

- Require the bank to take other action(s) that the OCC determines will better carry out the purpose of PCA.

There are additional discretionary actions that can be taken against parent companies and affiliates by the appropriate federal banking agency, generally the Board of Governors of the Federal Reserve System.³¹ If the OCC determines that such actions would improve the bank's condition, the supervisory office should contact the Board of Governors of the Federal Reserve System or appropriate Federal Reserve Bank.

PCA Restrictions for Critically Undercapitalized Banks

Critically undercapitalized banks are subject to all the mandatory and discretionary restrictions applicable to significantly undercapitalized banks. Critically undercapitalized banks are also subject to several additional actions, including

- receivership or conservatorship within 90 days, or such other action that the OCC determines, with the concurrence of the FDIC, would better achieve the purposes of PCA.
- restrictions on payments of principal or interest on the bank's subordinated debt.

In addition to these actions, the FDIC may, by regulation or order, restrict the activities of a critically undercapitalized bank. Refer to the "FDIC Restrictions on Activities" section of this bulletin for more information.

Appointment of Receiver or Conservator

Critically undercapitalized banks are required to be placed in receivership or conservatorship within 90 days of becoming critically undercapitalized unless the OCC and FDIC agree that another action would better achieve the purposes of PCA. Except in rare circumstances, the OCC appoints the FDIC as receiver within 90 days of a bank becoming critically undercapitalized. In rare cases, the OCC may consider appointing a conservator instead of a receiver. The FDIC must agree in writing before a conservator, rather than a receiver, can be appointed.

If the OCC determines that a bank should not be placed into receivership or conservatorship, the OCC must document the reasons an alternate action would better serve the purpose of PCA and receive the FDIC's concurrence to take the alternate action. If the FDIC concurs, no receiver or conservator need be appointed within 90 days of the bank becoming critically undercapitalized. The determination to defer placing a bank in receivership or conservatorship must be reviewed every 90 days. If the alternative action fails to restore capital, the OCC is required to appoint a receiver if the institution is critically undercapitalized on average during the calendar quarter beginning 270 days after the date on which the bank became critically undercapitalized. A limited exception to this requirement is possible when all of the following conditions are met:

- The OCC determines and the FDIC concurs that
 - the bank has positive net worth;
 - the bank has been in substantial compliance with an approved CRP that has required consistent improvement in the bank's capital since the approval date;
 - the bank is profitable or has an upward trend in earnings that the OCC projects as sustainable; and
 - the bank is reducing its ratio of nonperforming loans to total loans.
- The Comptroller of the Currency and the Chairperson of the FDIC certify, in writing, that the bank is viable and is not expected to fail.

Restriction on Payment of Subordinated Debt

Critically undercapitalized banks are also prohibited from making any payments of principal or interest on the bank's subordinated debt (without the prior approval of the FDIC) beginning 60 days after becoming critically undercapitalized.

FDIC Restrictions on Activities

Unless given prior written approval by the FDIC, critically undercapitalized banks are prohibited from the following:³²

- Entering into any material transaction, other than in the usual course of business, that would normally require prior notice to the OCC.
- Extending credit for any highly leveraged transaction.
- Amending the bank's charter or bylaws, except to the extent necessary to carry out any other requirements of law, regulation, or order.
- Making any material change in accounting methods.
- Engaging in any covered transaction, as that term is defined in 12 USC 371c(b)(7).
- Paying excessive compensation or bonuses.
- Paying rates of interest on new or renewed liabilities at a rate that would increase the bank's weighted average cost of funds to a level significantly above the prevailing rates of interest on insured deposits in the bank's normal market areas.

Capital Restoration Plans

A bank must submit a CRP to the OCC supervisory office within 45 days after the bank has notice, or is deemed to have notice, that it is undercapitalized, significantly undercapitalized, or critically undercapitalized, unless the OCC specifies a different time frame.

If a bank is operating under an approved CRP and its capital category changes, it must file a new or revised CRP only when required by the OCC in writing.

Content of Capital Restoration Plan

To prepare an acceptable CRP, a bank's board of directors and management should analyze the current condition and future prospects of the bank to determine the most efficient and expedient way to return the bank to the adequately capitalized PCA capital category. The bank's CRP should fully document the results of that analysis. Elements of this analysis should include current and pro forma balance sheets, current and long-term budgets, a strategic plan for the bank, the market analysis used to derive the appropriate means to raise capital, and any other relevant information. The CRP should clearly detail the assumptions used in the analysis.

The CRP must address the following:³³

- The steps the bank will take to become adequately capitalized.
- The levels of capital to be attained during each year of the plan.
- The types and levels of activities in which the bank will engage.
- How the bank will comply with the restrictions against asset growth (see 12 USC 1831o(e)(3)) and acquisitions, branching, and new lines of business (see 12 USC 1831o(e)(4)); and
- Any other information required by the OCC.

Capital plans required under 12 CFR 3, subpart J and subpart H do not automatically constitute CRPs required under PCA. A capital plan submitted under 12 CFR 3 is not acceptable as a CRP unless it addresses statutory requirements in 12 USC 1831o(e).

Guarantee of CRP by Controlling Company

The OCC cannot approve any CRP unless each company that controls the bank guarantees that the bank will comply with the CRP. The purpose of the guarantee is for the controlling company to provide a financial commitment; the controlling company must also provide appropriate assurances of performance to the OCC that the company's subsidiary bank will comply with the CRP.

The company's aggregate liability under the guarantee is limited to the lesser of the following:

- Five percent of the bank's total assets at the time the bank became undercapitalized.
- The amount necessary to restore the capital of the bank to the applicable minimum capital levels as those levels were defined at the time the bank initially failed to comply with its CRP.

The guarantee and limit of liability expire after the OCC notifies the bank in writing that the bank has remained adequately capitalized for four consecutive calendar quarters.³⁴ The expiration of

a guarantee given by a company or fulfillment of a guarantee given by a company in connection with one CRP does not relieve the company from an obligation to guarantee another CRP at a future date for the same bank if the bank again becomes undercapitalized. Fulfillment of one guarantee up to the statutory limit would not reduce the amount of any guarantee of a future CRP for the same bank. In addition, a new or revised guarantee is required if the bank is required to submit a new or revised CRP.

Each company controlling a given bank is jointly and severally liable for the amounts needed to recapitalize the bank. The OCC may direct the bank to seek payment of the full amount of the guarantee from any or all of the companies issuing the guarantee.

Content of Guarantee

In general, the guarantee should provide the controlling company's financial commitment guaranteeing the bank's compliance with the CRP. In addition, the guarantee may include assurances that the company will take actions required by the CRP, for example, (1) ensuring that competent management will be selected, (2) restricting transactions between the bank and the company, and (3) discontinuing certain risky or inappropriate bank or affiliate activities.

Depending on the company involved, other assurances of performance may be appropriate, such as a promissory note, a pledge of controlling company assets, legal opinions from controlling company counsel, or a controlling company board of director's resolution.

Attached to this bulletin is a sample guarantee companies may use when guaranteeing CRPs to assure performance. The sample guarantee

- references the parties to the guarantee (the bank and the guarantor holding company(s)).
- incorporates by reference the CRP submitted for approval by the bank.
- provides that the holding company unconditionally guarantees and provides a financial commitment that the bank will comply with its CRP.
- provides that the holding company will (1) take any action directly required under the CRP; (2) take any corporate actions necessary to enable the bank to take actions required of the bank under the CRP; (3) not take any action that would impede the bank's ability to implement its CRP; (4) ensure that the bank is staffed by competent management; and (5) restrict transactions between the holding company and the bank.
- states the limit of liability and the promise to pay the amount described.
- incorporates by reference a certified resolution of the board of directors of the holding company regarding the guarantee.
- describes the consideration provided, and certain rights of the parties.
- provides for the pledge of holding company assets, or other appropriate collateral, to secure the guarantee, when deemed appropriate.
- includes certain other provisions such as a statement on governing law.

The guarantee is patterned after a standard commercial guarantee. It requires the controlling company to perform on its guarantee when the bank notifies the company that the bank has failed to comply with its CRP. If the bank declines or delays in enforcing the guarantee, the OCC may take action directing the bank to enforce the guarantee or take any other action under 12 USC 1831o or 12 USC 1818 as may be appropriate. In the event the bank is placed in receivership, the FDIC as receiver would be entitled to the proceeds of any contribution by the controlling company.

Pledge of Controlling Company Assets

12 USC 1831o(e)(2)(C)(ii)(II) states each company having control over the bank must provide "appropriate assurances of performance" to satisfy the guarantee requirement. These assurances vary on a case-by-case basis depending on the bank's condition and willingness to implement changes, the strength of the controlling company, and other relevant factors.

In the case of a cooperative, strong company controlling an undercapitalized bank, the OCC generally requires only a written guarantee from the company along with a copy of its audited financial statements.

In other cases, a pledge of certain non-banking assets may be required. For example, the OCC typically requires a financially weak company that controls an undercapitalized bank to pledge assets to secure its guarantee. Similarly, the OCC typically requires a company that controls a significantly or critically undercapitalized bank to pledge assets regardless of its financial strength. The OCC may also require a security agreement and a UCC-1 financing statement if a controlling company pledges assets to secure the guarantee.

In addition, if the pledged assets are not of a type that a bank can legally hold, to the extent permissible under applicable law, the pledge agreement and other relevant documents will not prevent or inhibit the bank from liquidating such assets following contribution of those assets to the bank.

The need for a pledge also depends on the organizational structure of the controlling company. In a multi-tiered company structure, each controlling company is jointly and severally liable for implementation of the bank's CRP. So, for the bank's CRP to be acceptable, each company must guarantee the CRP and provide adequate assurances of performance. Intermediate shell holding companies may, however, rely on the financial resources of the parent company or of a third party as adequate assurance of performance on the guarantee.

In the case of a controlling shell company or a company that has limited resources, a guarantee is required for the bank's CRP to be acceptable. Given the company's lack of resources, however, a pledge of assets is not generally required. Instead, the OCC evaluates the CRP on the same basis that it evaluates plans submitted by banks owned by individuals. If the OCC would approve a CRP submitted by a bank owned by an individual, it will approve a similar CRP submitted by a bank owned by a shell company.

OCC Review of CRP and Controlling Company Guarantees

The OCC does not accept a CRP unless the plan contains the information required by statute, is based on realistic assumptions, is likely to succeed in restoring the bank's capital, and will not increase the risk to the bank. In addition, the OCC does not accept a CRP that is not guaranteed by the company or companies that control the bank.

The OCC determines, on a case by case basis, the adequacy of guarantees and assurances of performance by the bank's controlling company. The OCC supervisory office may consult with the Board of Governors of the Federal Reserve System or appropriate Federal Reserve Bank to discuss provisions of the guarantee. The OCC may also consult with the FDIC on the terms of the guarantee to ensure that the FDIC's interest as receiver would be protected if the bank is later placed in receivership. The OCC may also request that the bank and the controlling company obtain a legal opinion from the bank's or company's counsel that the guarantee and any pledge of assets securing such guarantee, if applicable, constitute a legally binding commitment against the company that is given in the ordinary course of business for adequate consideration.

The OCC generally must notify the bank in writing of the CRP's approval within 60 days of receipt or must notify the bank in writing of the delay and the reason for the delay. The OCC supervisory office must submit a copy of each approved CRP to the FDIC's regional office within 45 days of approval.

Assessment of Grounds for Appointment of Receiver or Conservator

In reviewing the bank's CRP, the OCC also assesses the bank's viability, including an assessment of whether grounds exist for the appointment of a receiver. The OCC may appoint the FDIC receiver if one or more of these grounds exists:³⁵

- The bank's assets are less than its obligations to its creditors and others, including members of the bank.
- There is substantial dissipation of assets or earnings due to
 - any violation of any statute or regulation, or
 - any unsafe or unsound practice.
- The bank is in an unsafe or unsound condition to conduct business.
- There is willful violation of a final order to cease and desist.

- There is any concealment of the bank's books, papers, records, or assets, or any refusal to submit the bank's books, papers, records, or affairs for inspection to any examiner or to any lawful agent of the OCC.
- The bank is likely to be unable to pay its obligations or meet its depositors' demands in the normal course of business.
- The bank has incurred or is likely to incur losses that will deplete all or substantially all of its capital, and there is no reasonable prospect for the bank to become adequately capitalized without federal assistance.
- There is any violation of law or regulation, or any unsafe or unsound practice or condition that is likely to
 - cause insolvency or substantial dissipation of assets or earnings;
 - weaken the bank's condition; or
 - otherwise seriously prejudice the interests of the bank's depositors or the Deposit Insurance Fund.
- The bank, by resolution of its board of directors or its shareholders or members, consents to the appointment.
- The bank has ceased being an insured institution.
- The bank is undercapitalized and
 - has no reasonable prospects of becoming adequately capitalized;
 - has failed to become adequately capitalized when required to do so;
 - has failed to submit an acceptable CRP within the time prescribed; or
 - has materially failed to implement an accepted CRP.
- The bank is critically undercapitalized or otherwise has substantially insufficient capital.
- The Attorney General notifies the OCC or FDIC in writing that the bank has been found guilty of a criminal offense under 18 USC 1956, 18 USC 1957, 31 USC 5322, or 31 USC 5324.
- A national bank's board of directors has fewer than five members.³⁶

A bank that meets one or more of these grounds may not be viable.

PCA Directives

The OCC imposes the discretionary actions applicable to undercapitalized, significantly undercapitalized, and critically undercapitalized banks by issuing a PCA directive. Refer also to PPM 5310-3, "Bank Enforcement Actions and Related Matters,"³⁷ for the OCC's enforcement action procedures, including procedures applicable to issuing a PCA directive.

A PCA directive is enforceable as a final order in federal district court in the same manner and to the same extent as a final cease-and-desist order. Also, civil money penalties may be assessed for violation of a PCA directive.

Further Information

Please contact Michael Brickman, Deputy Comptroller for Special Supervision, at (202) 649-6450.

Toney M. Bland
Senior Deputy Comptroller for Midsize and Community Bank Supervision

Morris Morgan
Senior Deputy Comptroller for Large Bank Supervision

Bao Nguyen
Acting Chief Counsel

Related Links

- [PPM 5310-3, "Bank Enforcement Actions and Related Matters" \(PDF\)](#)

- [Sample Guarantee \(PDF\)](#)

¹Although this issuance uses the term "bank" to include insured federal branches, the OCC recognizes that some of the prescribed measures and applicable restrictions may not be practical or appropriate in dealing with insured federal branches. The OCC intends to apply to insured federal branches as many of the PCA measures and restrictions as practical and appropriate, given the unique characteristics of federal branches and the individual circumstances in any given case. When appropriate, PCA directives taken against insured federal branches will be comparable to those taken against insured national banks or FSAs.

²Refer to 12 USC 1831o(a)(1).

³Refer to the "Capital and Dividends" booklet of the Comptroller's Handbook for more information.

⁴The minimum requirements in 12 CFR 3 align with the definition of "adequately capitalized" in 12 CFR 6.4.

⁵"Written agreement" means those agreements that are considered formal enforcement actions. Refer to PPM 5310-3, "Bank Enforcement Actions and Related Matters," for more information.

⁶This includes such agreements, orders, or directives issued by the OCC or the former Office of Thrift Supervision pursuant to section 8 of the FDI Act, the International Lending Supervision Act of 1983 (12 USC 3907), the Home Owners' Loan Act (12 USC 1464(t)(6)(A)(ii)), or section 38 of the FDI Act, or any regulation thereunder.

⁷Refer to 12 CFR 6.6.

⁸"ALLL" as used in this bulletin should also be interpreted to mean the allowance for credit losses upon implementation of the current expected credit losses (CECL) model.

⁹Refer to 12 CFR 6.3(c).

¹⁰Refer to 12 CFR 19.221 (national banks) and 12 CFR 165.8 (FSAs).

¹¹Refer to 12 USC 1818(b)(8).

¹²Refer to the "Supervision Review Committees" section of PPM 5310-3, "Bank Enforcement Actions and Related Matters," for more information.

¹³Refer to 12 CFR 19.221(b) (national banks) and 12 CFR 165.8(a)(2) (FSAs).

¹⁴Refer to 12 CFR 19.221(f) (national banks) and 12 CFR 165.8(a)(6) (FSAs).

¹⁵Refer to 12 CFR 6.1(e).

¹⁶Refer to 12 USC 1831f, 12 CFR 303.243 and 337.6. Deposit rate restrictions prevent a bank that is not well capitalized from circumventing the prohibition on brokered deposits by offering rates significantly above market in order to attract a large volume of deposits quickly. As a general rule, a bank that is not well capitalized may not offer deposit rates more than 75 basis points above average national rates for deposits of similar size and maturity. Refer to FDIC FIL-42-2016, "Frequently Asked Questions on Identifying, Accepting and Reporting Brokered Deposits," for more information.

¹⁷Refer to 12 USC 1821(a)(1)(D).

¹⁸Refer to 12 USC 371b-2 and 12 CFR 206.

¹⁹Refer to 12 USC 1817(b)(1)(C) and 12 CFR 327.

²⁰Refer to 12 USC 1831o(b)(2)(B).

²¹Refer to 12 CFR 6.2. The definition of "management fee" does not include payments such as those for electronic data processing, trust activities, mortgage servicing, audit or accounting services, property management, or similar service fees.

²²Refer to 12 USC 1841.

²³Refer to 12 USC 1831o(e)(4)(B).

²⁴Refer to 12 USC 1831o(e)(4)(A).

²⁵Banks may have additional obligations under 12 CFR 359, "Golden Parachute and Indemnification Payments." Requesting approval for paying a bonus or increasing compensation of a senior executive officer for PCA purposes does not fulfill the bank's obligations under 12 CFR 359.

²⁶Refer to 12 USC 1831o(f)(2).

²⁷Refer to 12 USC 1831o(f)(3).

²⁸For more information regarding receivership or conservatorship grounds, refer to 12 USC 1821(c)(5) (national banks and FSAs), 12 USC 191 and 203 (national banks) and 12 USC 1464(d)(2) (FSAs).

²⁹Separate notice and OCC review may be required under 12 CFR 5.51. Refer to the "Changes in Directors and Senior Executive Officers" booklet of the Comptroller's Licensing Manual for more information.

³⁰Refer to 12 USC 1831o(f)(6).

³¹Refer to 12 USC 1831o(f)(2)(H) and (l)(ii)-(iii).

³²Refer to 12 USC 1831o(i)(2).

³³Refer to 12 USC 1831o(e)(2).

³⁴Refer to 12 CFR 6.5(i)(1)(ii).

³⁵Refer to 12 USC 1821(c)(5) (national banks and FSAs), 12 USC 191 (national banks), and 12 USC 1464(d)(2) (FSAs).

³⁶Refer to 12 USC 71a (national banks). There is no equivalent statutory provision for FSAs.

³⁷PPM 5310-3 is an attachment to OCC Bulletin 2017-48, "Bank Enforcement Actions and Related Matters: Updated Guidance."

RESCINDED