

(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 insured national banks, the capital measures and capital levels, and for insured federal branches, comparable asset-based measures and levels, that are used for determining the supervisory actions authorized under section 38 of the FDI Act. This part 6 also establishes procedures for submission and review of capital restoration plans and for issuance and review of directives and orders pursuant to section 38.

(c) *Scope.* This subpart implements the provisions of section 38 of the FDI Act as they apply to insured national banks and insured federal branches. Certain of these provisions also apply to officers, directors and employees of these insured institutions. Other provisions apply to any company that controls an insured national bank or insured federal branch and to the affiliates of an insured national bank or insured federal branch.

(d) *Other supervisory authority.* Neither section 38 nor this part in any way limits the authority of the OCC 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 part may be taken independently of, in conjunction with, or in addition to any other enforcement action available to the OCC, 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 insured national bank or insured federal branch under this subpart within a particular capital category is for purposes of implementing and applying the provisions of section 38. Unless permitted by the OCC or otherwise required by law, no bank may state in any advertisement or promotional material its capital category under this subpart or that the OCC or any other federal banking agency has

assigned the bank to a particular capital category.

### § 6.2 Definitions.

For purposes of section 38 and this part, the definitions related to capital in part 3 of this chapter shall apply. In addition, except as modified in this section or unless the context otherwise requires, the terms used in this subpart have the same meanings as set forth in section 38 and section 3 of the FDI Act.

(a) *Bank* means all insured national banks and all insured federal branches, except where otherwise provided in this subpart.

(b)(1) *Control* has the same meaning assigned to it in section 2 of the Bank Holding Company Act (12 U.S.C. 1841), and the term controlled shall be construed consistently with the term control.

(2) *Exclusion for fiduciary ownership.* No insured depository institution or company controls another insured depository institution or company by virtue of its ownership or control of shares in a fiduciary capacity. Shares shall not be deemed to have been acquired in a fiduciary capacity if the acquiring insured depository institution or company has sole discretionary authority to exercise voting rights with respect thereto.

(3) *Exclusion for debts previously contracted.* No insured depository institution or company controls another insured depository institution or company by virtue of its ownership or control of shares acquired in securing or collecting a debt previously contracted in good faith, until two years after the date of acquisition. The two-year period may be extended at the discretion of the appropriate federal banking agency for up to three one-year periods.

(c) *Controlling person* means any person having control of an insured depository institution and any company controlled by that person.

(d) *Leverage ratio* means the ratio of Tier 1 capital to adjusted total assets, as calculated in accordance with the OCC's Minimum Capital Ratios in part 3 of this chapter.

(e) *Management fee* means any payment of money or provision of any other thing of value to a company or

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individual for the provision of management services or advice to the bank or related overhead expenses, including payments related to supervisory, executive, managerial, or policymaking functions, other than compensation to an individual in the individual's capacity as an officer or employee of the bank.

(f) *Risk-weighted assets* means total risk weighted assets, as calculated in accordance with the OCC's Minimum Capital Ratios in part 3 of this chapter.

(g) *Tangible equity* means the amount of Tier 1 capital elements in the OCC's Risk-Based Capital Guidelines (appendix A to part 3 of this chapter) plus the amount of outstanding cumulative perpetual preferred stock (including related surplus) minus all intangible assets except mortgage servicing assets to the extent permitted in Tier 1 capital under section 2(c)(2) in appendix A to part 3 of this chapter.

(h) *Tier 1 capital* means the amount of Tier 1 capital as defined in the OCC's Minimum Capital Ratios in part 3 of this chapter.

(i) *Tier 1 risk-based capital ratio* means the ratio of Tier 1 capital to risk weighted assets, as calculated in accordance with the OCC's Minimum Capital Ratios in part 3 of this chapter.

(j) *Total assets* means quarterly average total assets as reported in a bank's Consolidated Reports of Condition and Income (Call Report), minus intangible assets as provided in the definition of tangible equity. The OCC reserves the right to require a bank to compute and maintain its capital ratios on the basis of actual, rather than average, total assets when computing tangible equity.

(k) *Total risk-based capital ratio* means the ratio of qualifying total capital to risk-weighted assets, as calculated in accordance with the OCC's Minimum Capital Ratios in part 3 of this chapter.

[57 FR 44891, Sept. 29, 1992, as amended at 60 FR 39229, Aug. 1, 1995; 63 FR 42674, Aug. 10, 1998]

#### § 6.3 Notice of capital category.

(a) *Effective date of determination of capital category.* A bank shall be deemed to be within a given capital category for purposes of section 38 of the FDI Act and this part as of the date the bank 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.* A bank shall be deemed to have been notified of its capital levels and its capital category as of the most recent date:

(1) A Consolidated Report of Condition and Income (Call Report) is required to be filed with the OCC;

(2) A final report of examination is delivered to the bank; or

(3) Written notice is provided by the OCC to the bank of its capital category for purposes of section 38 of the FDI Act and this part or that the bank's capital category has changed as provided in paragraph (c) of this section or § 6.1 of this subpart and subpart M of part 19 of this chapter.

(c) *Adjustments to reported capital levels and capital category*—(1) *Notice of adjustment by bank.* A bank shall provide the OCC with written notice that an adjustment to the bank'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 bank to be placed in a lower capital category from the category assigned to the bank for purposes of section 38 and this part on the basis of the bank's most recent Call Report or report of examination.

(2) *Determination to change capital category.* After receiving notice pursuant to paragraph (c)(1) of this section, the OCC shall determine whether to change the capital category of the bank and shall notify the bank of the OCC's determination.

#### § 6.4 Capital measures and capital category definitions.

(a) *Capital measures.* For purposes of section 38 and this part, the relevant capital measures shall be:

(1) The total risk-based capital ratio;

(2) The Tier 1 risk-based capital ratio;

(3) The leverage ratio.

(b) *Capital categories.* For purposes of the provisions of section 38 and this part, a bank shall be deemed to be:

(1) *Well capitalized* if the bank:

(i) Has a total risk-based capital ratio of 10.0 percent or greater; and

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