

Regulatory Bulletin

RB 37-23

Handbook: **Examination**
Subject: **Administration**



Section: 080

Enforcement Actions

Summary: This bulletin transmits Examination Handbook Section 080, Enforcement Actions, and moves it from Management to the Administration Chapter of the Handbook. Examination Handbook Section 080 replaces Examination Handbook Section 370, Enforcement Actions, and 045, Regulatory Action Data System. Section 080 also replaces former Compliance Activities Handbook Section 140, Enforcement Actions. This bulletin rescinds RB 32-28 dated June 11, 2003.

For Further Information Contact: Your Office of Thrift Supervision (OTS) Regional Office or the Examination Programs Division of OTS, Washington, DC. You may access this bulletin at our web site: www.ots.treas.gov.

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SUMMARY OF CHANGES

We substantially revised and updated this section to comport with interagency guidance related to enforcement actions. We provide a summary of all substantive changes below.

080 Enforcement Actions

We updated the language and added Memoranda of Understanding as an informal enforcement tool. In addition, because OTS undertakes certain actions regularly as part of its supervisory function, we deleted the following actions from the list of informal enforcement actions:

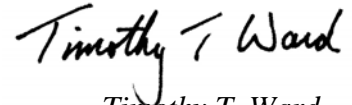
- Meetings with Management
- Meetings with the Board of Directors
- Special Examinations
- Request for Voluntary Management Changes

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We clarified our guidance with respect to our expectations on enforcement actions. This clarification reflects the interagency composite CAMELS rating definitions.

We deleted the separate section on unsatisfactory ratings for holding companies since the rating system for holding companies has changed. Instead, we discuss 3-rated associations and holding companies together since we use a parallel approach to enforcement.

We updated references.



—*Timothy T. Ward*

*Deputy Director, Examinations, Supervision and
Consumer Protection*

Enforcement Actions

The Office of Thrift Supervision (OTS) uses its statutory authorities to take prompt and vigorous enforcement action when warranted. Proper use of OTS's formal enforcement powers and informal supervisory responses is critical in helping OTS meet its functional responsibilities:

- Ensuring the safety and soundness of the thrift industry.
- Ensuring that all associations and their holding companies comply with laws and regulations.
- Maintaining the soundness of the insurance fund.

OTS uses its enforcement powers primarily to eliminate unsafe or unsound practices and to require corrective action. OTS may take enforcement action against savings associations, savings and loan holding companies, service corporations, operating subsidiaries, other affiliates, or institution-affiliated parties (IAP).¹

[LINKS](#)
[Program](#)
[Appendix A](#)

The enforcement policies in this handbook section apply to all the parties listed in the paragraph above as well as all examination types.²

OTS uses formal and informal enforcement tools to carry out its supervisory and enforcement responsibilities to address violations of laws and regulations, conditions imposed in writing, and written agreements with the agency. These tools are the focus of this handbook section.

¹ Institution-affiliated party means:

- Any director, officer, employee, or controlling stockholder (other than a savings and loan holding company) of, or agent for, an insured depository institution.
- Any other person who filed or OTS requires to file a change-in-control notice with OTS under 12 USC § 1817(j).
- Any shareholder (other than a savings and loan holding company), consultant, joint venture partner, or any other person as determined by OTS (by regulation or case-by-case) who participates in the conduct of the affairs of an insured depository institution.
- Any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in any:
 - violation of law or regulation,
 - breach of fiduciary duty, or
 - unsafe or unsound practice,which caused or is likely to cause more than a minimal financial loss to, or have a significant adverse effect on, the insured depository institution. 12 USC § 1813 (u).

² These policies and procedures only provide guidance. They are not intended to, do not, and may not be relied upon to, create rights, substantive or procedural, enforceable at law or in any administrative proceeding.

SUPERVISORY POLICIES

OTS considers the following items before determining whether an association's problems warrant any enforcement action:

- An analysis of the facts.
- An assessment of the seriousness of the problem.
- The association's supervisory history.
- The quality and cooperation of management involved.
- The results of any meetings with the board of directors.
- An evaluation of whether management has demonstrated it will take appropriate corrective action.
- An assessment of the potential harm to the association if the association does not take corrective action.
- Information or referrals from another financial regulator, including a functional regulator such as the SEC.
- Severity of the effect the holding company enterprise is having on the savings association.

Selecting the Appropriate Tool

Choosing the appropriate supervisory response involves the careful balancing of factors and the exercise of sound supervisory judgment. The general considerations for determining whether to use a formal or informal enforcement action are:

- The extent of actual or potential damage, harm, or loss to the savings association because of its action or inaction.
- Whether the misconduct or unsafe or unsound practice is repeated.
- The likelihood based on prior conduct that the unsafe or unsound practice may occur again.
- The association's prompt remedial and corrective action in the present matter as well as past violations.
- The capability, cooperation, integrity, and commitment of the association's management, board of directors, and ownership to correct identified problems.

- The extent the identified problems were preventable.
- The effect of the misconduct, or unsafe or unsound practice on other financial institutions, depositors, or the public.
- The examination rating of the association.
- Whether the association's condition is improving or deteriorating based on exam findings.
- The presence of unique circumstances.
- The supervisory goal OTS wants to achieve.

The last factor, the supervisory goal, is especially important in determining the appropriate supervisory action. For example, a Cease and Desist (C&D) order may require affirmative corrective actions, including the payment of restitution or reimbursement to an institution, but cannot require the removal or prohibition of an individual from participating in the institution's affairs. That remedy requires issuance of a Removal and Prohibition (R&P) order, based on the statutory elements in 12 USC § 1818(e).

Policy on Enforcement Actions

When to Take Formal Enforcement Action

For serious problems or deficiencies, formal enforcement action may be the appropriate initial action. There is a strong presumption that OTS will take prompt formal enforcement action against any association with serious problems regardless of examination ratings or capital levels. Examples of when OTS will consider taking formal enforcement action include, but are not limited to, one or more of the following situations:

For serious problems or deficiencies, formal enforcement action may be the appropriate initial action.

- The association's records, systems, controls, policies, or internal audit program exhibit significant problems or weaknesses.
- There is insider abuse.
- There are violations of law or regulations.
- There is material noncompliance despite prior commitments to take corrective actions.
- The board does not take corrective action.
- Informal actions are or would be insufficient.

- The association does not maintain satisfactory books and records or provide OTS or other regulatory authorities with prompt and complete access to books and records.

4- and 5-Rated Associations and Holding Companies

There is a strong presumption that savings associations and holding companies with a composite examination rating of 4 or 5 warrant formal enforcement action. Because a 4- or 5-rated association or holding company requires close supervisory attention and failure is possible if the problems and weaknesses are not satisfactorily addressed and resolved in a timely manner, a formal OTS enforcement action is presumed necessary.

3-Rated Associations and Holding Companies

There is a presumption that savings associations or holding companies with a composite examination rating of 3 warrant informal enforcement action. Although failure appears unlikely given the association's overall strength and financial capacity, 3-rated institutions require more than normal supervision and an informal enforcement action is presumed necessary. The capability, cooperation, integrity, and commitment of management, the board, and owners and the timeliness of remedial actions are important considerations in choosing the appropriate action. OTS will consider taking formal enforcement action under one or more of the following circumstances:

- Management rating of the association or risk management rating of the holding company is 3 or below.
- There is uncertainty as to whether management and the board have the ability or willingness to take appropriate corrective measures.
- Overall condition is rapidly deteriorating.
- A 3-rating continues for two consecutive examinations following the association or holding company entering into the informal enforcement action or the informal action is deemed insufficient to address the issues.
- The association or holding company is not in compliance with prior commitments to take corrective action.

Consulting with State Authorities and the FDIC

Communications with other regulators is essential to ensure an effective resolution of a problem association. Consultation with state banking supervisors should occur in parallel with examinations, supervisory efforts, and enforcement actions. For example, when considering a supervisory agreement with a state-chartered association,

Communications with other regulators is essential to ensure a smooth resolution of a problem association.

OTS will consult with the state supervisor and solicit concurrence. If OTS issues an Individual Minimum Capital Requirement directive to a state-chartered savings association, OTS will notify the state regulator (12 CFR § 567.3(d)(1) and (3)). OTS consults with the FDIC and other appropriate regulatory agencies, as well as state regulators, before taking formal enforcement actions against state-chartered associations.

In coordinating these consultations, OTS will comply with existing information sharing agreements and laws that govern information sharing between regulators.

TYPES OF ENFORCEMENT ACTIONS

This section discusses the specific types of enforcement actions, formal and informal, that OTS may take, the regulatory considerations in deciding whether and what type of enforcement action to take, and the procedures for investigating and initiating enforcement actions.

OTS generally attempts to obtain consent to the issuance of an enforcement action from an association's board of directors. Where an immediate cessation to an activity is necessary, OTS will proceed without seeking consent (e.g., if books and records of the association are in danger of being destroyed or if the books and records of the association are so incomplete or inaccurate that OTS cannot determine the financial condition of the association).

Informal Enforcement Actions

When an association's overall condition is sound, but it is necessary to obtain written commitments from an association's board of directors or management to ensure that it will correct the identified problems and weaknesses, OTS may use informal enforcement actions. OTS commonly uses informal actions for problems in the following types of associations:

- Well or adequately capitalized associations.
- Associations with a composite rating of 1, 2, or 3 .

Informal actions notify the board and management that OTS has identified problems that warrant attention. A record of informal action is beneficial in case formal action is necessary later.

Informal actions are not enforceable in and of themselves. If the association violates or refuses to comply, OTS cannot enforce compliance in federal court or assess civil money penalties for noncompliance, but OTS may take more severe enforcement actions if the association fails to comply. The effectiveness of the informal tools depends in part on the willingness and ability of the association to correct deficiencies that OTS notes.

OTS has a number of informal enforcement tools available to address unsafe or unsound practices or violations of laws and regulations. Those informal enforcement actions include:

- **Memorandum of Understanding.** A Memorandum of Understanding is a commitment by an association to OTS in which the association agrees to correct a violation of law, regulation or an unsafe or unsound practice.
- **Board Resolution.** A document designed to address one or more specific concerns identified by OTS and adopted by the association's board of directors.
- **Supervisory directive.** A directive to the association to cease an activity or take an affirmative action to remedy or prevent an unsafe or unsound practice.
- **Notice of deficiency and request for safety and soundness compliance plan.**
- **Individual Minimum Capital Requirement (IMCR) Directives.** OTS may establish an IMCR for a savings association that varies from the requirement that would otherwise apply to the association. OTS may establish an IMCR for a savings association, as necessary on a case-by-case basis, pursuant to 12 CFR § 567.3.

Minimum capital levels higher than those normally required may be appropriate for savings associations:

- Needing special supervisory attention.
- Exhibiting a high degree of exposure to interest rate risk, credit risk, and other risks.
- Experiencing poor liquidity or cash flow problems due to weak credit quality, operational losses, and other factors.

Savings associations have the opportunity to respond in writing when they are notified that OTS is imposing an IMCR. Failure to satisfy an IMCR may constitute grounds for issuance of a capital directive or other formal enforcement action.

If informal tools do not resolve the problem, OTS will use formal enforcement tools. An association's unwillingness to comply with an appropriate informal remedy is a significant factor in determining whether a formal enforcement action is appropriate.

Formal actions are appropriate when an association has significant problems, especially when there is a threat of harm to the association, depositors, or the public.

Formal Enforcement Actions

A formal enforcement action is enforceable under the Federal Deposit Insurance Act (FDIA) (12 USC § 1818). Formal actions are appropriate when an association has significant problems, especially when there is a threat of harm to the association, depositors, or the public. OTS will use formal enforcement actions when informal remedial actions are considered inadequate, ineffective, or otherwise unlikely to secure correction of safety and soundness or compliance problems.

Because formal actions are enforceable, OTS can assess civil money penalties against associations and individuals for noncompliance with a formal agreement or final orders. OTS can also request a federal court to require the association to comply with an order. Unlike informal actions, formal enforcement actions are public.

Formal enforcement actions include the following:

- Formal written agreements pursuant to 12 USC § 1818. These agreements include supervisory agreements and capital directives under 12 CFR § 567.
- Cease-and-desist orders (C&Ds).
- Temporary C&Ds.
- Removal and/or prohibition orders (R&Ps).
- Temporary suspensions for certain criminal indictments.
- Civil money penalties (CMPs).
- Prompt Corrective Action (PCA) directives, including capital plans under 12 USC § 1831o and 12 CFR Part 565 (including temporary restrictions on operations).
- Safety and soundness orders pursuant to Section 39 of the FDIA.
- Injunctive actions.
- Immediate suspensions during removal and prohibition proceedings.
- Suspension or debarment of attorneys, accountants, and accounting firms.
- Conservatorships and receiverships.
- Enforcement of orders in United States District Court.

Supervisory Agreements

Supervisory agreements are formal written agreements used only with savings associations or their holding companies that are subject to OTS's continuing supervision and jurisdiction, not with individuals or other entities. OTS may use supervisory agreements to require savings associations or holding companies to take corrective action with respect to the association's violation of law or regulation or continued unsafe or unsound practice. The agreements may also require affirmative corrective action to address any existing violations, management or operational deficiencies, or other

unsound practices. In short, they may include the same broad range of provisions that OTS may incorporate into C&D orders.

Violations of supervisory agreements, unlike violations of other types of formal enforcement actions, are not enforceable in federal court (12 USC § 1818 (i)). However, a violation of a supervisory agreement may form the basis for the assessment of CMPs, C&D actions, and R&P actions. To ensure that supervisory agreements, if violated, will properly form the basis for other enforcement actions, each supervisory agreement should state that “the Agreement is a ‘written agreement’ for the purposes of Section 8 of the FDIA, 12 USC § 1818.”

Violations of supervisory agreements, unlike violations of other types of formal enforcement actions, are not enforceable in federal court.

Capital Directives

A capital directive is an order designed to establish and enforce capital levels and for taking capital-related action. OTS may issue a capital directive based on any of the following:

- A savings association’s noncompliance with a capital requirement established under 12 CFR §§ 567.2 and 567.3.
- By a written agreement under 12 USC § 1464(s).
- As a condition for approval of an application.

Cease-and-Desist Orders

A C&D order normally requires the association to correct any violation of law, regulation, or an unsafe or unsound practice. OTS may issue a C&D order in response to violations of federal banking, securities, or other laws by associations or individuals, or if it believes that an unsafe and unsound practice or violation is about to occur.

OTS authority for issuing C&D orders is the FDIA (12 USC § 1818(b)). OTS may issue a C&D order if one of the following factors is present:

- An unsafe or unsound practice.
- A violation of law, rule, or regulation.
- A violation of any condition imposed in writing in connection with the granting of an application, or any written agreement with OTS.

OTS can issue a C&D order by consent or following a formal administrative hearing.

OTS can issue a C&D order against a savings association, its service corporation or subsidiary, an IAP, a savings and loan holding company, a holding company subsidiary, or service providers.

If an entity or individual fails to comply with a final order, OTS may seek enforcement of the order through the United States District Court. Violations of an order may form the basis for civil money penalties and for removal and prohibition actions. A party subject to the C&D order may request modification or termination of the order.

Temporary Cease-and-Desist Orders

OTS uses temporary C&D orders to address situations requiring immediate action. When issuing a temporary order, OTS also issues a notice of charges, which also initiates a proceeding to obtain a permanent C&D order. In the notice of charges, OTS must state that it has determined that there is a violation, an unsafe or unsound practice, or a threatened violation or practice that is likely to result in one or more of the following conditions:

- Insolvency or significant dissipation of assets or earnings.
- Weakening of the association's condition.
- Prejudice to the interests of the depositors before the completion of the C&D proceeding.

A temporary C&D order may require affirmative action to prevent insolvency, dissipation of assets, a weakened condition, or prejudice. OTS may use a temporary C&D order to require that an association restore its books and records to a complete and accurate state under the following conditions:

A temporary C&D order may require affirmative action to prevent insolvency, dissipation of assets, a weakened condition, or prejudice.

- An association's books and records are so incomplete or inaccurate that OTS is unable, through the normal supervisory process, to determine the financial condition of the association.
- An association's books and records are so incomplete or inaccurate that OTS cannot determine the details or purpose of a transaction that may have a material effect on the association's financial condition.

OTS may also use a temporary C&D to order cessation of any activity pending the completion of the C&D proceeding. For example, OTS may issue a temporary C&D order to freeze assets pending the outcome of litigation or to require immediate change in management. OTS can also require cessation of activities causing incomplete or inaccurate books or records.

A temporary C&D order terminates automatically when OTS dismisses the charges in the notice initiating the C&D proceeding or when a permanent C&D order against the same party becomes effective.

Orders of Removal and Prohibition

OTS can remove an IAP from office and prohibit a person or entity from further participation in any insured depository institution under Section 8(e) of the FDIA, 12 USC § 1818(e), if one element of each of the following three statutory prongs is met:

- The IAP directly or indirectly engaged in any of the following practices:
 - Violated a law, regulation, or final C&D order.
 - Violated any condition imposed in writing by the appropriate federal banking agency in connection with the grant of any application or other request by the depository institution.
 - Violated any written agreement between the depository institution and the agency.
 - Engaged or participated in any unsafe or unsound practice with respect to any insured depository institution or business institution.
 - Committed or engaged in any act, omission, or practice that constitutes a breach of fiduciary duty.
- As a result of the violation, unsafe or unsound practice, or breach of fiduciary duty described above, any of the following occurred:
 - The insured depository institution suffered or will probably suffer financial loss or other damage.
 - The interests of the insured depository institution's depositors have been or could be prejudiced.
 - The IAP received financial gain or other benefit from the violation, practice, or breach.
- The violation, unsafe or unsound practice, or breach of fiduciary duty:
 - Involves personal dishonesty.
 - Demonstrates a willful or continuing disregard for the safety or soundness of the insured depository institution or business institution.

An R&P order has industry-wide effect and bars an individual from holding office in, being employed by, or participating in any manner in the conduct of the affairs of any insured depository institution, including credit unions, and from working for any depository institution regulatory agency without the prior written consent of the agency issuing the order. Removed or prohibited individuals may request modification or termination of the R&P order. Individuals who violate R&P orders are subject to criminal penalties.

Anyone convicted of a criminal offense involving dishonesty or breach of trust, or who has agreed to enter into a pre-trial diversion or similar program in connection with such a prosecution, is automatically subject to an industry-wide prohibition by operation of law (12 USC § 1829).

Temporary Suspensions

OTS may issue an order temporarily suspending an individual from a position in conjunction with a notice of intention to remove or prohibit the individual (12 USC § 1818(e)(3)). By statute, OTS can issue a temporary suspension only if the suspension is necessary to protect the interests of the depository institution or its depositors. The suspension remains in effect pending the removal or prohibition proceeding initiated by the notice, unless a district court stays the suspension as provided by the FDIA (12 USC § 1818(f)).

OTS staff must adequately document violations or unsafe or unsound practices underlying the temporary suspension. OTS will use the documentation when presenting its action to a reviewing court. Appropriate documentation may include the following materials:

- Examination reports.
- Sworn testimony.
- Other materials documenting violations or personal gain to the individual.
- Periodic reports to OTS showing a decline in an association's financial condition.

A suspended individual may apply to the U.S. District Court for an injunction or stay of the temporary suspension within ten days of service of the suspension. The court will consider both the reasonableness of OTS's decision to issue the suspension and the traditional standards for injunctive relief.

OTS has authority to temporarily suspend or remove an individual charged with committing or participating in a crime involving dishonesty or breach of trust, which is punishable by a term of imprisonment exceeding one year, if the individual's continued service poses a threat to the interests of the association's depositors or threatens to impair public confidence in any relevant depository institution (12 USC § 1818(g)). In such cases, the temporarily suspended or prohibited individual may request an opportunity to appear before the agency to show that his or her continued participation does not pose a threat or may pose a threat to the interests of depositors or threaten or may threaten to

impair public confidence. The suspension or prohibition remains in effect until resolution of the criminal charges or termination of the order of suspension.

Civil Money Penalties

OTS possesses statutory authority under the FDIA and other statutes to assess CMPs against savings associations, their service corporations or subsidiaries, savings and loan holding companies, subsidiaries of holding companies, and IAPs. Assessment of a CMP is appropriate for any of the following violations:

- Violations of any law or regulation.
- Violations of the terms of any final or temporary order.
- Violations of any condition OTS imposed in writing in connection with the granting of any application or other request by the association.
- Violations of any written agreement between the association and OTS.
- Breaches of fiduciary duty.
- Failure to maintain adequate records.
- Failure to file, or filing late or inaccurate OTS-required reports.
- Unsafe or unsound practices.

When assessing a CMP, OTS considers the following factors:

- Financial resources and good faith of the person, association, or company.
- Whether the person, association, or company will make financial resources available.
- The gravity of the violation.
- The history of previous violations.
- Any such other matters as justice may require.

OTS uses the Civil Money Penalty Form in [Regulatory Bulletin \(RB\) 18-3a](#) as guidance in considering and assessing CMPs. The form consists of the Civil Money Penalty Tier Matrix to determine the tier of a violation, and the Civil Money Penalty Calculation Sheet to assess a penalty amount for the violation. There are two tier matrices: the General Tier Matrix and the Reporting Violation Tier Matrix.

While OTS expects to use these matrices in all cases where it is considering an assessment, they are not substitutes for sound supervisory judgment. Individual cases may possess particularly egregious or mitigating characteristics not included as factors in the matrices.

For detailed information on the application of civil money penalties, refer to the FFIEC Policy Statement on Civil Money Penalties (6/3/98) and to [RB 18-3a](#), Enforcement Policy Statement on Civil Money Penalties (7/30/93).

Prompt Corrective Action

Prompt Corrective Action (PCA) is triggered by an association's capital category, as defined in 12 USC § 1831o and 12 CFR Part 565. Depending on an association's PCA capital category, certain restrictions and actions are automatically imposed by operation of law. Other PCA actions are discretionary. (See [Appendix A](#)).

Capital Plans

In addition to mandatory and discretionary operating restrictions, the FDIA requires all savings associations with a capital category below adequately capitalized to submit a capital restoration plan (Capital Plan) within 45 days of receiving notice or being deemed to have notice of becoming undercapitalized. OTS regulations provide the timing, content, and approval standards for Capital Plans in 12 CFR § 565.5. The Capital Plan must explain in detail the proposed strategy for becoming, at a minimum, adequately capitalized, and for accomplishing the association's overall objectives.

Under 12 USC § 1831o(e)(2), OTS must consider various factors in determining whether to approve the plan. These factors include, but are not limited to, the following criteria:

- How the association will comply with restrictions and requirements under the FDIA.
- The association's proposal to become adequately capitalized.
- The association's activities.
- Whether the association's assumptions are realistic.
- Likelihood of success.
- Risk exposure.

Each controlling company of an undercapitalized association must guarantee that the association will comply with the Capital Plan until adequately capitalized (on average) during four consecutive quarters, and provide adequate assurances of performance (12 USC § 1831o(e)(2)(c)(ii)).

If OTS approves the Capital Plan submitted by the association, it becomes the basis for a PCA Directive along with any mandatory or discretionary operating restrictions applicable to the association.

If OTS determines that the association's Capital Plan is not acceptable or if the association fails to file one, OTS issues a PCA Directive. The PCA Directive becomes the basis for curtailing certain activities, and mandating the steps necessary to either increase capital to acceptable levels, or otherwise move the association toward resolution. See discussion in [Appendix A](#) on Capital Plans.

Prompt Corrective Action (PCA) Directives

The FDIA requires that the agencies take prompt enforcement against undercapitalized institutions. Under PCA standards, an institution is in one of five capital categories: well capitalized, adequately capitalized, undercapitalized, significantly undercapitalized, or critically undercapitalized. Mandatory, discretionary, and presumed restrictions and sanctions apply for institutions in the three undercapitalized categories. Additional information regarding the five capital categories is contained in the [Examination Handbook Section 120, Capital Adequacy](#). A PCA directive establishes a capital-based supervisory scheme that requires OTS to place increasingly stringent restrictions on associations as regulatory capital levels decline. The primary objective of PCA is "to resolve problems of insured depository institutions at the least possible long-term loss to the deposit insurance fund" (12 USC § 1831o(a)(1)).

PCA mandates the imposition of certain restrictions once an association falls below the well capitalized category. Most of the restrictions are limited to associations at the undercapitalized level or below. The following two restrictions, however, pertain to all adequately capitalized associations:

PCA mandates the imposition of certain restrictions once an association falls below the well capitalized category.

- No association can make a capital distribution if it results in undercapitalization; and
- The FDIC restricts associations from receiving brokered deposits or acting as a deposit broker unless they meet the well capitalized definition.

For associations at the undercapitalized level and below, there are additional mandatory operating restrictions that apply automatically without regard to whether a PCA directive is in place. These restrictions set out in 12 USC § 1831o(e) and 12 CFR § 565.6(a)(2), include the following actions:

- Restricting asset growth.
- Restricting capital distributions and certain management fees.
- Limiting the ability to make acquisitions, branch, or enter new lines of business.
- Requiring compliance with a capital restoration plan submitted by the association.
- Monitoring by OTS. (This may include more frequent field visits by OTS or written quarterly reports from the board of directors on adherence to the PCA restrictions.)

In addition to the mandatory restrictions, the PCA regulations provide OTS with authority to apply a wide range of discretionary remedies (12 USC § 1831o(e)(5) and § 1831o(f)(5)). OTS will consider imposing the following discretionary restrictions when conditions warrant:

- Require recapitalization.
- Restrict transactions with affiliates.
- Restrict interest rates paid.
- Restrict asset growth more stringently than required by statute.
- Restrict activities (for example, banning certain types of lending).
- Improve management (for example, mandating the election of a new board of directors, dismissing current directors and members of senior management, or requiring the hiring of certain qualified employees subject to OTS approval) (12 USC § 1831o(f)(2)(F) and 12 CFR §§ 565.6 and 565.9).
- Prohibit deposits from correspondent banks.
- Require prior approval for capital distributions by a bank holding company.
- Require divestiture.
- Restrict executive or senior officer compensation more stringently than required by statute (for example, restricting bonuses) (12 USC § 1831o(f)(4)).
- Take any other action necessary to resolve the problems of the association at the least possible long term loss to the insurance fund.

The above provisions apply to associations that fail to submit and implement Capital Plans. OTS regulations at 12 CFR § 565.7 pertain to the process for issuance of PCA directives. See also Appendix A under PCA Directives.

In addition to the PCA remedies available for undercapitalized savings associations, the statutory framework allows OTS to reclassify an association's PCA category if it operates in an unsafe and unsound condition (12 USC § 1831o(g) and 12 CFR § 565.8). Associations may request a hearing regarding the reclassification and the restrictions under 12 CFR § 565.8(a)(5) and (6). Once OTS has implemented a reclassification, an association can petition OTS for a PCA category upgrade if it successfully rectifies the unsafe and unsound conditions. See discussion in Appendix A on PCA Reclassifications.

Safety and Soundness Orders Pursuant to Section 39 of the FDIA

OTS also has authority to issue a Safety and Soundness Order against a savings association under 12 USC § 1831p-1 and the implementing regulations, 12 CFR Part 570.

The process begins with OTS issuing a notification to the association of its failure to meet the safety and soundness standards, and requesting that the association submit a compliance plan.

Generally, this tool addresses unsafe and unsound conduct that is not reflected in capital levels. These notices of deficiencies may also address specific problems in well or adequately capitalized associations. OTS generally only uses Part 570 safety and soundness notices of deficiency when the following conditions are present:

- The problems or weaknesses are narrow in scope and correctable.
- OTS is confident of the board's and management's commitment and ability to correct problems or weaknesses.

If the association fails to submit a compliance plan, or fails to comply with an approved compliance plan, OTS may issue a Safety and Soundness Order. The association has the right to respond in writing to the proposed issuance of an order. There are serious consequences for an association's failure to comply with a Safety and Soundness Order. OTS can impose CMPs or seek enforcement through judicial or administrative proceedings.

POST-ENFORCEMENT ACTIONS

Checking for Compliance with Outstanding Agreements and Orders

The recurrence of a problem previously addressed by an informal method of supervision, such as a supervisory directive, raises a presumption that OTS will pursue a C&D action or assess a CMP. That is, a material violation of an informal enforcement action should cause OTS to consider a C&D action or a CMP assessment, unless there are substantial mitigating factors.

A significant violation of a formal enforcement order raises a presumption that OTS will take a more severe formal enforcement action (for instance, CMPs against the board or management if the association has failed to comply with a C&D order).

During every comprehensive examination, examiners will expressly check for compliance with each outstanding directive, agreement, or order. Examiners must document compliance or noncompliance in the report of examination (ROE). The terms of the directive, agreement, or order will dictate the scope of the inquiry. For example, an agreement requiring an association to develop and adopt effective, written lending procedures necessitates that examiners review the procedures for clarity, effectiveness, and proof that the board of directors adopted them. An agreement that the association must comply fully with new loan procedures requires a review of a sample of loans for compliance with those

procedures. This review should be in addition to the normal loan review for compliance with applicable regulations and safety and soundness standards. (See [Handbook Section 060](#), Examination Scheduling, Scoping, and Management).

Documentation

Supervisory and enforcement actions require thorough documentation. In the event an association violates a formal enforcement action, OTS will enforce the formal enforcement action in court. OTS will rely on the examiners' determination and documentation of the source of noncompliance (or other conduct). Discussions with management should be documented and summarized. The documentation should include management's verbal and written explanations of why such violations occurred and OTS's opinion as to the necessity of further enforcement action.

In all cases, OTS should obtain clear documentary evidence of the violations or conduct to provide evidence in the event OTS issues an order or must enforce the order in District Court.

Termination or Modification of Enforcement Actions

Generally, OTS does not terminate an enforcement action until the association has complied with all the articles in the enforcement action document.

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OTS must document a decision to terminate or modify an enforcement action. An OTS examination documenting compliance with the enforcement action is usually a prerequisite to removal of the action unless OTS can obtain the appropriate documentation to support such modification or termination without an examination. In limited instances, OTS will permit a modification or termination of an enforcement action without an examination if deemed appropriate.

METHODS OF GATHERING INFORMATION

Regular and Special Examinations

Generally, OTS will attempt to informally obtain information before requesting a formal examination with subpoena power. OTS will obtain and use reliable information from savings associations and their affiliates, employees, and agents.

Because of OTS's authority to examine the records of any savings association and that association's affiliates, OTS does not need to issue subpoenas to compel the production of the records of the savings association or their affiliates. HOLA § 5(d)(1)(B) entitles OTS to prompt and complete access to all association personnel and agents, and to all association documents. Examiners should notify Regional Counsel or Regional Enforcement Counsel immediately if the association or its personnel refuse to supply association records or otherwise obstructs the progress of an OTS examination.

Section 5(d)(1)(B) grants OTS specific authority to go to federal court to obtain an order requiring that the association provide such access. Informal requests to interview persons outside of the association or to review records of a borrower or other entity that is not a savings association or its affiliate may also be informative.

The Gramm-Leach-Bliley Act [Pub. L. No. 106-102, 113 Stat. 1338 (1999)] established a framework of procedural requirements and criteria for working with functionally related entities, which may be a subsidiary, affiliate, or other depository institution engaged in activities regulated by another regulatory agency, such as the SEC. OTS will work cooperatively with the primary regulator of the entity to request information and reports. In limited circumstances, if the regulator is unable or unwilling to obtain the information, OTS can request the information directly from the entity. If the information is insufficient, OTS can, in some instances, conduct an on-site examination of the entity if OTS can meet certain requirements showing need for the information.

REFERENCES

United States Code (12 USC)

| | |
|--------------|---|
| § 1464(d) | Regulatory Authority |
| § 1464(s)(2) | Individual Minimum Capital Requirement |
| § 1464(s)(4) | Directive to Increase Capital |
| § 1467a | Regulation of Holding Companies |
| § 1467a(g) | Administration and Enforcement |
| § 1813(u) | Institution-Affiliated Party |
| § 1817(j) | Change in Control of Insured Depository Institutions |
| § 1818(b) | Cease-and-Desist Proceedings |
| § 1818(e) | Removal and Prohibition Authority |
| § 1818(f) | Stay of Suspension and/or Prohibition of Institution-Affiliated Party |
| § 1818(g) | Suspension or Removal of Institution-Affiliated Party Charged with Felony |
| § 1818(i)(1) | Proceedings to Enforce Compliance |
| § 1818(i)(2) | Civil Money Penalties |
| § 1818(i)(4) | Prejudgment Attachment |

| | |
|-----------|---|
| § 1818(n) | Subpoena Power |
| § 1820(c) | Subpoena Power |
| § 1831o | Prompt Corrective Action |
| § 1831p-1 | Actions to be Taken for Failure to Comply with Safety and Soundness Standards |

Code of Federal Regulations (12 CFR)

| | |
|--------------|--|
| Part 508 | Removals, Suspensions, and Prohibitions Where a Crime Is Charged or Proven |
| § 509 et seq | Adjudicatory Proceedings |
| § 512 et seq | Investigative and Formal Examination Proceedings |
| Part 513 | Practice Before the Office |
| Part 565 | Prompt Corrective Action |
| § 565.7 | Directives to Take Prompt Corrective Action |
| § 567.3 | Individual Minimum Capital Requirements |
| § 567.4 | Capital Directives |
| Part 570 | Safety and Soundness Orders |

Office of Thrift Supervision Bulletins

| | |
|----------|---|
| RB 18 | Issuance of Enforcement Policies |
| RB 18-3a | Enforcement Policy Statement on Civil Money Penalties |

Other References

FFIEC Interagency Policy Regarding the Assessment of Civil Money Penalties by the Federal Financial Institutions Regulatory Agencies, June 3, 1998

Enforcement Actions Program

EXAMINATION OBJECTIVES

To determine if the association and individuals are in compliance with the requirements of outstanding agreements or orders.

To determine if new or additional enforcement actions need to be taken to correct deficiencies.

EXAMINATION PROCEDURES

LEVEL I

WKP. REF.

1. Review any written enforcement action that is in effect between the association and OTS, FDIC, or state supervisory authorities, if applicable.

-
2. Review the ECEF "Actions History" report on the Intranet for any open enforcement actions associated with the association.

-
3. Identify what the association or individual is required to do or is prohibited from doing by the enforcement action.

-
4. Evaluate how the association monitors compliance with enforcement actions. Assess how the association communicates with officers and employees and determine whether the appropriate employees are aware of any corrective action needed.

-
5. Review the appropriate areas of concern to determine whether or not the association or individual is in compliance with the provisions of the enforcement action. Work papers should fully support all conclusions.
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| Exam Date: | |
| Prepared By: | |
| Reviewed By: | |
| Docket #: | |

Enforcement Actions Program

WKP. REF.

6. If compliance is determined, summarize the findings, including comments for the report of examination (ROE) as necessary.
-

7. If noncompliance is found, proceed to Level II procedures.
-

8. Discuss overall examination findings with the examiner-in-charge (EIC).

- If a composite rating of 3, 4, or 5 is anticipated, determine what enforcement action(s), if any, is(are) necessary.
 - Document your decision and proceed to Level II procedures.
-

LEVEL II

1. Determine if there is another regulatory agency that is the primary regulator of the entity from whom you must obtain information. If so, work with your regional office staff to coordinate your information requests and any examination of a functionally regulated entity.
-

2. If documents required by the enforcement action, such as an appraisal or financial statements, cannot be located, request them in writing from management. If you fail to receive the requested material, request a written response. If management will only respond orally, assure that two examiners are present and immediately write a summary of the response signed by both examiners.
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Enforcement Actions Program

WKP. REF.

3. Gather documents or materials that support the noncompliance such as poor appraisals, modified notes, loan register, loans in process ledger, etc. Separate and identify all appropriate work papers, ensuring they are factual, complete, and do not contain expressions of examiner opinion.
-

4. Assess whether noncompliance is due to the association's administrative oversight, lack of knowledge, or willful disregard. State facts, be objective, and avoid speculation.
-

5. Formulate recommendations for any necessary supervisory action. State the facts such as whether a previous supervisory agreement is violated and recommend an appropriate enforcement action such as a cease & desist (C&D) or assessment of a civil money penalties (CMP).
-

6. The EIC must notify the regional office's legal staff by telephone and report the findings, recommending any further enforcement action.
-

7. Per discussion with EIC or regional office staff, write an interim report detailing your findings.
-

8. Prepare all comments and conclusions for the ROE as necessary.
-

EXAMINER'S SUMMARY, RECOMMENDATIONS, AND COMMENTS

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| Exam Date: | |
| Prepared By: | |
| Reviewed By: | |
| Docket #: | |

PROMPT CORRECTIVE ACTION GUIDELINES

The PCA statutory, regulatory, and policy framework provides OTS with effective supervisory remedies to minimize losses to the deposit insurance fund.¹

The statutory authority for PCA is found in the Federal Deposit Insurance Act (FDIA) at 12 USC 1831o. OTS has implemented that authority in regulations at 12 CFR Part 565. PCA requires that certain operating restrictions take effect when an association is undercapitalized. The statute creates five capital categories, which are defined as follows by OTS at 12 CFR § 565.4(b) (consistent with the other banking agencies):

PCA Categories

Savings associations fall into one of five PCA categories. The PCA minimum requirements are as follows:

| | <u>Total Risk- Based</u> | | <u>Tier 1/Risk- Based</u> | | <u>Tier 1/Leverage</u> |
|--------------------------------|--|------------|-------------------------------|------------|--------------------------------------|
| Well Capitalized* | 10% or greater | <i>and</i> | 6% or greater | <i>and</i> | 5% or greater |
| Adequately Capitalized | 8% or greater | <i>and</i> | 4% or greater | <i>and</i> | 4% or greater (3% for 1-rated) |
| Undercapitalized | Less than 8% | <i>or</i> | Less than 4% | <i>or</i> | Less than 4% (except for 1-rated) |
| Significantly Undercapitalized | Less than 6% | <i>or</i> | Less than 3% | <i>or</i> | Less than 3% |
| Critically Undercapitalized | Has a ratio of tangible equity to total assets that is equal to or less than 2%. Tangible equity is defined in 12 CFR § 565.2(f) and differs from the definition of tangible capital under FIRREA. | | | | |

¹ OTS has additional powers under the Home Owners Loan Act (HOLA) for association's failure to meet capital requirements as detailed in the implementing regulation, 12 CFR 567.10. This document does not discuss the HOLA capital provisions and implementing regulations that are addressed in Handbook Section 120 Capital Adequacy.

* To be well capitalized, association also cannot be subject to a higher capital requirement imposed by OTS.

Notice of Capital Category and Mandatory and Discretionary Operating Restrictions

OTS deems that savings associations have received notice of their capital category as of the date they file a Thrift Financial Report (TFR) or when OTS transmits a final report of examination (ROE). An association must also notify OTS of any event that results in the lowering of a PCA capital category within 15 days of the material event that caused the decreased capital (12 CFR § 565.3(c)(2)). In addition, OTS should provide written notice of an association's reclassified PCA status after receipt of a TFR, with the transmittal of a ROE, or upon learning of an event that results in a reclassification in capital category. The notice from OTS should include the mandatory and any discretionary operating restrictions (discussed below) applicable to associations in the designated category (see Chart 1 - PCA Categories). The restrictions are effective immediately upon the earlier of being deemed to have notice or receiving written notice of a capital category reclassification.

PCA requires OTS to apply progressively more significant restrictions on an association's operations as its capital category falls. PCA mandates the imposition of two restrictions once an association falls below the well capitalized category. First, no association can make a capital distribution or pay certain management fees if it results in its becoming undercapitalized. Second, the FDIC restricts associations from receiving brokered deposits unless they meet the well capitalized definition. The remaining mandatory operating restrictions apply to associations in the undercapitalized (or below) category.

For associations at the undercapitalized level and below, the additional mandatory operating restrictions include the following, found at 12 CFR § 565.6:

- Restricting capital distributions and certain management fees.
- Restricting asset growth.
- Limiting the ability to make acquisitions, branch, or enter new lines of business without prior agency approval.
- Compliance with a capital restoration plan submitted by the association.
- Requiring that OTS monitor the condition of the association.

All mandatory restrictions are effective immediately upon receiving or being deemed to have received notice of being less than well capitalized.

In addition to the mandatory restrictions, the PCA regulations provide OTS with authority to apply a wide range of discretionary remedies. Some of these provisions allow for directing changes in management should an association fall into the significantly undercapitalized level. OTS can mandate the election of a new board of directors, dismiss current directors and members of senior management, and require the hiring of certain qualified employees (subject to OTS approval) deemed necessary for safe and sound operations (12 USC 1831o(f)(2)(F); 12 CFR §§ 565.6 and 565.9). Other discretionary remedies include restrictions or bans on certain types of lending, limits on bonuses, prior approval of certain contracts, and other restrictions that OTS deems appropriate.

If an association remains critically undercapitalized for ninety days, OTS must appoint a receiver or a conservator, or take such other action approved by the FDIC. (Capital failure as defined under the PCA statute is just one of the grounds for placing an association under a conservator or receiver.)

Even when savings associations are well capitalized or adequately capitalized under the PCA statute and regulations, OTS may exercise other authority to restrict an association's operations when capital levels are not commensurate with its balance sheet risk. OTS may use Individual Minimum Capital Requirements, Part 570 Compliance Plans, Supervisory Agreements, and/or Cease and Desist Orders.

Capital Restoration Plan

In addition to the mandatory and discretionary operating restrictions, the FDIA requires all savings associations below adequately capitalized to submit a capital restoration plan (Capital Plan) within forty-five days of their receiving notice or being deemed to have notice of becoming undercapitalized. This section discusses the contents and approval of a Capital Plan in detail.

OTS regulations explain the timing, content, and approval standards for Capital Plans at 12 CFR § 565.5. The agency may alter the timing with proper cause.

Pursuant to agency policy, the Capital Plan must explain in detail the proposed strategy for becoming, at a minimum, adequately capitalized and for accomplishing the association's overall objectives. The plan should include:

- A detailed discussion of the following information:
 - The steps the association will take to become adequately capitalized, including underlying assumptions and proposed strategies.
 - Methodologies for forecasting the disposition of problem assets and the levels of expected charge-offs.
 - Any substantial changes in assets and liabilities.
 - The types and levels of activities in which the association plans to engage.
 - Strategies to control operating expenses, interest-rate risk, credit risk, and other significant risk exposures.
- Quarterly financial projections that generally follow the TFR, extending four quarters beyond the date the association becomes adequately capitalized. The projections should show the following information:
 - Progressively higher capital levels for complying with adequately capitalized standards.
 - Levels of core and net earnings.
 - Any capital infusions (specific steps must be taken within six months of becoming undercapitalized).

— Compliance with applicable statutory or regulatory restrictions and OTS policies.

The association must base its projections on the following realistic assumptions and rates:

- Current Treasury rates and the implied interest rate forecast embedded in the existing yield curve for Treasury securities, with spreads over Treasuries on incremental assets and liabilities consistent with prevailing market spreads.
- Prepayment rates that reflect the market's consensus estimate for similar mortgage loans.
- Loan origination rates using recent experience and taking into consideration current national and regional economic conditions.
- The association may use OTS's quarterly updates on interest rates. The association can request a copy from the OTS Regional Office shortly after each quarter-end.
- A standard form of guarantee and assurance from all controlling companies, as required under 12 USC 1831o. In a tiered holding company structure, each controlling company must provide a standard form of guarantee and assurance signed by a majority of the board of directors or a duly authorized official. The guarantee does not supersede any existing capital maintenance agreements. A copy of the standard form can be obtained from the Chief Counsel's Office.
- A commitment in the Capital Plan to provide the Regional Director with quarterly variance reports comparing actual results to projected targets established in the Capital Plan within 30 days (or sooner if the association drops another PCA Capital category) following the close of each calendar quarter. OTS will condition approval of the plan upon submission of these variance reports. Failure to file required variance reports may result in enforcement action including civil money penalties. Material variances are grounds for terminating a Capital Plan approval.

After receipt of the Capital Plan, OTS has 60 days to review the contents and decide whether to approve or deny. If the association is critically undercapitalized, the FDIC will conduct a joint review of the proposed Capital Plan. By statute, 12 USC 1831o(e)(2), each agency must consider the following factors in determining whether to approve the plan:

- Does the Capital Plan specify the following information:
 - The steps proposed by the association to become adequately capitalized and the anticipated capital levels for each quarter contained in the plan.
 - How the association will comply with the restrictions and requirements under the FDIA.
 - The types and levels of activities that the association proposes to engage in, and such other information OTS may require.
- Has the association based its Capital Plan on realistic assumptions and is it likely to succeed in restoring the association's capital?

-
- Does the Capital Plan demonstrate that the plan will not appreciably increase the association's exposure to risk (including credit, interest-rate, and other types of risk)?
 - Does each controlling company of the undercapitalized association:
 - Guarantee that the association will comply with the plan until adequately capitalized (on average) during four consecutive quarters?
 - Provide appropriate assurances of performance?

PCA Directive

Whether or not OTS approves the Capital Plan, OTS regulations mandate issuing a directive to take prompt corrective action (12 CFR § 565.7 (PCA Directive)).

If the Regional Director approves the Capital Plan submitted by the association then it becomes the basis for the PCA Directive along with any mandatory or discretionary operating restrictions applicable to the association (as discussed above). If the Regional Director determines that the association's Capital Plan is not acceptable or it fails to file one, the PCA Directive becomes the basis for imposing the mandatory and discretionary restrictions and directing the steps necessary to either increase capital to acceptable levels or otherwise move the association toward resolution.

The sequence for issuing the PCA Directive is as follows:

- Within 15 days of reviewing and either approving or denying the association's Capital Plan, OTS will issue a "Notice of Intent to Issue a PCA Directive" providing the association with a copy of the proposed PCA Directive and allowing the association 14 calendar days to respond. OTS may shorten the 14-day period if the association's financial condition, or other circumstances, warrants.
- The notice of intent should state either that OTS is proposing to issue the directive in conjunction with approval of the Capital Plan, or that the association has not submitted an acceptable Capital Plan under the standards of PCA. It should also state that OTS has issued the Directive to carry out the purpose of PCA to resolve the association's problems at the least possible long-term loss to the deposit insurance fund.
- After reviewing the association's response to the proposed PCA Directive, OTS should make any appropriate revisions.
- Within the 15 days of issuing the Notice of Intent, OTS should provide the association with the "Stipulation and Consent to the Issuance of a PCA Directive" for signature by the association's board of directors.
- Upon receipt of an executed "Stipulation and Consent," OTS should then issue a final PCA Directive that requires compliance with the mandatory PCA sanctions and any discretionary PCA restrictions deemed appropriate. OTS may issue an immediately effective PCA Directive even if

the association declines to execute the “Stipulation and Consent.” OTS can make the Directive effective upon issuance, or within a specified amount of time thereafter.

- In unusual circumstances, where immediate effectiveness of the PCA Directive is crucial, OTS may issue a PCA Directive without prior notice. To do so, OTS must document that immediate effectiveness is necessary to achieve the purpose of PCA. When we issue an immediately effective PCA Directive, the association has 14 calendar days to submit a written appeal and OTS has 60 days to decide whether or not to modify the PCA Directive. The OTS’s PCA regulation permits shortening of the 14-day response period if the financial condition of the association or other relevant circumstances warrants. The shortened period should allow sufficient time to make a meaningful response (12 CFR § 565.7). OTS should document in the official file when it shortens the response period.

PCA Reclassifications

In certain situations, the statute allows OTS to reclassify a well capitalized association as adequately capitalized or subject an association to the supervisory actions applicable to the next lower capital category (together, “reclassification”).

OTS may reclassify a well capitalized association as adequately capitalized or may subject an adequately capitalized or undercapitalized association to the supervisory actions applicable to the next lower capital category if OTS determines that the savings association is in an unsafe or unsound condition or OTS deems the savings association to be engaged in an unsafe and unsound practice and not to have corrected the deficiency (12 USC 1831o(g); 12 CFR § 565.8). Once OTS determines that a capital category reclassification is appropriate, all of the mandatory and any appropriate discretionary restrictions for that capital category apply to the association.

Before reclassifying an association’s PCA capital category, OTS must specify its grounds for doing so and serve the association with a Notice of Intent to Reclassify. The Notice should include the following items:

- A statement of the association’s capital measures and capital levels and the proposed reclassified capital category;
- The reasons for reclassification of the association; and
- The date that the association may file 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 OTS determines that a shorter period is appropriate in light of the financial condition of the savings association or other relevant circumstances.

In the written response, an association may request an informal hearing and if it desires to present oral testimony or witnesses rebutting the reclassification the association shall include a request to do so with the request for an informal hearing (12 CFR § 565.8(a)(5)(6)). An association that has been reclassified can petition OTS for a PCA category upgrade once it has successfully rectified the unsafe and unsound conditions. An association’s failure to file a written response with OTS within the prescribed timeframe

shall constitute the association's consent to the reclassification and a waiver of the opportunity to respond.