the reclassification.

(5) *Request for hearing and presentation of oral testimony or witnesses.* The response may include a request for an informal hearing before the OTS or its designee under this section. If the savings association desires to present oral testimony or witnesses at the hearing, the savings association shall include a request to do so with the request for an informal hearing. A request to present oral testimony or witnesses shall specify the names of the witnesses and the general nature of their expected testimony. Failure to request a hearing shall constitute a waiver of any right to a hearing, and failure to request the opportunity to present oral testimony or witnesses shall constitute a waiver of any right to present oral testimony or witnesses.

(6) *Order for informal hearing.* Upon receipt of a timely written request that includes a request for a hearing, the OTS shall issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless the OTS allows further time at the request of the savings association. The hearing shall be held in Washington, DC or at such other place as may be designated by the OTS, before a presiding officer(s) designated by the OTS to conduct the hearing.

(7) *Hearing procedures.* (i) The savings association shall have the right to introduce relevant written materials and to present oral argument at the hearing. The savings association may introduce oral testimony and present witnesses only if expressly authorized by the OTS or the presiding officer(s). Neither the provisions of the Administrative Procedure Act (5 U.S.C. 554-557) governing adjudications required by statute to be determined on the record nor part 509 of this chapter apply to an informal hearing under this section unless the OTS orders that such procedures shall apply.

(ii) The informal hearing shall be recorded and a transcript furnished to the savings association upon request and payment of the cost thereof. Witnesses need not be sworn, unless specifically requested by a party or the presiding officer(s). The presiding officer(s) may ask questions of any witness.

(iii) The presiding officer(s) may order that the hearing be continued for a reasonable period (normally five business days) following completion of oral testimony or argument to allow additional written submissions to the hearing record.

(8) *Recommendation of presiding officers.* Within 20 calendar days following the date the hearing and the record on the proceeding are closed, the presiding officer(s) shall make a recommendation to the OTS on the reclassification.

(9) *Time for decision.* Not later than 60 calendar days after the date the record is closed or the date of the response in a case where no hearing was requested, the OTS will decide whether to reclassify the savings association and notify the savings association of the OTS's decision.

(b) *Request for rescission of reclassification.* Any savings association that has been reclassified under this section, may, upon a change in circumstances, request in writing that the OTS reconsider the reclassification, and may propose that the reclassification be rescinded and that any directives issued in connection with the reclassification be modified, rescinded, or removed. Unless otherwise ordered by the OTS, the savings association shall remain subject to the reclassification and to any directives issued in connection with that reclassification while such request is pending before the OTS.

**§ 565.9 Order to dismiss a director or senior executive officer.**

(a) *Service of notice.* When the OTS issues and serves a directive on a savings association pursuant to section 565.7 requiring the savings association to dismiss any director or senior executive officer under section 38(f)(2)(F)(ii) of the FDI Act, the OTS shall also serve a copy of the directive, or the relevant portions of the directive where

appropriate, upon the person to be dismissed.

(b) *Response to directive—(1) Request for reinstatement.* A director or senior executive officer who has been served with a directive under paragraph (a) of this section (Respondent) may file a written request for reinstatement. The request for reinstatement shall be filed within 10 calendar days of the receipt of the directive by the Respondent, unless further time is allowed by the OTS at the request of the Respondent.

(2) *Contents of request; informal hearing.* The request for reinstatement should include reasons why the Respondent should be reinstated, and may include a request for an informal hearing before the OTS or its designee under this section. If the Respondent desires to present oral testimony or witnesses at the hearing, the Respondent shall include a request to do so with the request for an informal hearing. The request to present oral testimony or witnesses shall specify the names of the witnesses and the general nature of their expected testimony. Failure to request a hearing shall constitute a waiver of any right to a hearing and failure to request the opportunity to present oral testimony or witnesses shall constitute a waiver of any right or opportunity to present oral testimony or witnesses.

(3) *Effective date.* Unless otherwise ordered by the OTS, the dismissal shall remain in effect while a request for reinstatement is pending.

(c) *Order for informal hearing.* Upon receipt of a timely written request from a Respondent for an informal hearing on the portion of a directive requiring a savings association to dismiss from office any director or senior executive officer, the OTS shall issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless the Respondent requests a later date. The hearing shall be held in Washington, DC, or at such other place as may be designated by the OTS, before a presiding officer(s) designated by the OTS to conduct the hearing.

(d) *Hearing procedures.* (1) A Respondent may appear at the hearing personally or through counsel. A Respondent