

submit to the Director a capital restoration plan that complies with section 4622 of this title and carry out the plan after approval.

(3) Restriction on capital distributions

A regulated entity that is classified as undercapitalized may not make any capital distribution that would result in the regulated entity being reclassified as significantly undercapitalized or critically undercapitalized.

(4) Restriction of asset growth

An undercapitalized regulated entity shall not permit its average total assets during any calendar quarter to exceed its average total assets during the preceding calendar quarter, unless—

(A) the Director has accepted the capital restoration plan of the regulated entity;

(B) any increase in total assets is consistent with the capital restoration plan; and

(C) the ratio of tangible equity to assets of the regulated entity increases during the calendar quarter at a rate sufficient to enable the regulated entity to become adequately capitalized within a reasonable time.

(5) Prior approval of acquisitions and new activities

An undercapitalized regulated entity shall not, directly or indirectly, acquire any interest in any entity or engage in any new activity, unless—

(A) the Director has accepted the capital restoration plan of the regulated entity, the regulated entity is implementing the plan, and the Director determines that the proposed action is consistent with and will further the achievement of the plan; or

(B) the Director determines that the proposed action will further the purpose of this subchapter.

(b) Reclassification from undercapitalized to significantly undercapitalized

The Director shall reclassify as significantly undercapitalized a regulated entity that is classified as undercapitalized (and the regulated entity shall be subject to the provisions of section 4616 of this title) if—

(1) the regulated entity does not submit a capital restoration plan that is substantially in compliance with section 4622 of this title within the applicable period or the Director does not approve the capital restoration plan submitted by the regulated entity; or

(2) the Director determines that the regulated entity has failed to comply with the capital restoration plan and fulfill the schedule for the plan approved by the Director in any material respect.

(c) Other discretionary safeguards

The Director may take, with respect to an undercapitalized regulated entity, any of the actions authorized to be taken under section 4616 of this title with respect to a significantly undercapitalized regulated entity, if the Director determines that such actions are necessary to carry out the purpose of this subchapter.

(Pub. L. 102-550, title XIII, §1365, Oct. 28, 1992, 106 Stat. 3978; Pub. L. 110-289, div. A, title I, §1143, July 30, 2008, 122 Stat. 2732.)

Editorial Notes

AMENDMENTS

2008—Subsec. (a)(1). Pub. L. 110-289, §1143(4)(B), added par. (1). Former par. (1) redesignated (2).

Pub. L. 110-289, §1143(2), substituted “A regulated entity” for “An enterprise”.

Subsec. (a)(2). Pub. L. 110-289, §1143(4)(A), redesignated par. (1) as (2). Former par. (2) redesignated (3).

Pub. L. 110-289, §1143(1), (2), substituted “the regulated entity” for “the enterprise” and “A regulated entity” for “An enterprise”.

Subsec. (a)(3). Pub. L. 110-289, §1143(4)(A), redesignated par. (2) as (3).

Subsec. (a)(4), (5). Pub. L. 110-289, §1143(4)(C), added pars. (4) and (5).

Subsec. (b). Pub. L. 110-289, §1143(5)(A), (B), substituted “Reclassification” for “Discretionary reclassification” in heading and “shall” for “may” in introductory provisions.

Pub. L. 110-289, §1143(1), (3), substituted “a regulated entity” for “an enterprise” and “the regulated entity” for “the enterprise” in introductory provisions.

Subsec. (b)(1). Pub. L. 110-289, §1143(1), substituted “the regulated entity” for “the enterprise” in two places.

Subsec. (b)(2). Pub. L. 110-289, §1143(5)(C), struck out “make, in good faith, reasonable efforts necessary to” before “comply with” and inserted “in any material respect” before period at end.

Pub. L. 110-289, §1143(1), substituted “the regulated entity” for “the enterprise”.

Subsec. (c). Pub. L. 110-289, §1143(6), added subsec. (c) and struck out former subsec. (c). Prior to amendment, text read as follows: “This section shall take effect upon the expiration of the 1-year period beginning on the date of the effectiveness of the regulations issued under section 4611(e) of this title establishing the risk-based capital test.”

§ 4616. Supervisory actions applicable to significantly undercapitalized regulated entities

(a) Mandatory supervisory actions

(1) Capital restoration plan

A regulated entity that is classified as significantly undercapitalized shall, within the time period under section 4622(b) and (d) of this title, submit to the Director a capital restoration plan that complies with section 4622 of this title and carry out the plan after approval.

(2) Restrictions on capital distributions

(A) Prior approval

A regulated entity that is classified as significantly undercapitalized may not make any capital distribution that would result in the regulated entity being reclassified as critically undercapitalized. A regulated entity that is classified as significantly undercapitalized may not make any other capital distribution unless the Director approves the distribution.

(B) Standard for approval

The Director may approve a capital distribution by a regulated entity classified as significantly undercapitalized only if the Director determines that the distribution (i) will enhance the ability of the regulated en-

tity to meet the risk-based capital level and the minimum capital level for the regulated entity promptly, (ii) will contribute to the long-term financial safety and soundness of the regulated entity, or (iii) is otherwise in the public interest.

(b) Specific actions

In addition to any other actions taken by the Director (including actions under subsection (a)), the Director shall carry out this section by taking, at any time, 1 or more of the following actions with respect to a regulated entity that is classified as significantly undercapitalized:

(1) Limitation on increase in obligations

Limit any increase in, or order the reduction of, any obligations of the regulated entity, including off-balance sheet obligations.

(2) Limitation on growth

Limit or prohibit the growth of the assets of the regulated entity or require contraction of the assets of the regulated entity.

(3) Acquisition of new capital

Require the regulated entity to acquire new capital in a form and amount determined by the Director.

(4) Restriction of activities

Require the regulated entity to terminate, reduce, or modify any activity that the Director determines creates excessive risk to the regulated entity.

(5) Improvement of management

Take 1 or more of the following actions:

(A) New election of board

Order a new election for the board of directors of the regulated entity.

(B) Dismissal of directors or executive officers

Require the regulated entity to dismiss from office any director or executive officer who had held office for more than 180 days immediately before the date on which the regulated entity became undercapitalized. Dismissal under this subparagraph shall not be construed to be a removal pursuant to the enforcement powers of the Director under section 4636a of this title.

(C) Employ qualified executive officers

Require the regulated entity to employ qualified executive officers (who, if the Director so specifies, shall be subject to approval by the Director).

(6) Reclassification from significantly to critically undercapitalized

The Director may reclassify as critically undercapitalized a regulated entity that is classified as significantly undercapitalized (and the regulated entity shall be subject to the provisions of section 4617 of this title) if—

(A) the regulated entity does not submit a capital restoration plan that is substantially in compliance with section 4622 of this title within the applicable period or the Director does not approve the capital restoration plan submitted by the regulated entity; or

(B) the Director determines that the regulated entity has failed to make, in good faith, reasonable efforts necessary to comply with the capital restoration plan and fulfill the schedule for the plan approved by the Director.

(7) Other action

Require the regulated entity to take any other action that the Director determines will better carry out the purpose of this section than any of the other actions specified in this subsection.

(c) Restriction on compensation of executive officers

A regulated entity that is classified as significantly undercapitalized in accordance with section 4614 of this title may not, without prior written approval by the Director—

- (1) pay any bonus to any executive officer; or
- (2) provide compensation to any executive officer at a rate exceeding the average rate of compensation of that officer (excluding bonuses, stock options, and profit sharing) during the 12 calendar months preceding the calendar month in which the regulated entity became significantly undercapitalized.

(Pub. L. 102-550, title XIII, §1366, Oct. 28, 1992, 106 Stat. 3978; Pub. L. 110-289, div. A, title I, §1144, July 30, 2008, 122 Stat. 2733.)

Editorial Notes

AMENDMENTS

2008—Subsec. (a)(1). Pub. L. 110-289, §1144(3), substituted “A regulated entity” for “An enterprise”.

Subsec. (a)(2)(A). Pub. L. 110-289, §1144(1)–(3), substituted “A regulated entity” for “An enterprise” in two places, “the regulated entity” for “the enterprise”, and, in second sentence, “undercapitalized” for “undercapitalized enterprise”.

Subsec. (a)(2)(B). Pub. L. 110-289, §1144(2), (4), substituted “a regulated entity” for “an enterprise” and “the regulated entity” for “the enterprise” wherever appearing.

Subsec. (b). Pub. L. 110-289, §1144(4), (5)(A), (B), substituted “Specific” for “Discretionary supervisory” in heading and “shall carry out this section by taking, at any time, 1 or more” for “may, at any time, take any” and “a regulated entity” for “an enterprise” in introductory provisions.

Subsec. (b)(1) to (4). Pub. L. 110-289, §1144(2), substituted “the regulated entity” for “the enterprise” wherever appearing.

Subsec. (b)(5). Pub. L. 110-289, §1144(5)(E), added par. (5). Former par. (5) redesignated (6).

Pub. L. 110-289, §1144(2), (4), substituted “a regulated entity” for “an enterprise” in introductory provisions and “the regulated entity” for “the enterprise” wherever appearing.

Subsec. (b)(6). Pub. L. 110-289, §1144(5)(C), (D), redesignated par. (5) as (6) and struck out former par. (6) which permitted the Director to appoint a conservator.

Subsec. (b)(7). Pub. L. 110-289, §1144(5)(F), added par. (7).

Subsec. (c). Pub. L. 110-289, §1144(6), added subsec. (c) and struck out former subsec. (c). Prior to amendment, text read as follows: “This section shall take effect upon the first classification of the enterprises within capital classifications that occurs under section 4614 of this title.”

§ 4617. Authority over critically undercapitalized regulated entities

(a) Appointment of the Agency as conservator or receiver

(1) In general

Notwithstanding any other provision of Federal or State law, the Director may appoint the Agency as conservator or receiver for a regulated entity in the manner provided under paragraph (2) or (4). All references to the conservator or receiver under this section are references to the Agency acting as conservator or receiver.

(2) Discretionary appointment

The Agency may, at the discretion of the Director, be appointed conservator or receiver for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity.

(3) Grounds for discretionary appointment of conservator or receiver

The grounds for appointing conservator or receiver for any regulated entity under paragraph (2) are as follows:

(A) Assets insufficient for obligations

The assets of the regulated entity are less than the obligations of the regulated entity to its creditors and others.

(B) Substantial dissipation

Substantial dissipation of assets or earnings due to—

- (i) any violation of any provision of Federal or State law; or
- (ii) any unsafe or unsound practice.

(C) Unsafe or unsound condition

An unsafe or unsound condition to transact business.

(D) Cease and desist orders

Any willful violation of a cease and desist order that has become final.

(E) Concealment

Any concealment of the books, papers, records, or assets of the regulated entity, or any refusal to submit the books, papers, records, or affairs of the regulated entity, for inspection to any examiner or to any lawful agent of the Director.

(F) Inability to meet obligations

The regulated entity is likely to be unable to pay its obligations or meet the demands of its creditors in the normal course of business.

(G) Losses

The regulated entity 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 regulated entity to become adequately capitalized (as defined in section 4614(a)(1) of this title).

(H) Violations of law

Any violation of any law or regulation, or any unsafe or unsound practice or condition that is likely to—

- (i) cause insolvency or substantial dissipation of assets or earnings; or

- (ii) weaken the condition of the regulated entity.

(I) Consent

The regulated entity, by resolution of its board of directors or its shareholders or members, consents to the appointment.

(J) Undercapitalization

The regulated entity is undercapitalized or significantly undercapitalized (as defined in section 4614(a)(3) of this title), and—

- (i) has no reasonable prospect of becoming adequately capitalized;
- (ii) fails to become adequately capitalized, as required by—

(I) section 4615(a)(1) of this title with respect to a regulated entity; or

(II) section 4616(a)(1) of this title with respect to a significantly undercapitalized regulated entity;

- (iii) fails to submit a capital restoration plan acceptable to the Agency within the time prescribed under section 4622 of this title; or

- (iv) materially fails to implement a capital restoration plan submitted and accepted under section 4622 of this title.

(K) Critical undercapitalization

The regulated entity is critically undercapitalized, as defined in section 4614(a)(4) of this title.

(L) Money laundering

The Attorney General notifies the Director in writing that the regulated entity has been found guilty of a criminal offense under section 1956 or 1957 of title 18 or section 5322 or 5324 of title 31.

(4) Mandatory receivership

(A) In general

The Director shall appoint the Agency as receiver for a regulated entity if the Director determines, in writing, that—

- (i) the assets of the regulated entity are, and during the preceding 60 calendar days have been, less than the obligations of the regulated entity to its creditors and others; or

- (ii) the regulated entity is not, and during the preceding 60 calendar days has not been, generally paying the debts of the regulated entity (other than debts that are the subject of a bona fide dispute) as such debts become due.

(B) Periodic determination required for critically undercapitalized regulated entity

If a regulated entity is critically undercapitalized, the Director shall make a determination, in writing, as to whether the regulated entity meets the criteria specified in clause (i) or (ii) of subparagraph (A)—

- (i) not later than 30 calendar days after the regulated entity initially becomes critically undercapitalized; and
- (ii) at least once during each succeeding 30-calendar day period.

(C) Determination not required if receivership already in place

Subparagraph (B) does not apply with respect to a regulated entity in any period