Randall D. Guynn*

Resolution Planning in the United States

The resolution planning process in the United States is still evolving. A resolution plan is a plan for liquidating, reorganizing, recapitalizing or otherwise resolving a systemically important financial institution (“**SIFI**”) that has reached the point of insolvency, non-viability or failure. It is different from a recovery plan, which is a set of planned actions designed to prevent a financial institution from becoming insolvent or otherwise failing. Resolution planning is the last stage along the full continuum of contingency planning from risk management to recovery planning to resolution planning that is sometimes referred to as a “living will.”[1]

Section 165(d) under Title I of the Dodd-Frank Wall Street Recovery and Consumer Protection Act (the “**Dodd-Frank Act**”) requires all bank holding companies[2] and foreign banking organizations[3] with assets of $50 billion or more, as well as any nonbank financial institution that has been designated as systemically important,[4] to prepare and regularly update a resolution plan (“**Title**

* The author is deeply indebted to *Brandon Smith* for his excellent assistance on this paper, as well as to numerous other colleagues at Davis Polk, including *Donald Bernstein, John Douglas, Margaret Tahyar, Luigi De Ghenghi, Reena Sahni and Erika White* who shared valuable ideas and experiences with the author. Unless otherwise specified, this paper is current as of April 15, 2013.

1 The Federal Reserve and the FDIC have used the term “living will” interchangeably with the term “resolution plan,” see 76 U.S. Federal Register 67323, 67323 (Nov. 1, 2011). For a description of the full continuum of contingency planning from risk management to resolution planning. See, e.g., *Davis Polk & Wardwell LLP & McKinsey & Co.*, Credible Living Wills: The First Generation (Apr. 25, 2011), available at http://www.davispolk.com/files/Publication/37a3a804-6a6c-4e10-a628-7a1dbbaece7c/Presentation/PublicationAttachment/c621815c-9413-436b-91ea-3451b2b4cf32/042611_DavisPolkMcKinsey_LivingWills_Whitepaper.pdf.

2 A “**bank holding company**” is any U.S. or non-U.S. company that controls a U.S. “bank” as defined in Section 2 of the U.S. Bank Holding Company Act of 1956.

3 A “**foreign banking organization**” is any foreign bank with a branch, agency or commercial lending subsidiary in the United States or that controls a company organized under Section 25A of the U.S. Federal Reserve Act and acquired after March 5, 1987, as well as any company that directly or indirectly controls such a foreign bank.

4 See Dodd-Frank Act, U.S. Public Law No. 111-203, § 113, 124 U.S. Statutes at Large 1375, 1398 (2010); 77 U.S. Federal Register 21637 (Apr. 11, 2012). See also *Davis Polk & Wardwell LLP*, FSOC Issues Final Rule on Designation of Systemically Important Nonbank Financial Companies (Apr. 4, 2012), available at http://www.davispolk.com/files/Publication/bd4d269c-ecc1-4757-a5ae-007f26f378e1/Presentation/PublicationAttachment/c6a028ce-271b-4aef-b140-02f4b9094236/040412_FSOC.Final.Rules.pdf.

I resolution plan").[5] According to the regulation implementing this provision, these plans must assume that the covered company is resolved under the U.S. Bankruptcy Code or other applicable insolvency law,[6] and that no "extraordinary support" from the U.S. or any other government would be available.[7] The Federal Deposit Insurance Corporation (the "**FDIC**") separately requires all U.S. insured depository institutions ("**IDIs**") with assets of $50 billion or more to submit and regularly update a resolution plan ("**IDI resolution plan**").[8] The final rules for the Title I and IDI resolution plans were designed to complement each other.[9]

Neither the Dodd-Frank Act nor any other provision of U.S. law requires a financial institution to prepare a recovery (as distinguished from a resolution) plan. Nevertheless, the Board of Governors of the Federal Reserve System (the "**Federal Reserve**"), in its capacity as a banking supervisor, has required several of the largest U.S. bank holding companies to prepare and submit recovery plans,[10] and is in the process of expanding that requirement to the largest bank and nonbank SIFIs.[11]

---

5 Dodd-Frank Act, U.S. Public Law No. 111-203, § 165(d), 124 U.S. Statutes at Large 1375, 1426 (2010).

6 See 76 U.S. Federal Register 67323, 67327 note 8 (Nov. 1, 2011). Although the regulation does not prohibit a covered company from submitting a resolution plan under Title II of the Dodd-Frank Act as a supplement to its plan under the U.S. Bankruptcy Code or other applicable insolvency law, the regulation provides that the credibility of the overall plan and whether it would facilitate an orderly resolution of the covered company will be judged assuming the covered company is resolved under the U.S. Bankruptcy Code or, if the covered company is not subject to the U.S. Bankruptcy Code, under the insolvency regime to which it is normally subject, which would not include Title II. See id.; 12 U.S. Code of Federal Regulations § 243.5(b).

7 See 12 U.S. Code of Federal Regulations § 243.4(a)(4)(ii).

8 See id. § 360.10 (the "**IDI Rule**").

9 See 76 Federal Register 67323, 67329 (Nov. 1, 2011). See also *Davis Polk & Wardwell LLP*, Credible Living Wills under the U.S. Regulatory Framework (Sep. 19, 2011), available at http://www.davispolk.com/files/Publication/d0e11d7b-2f4b-45e4-849c-2320b1e0d9c5/Presentation/PublicationAttachment/7426ca31-e687-482b-a8e0-24c3cdbc5564/091911_Credible_Living_Wills_US_Framework.pdf (discussing final rules for Title I resolution plans and interim final rules for IDI resolution plans); Davis Polk & Wardwell LLP, FDIC Releases Joint Notice of Proposed Rulemaking on Resolution Plans and Credit Exposure Reports (Apr. 5, 2011), available at http://www.davispolk.com/files/Publication/c46d3612-578c-4706-9487-01144c479a32/Presentation/PublicationAttachment/9df66ece-09fa-4dd4-b73e-031278f4e668/050411_S165d_NPR_Summary.pdf (discussing proposed rules for Title I and IDI resolution plans).

10 See *Rick Rothacker* U.S. Banks Told to Make Plans for Preventing Collapse, Reuters, Aug. 10, 2012.

11 See, e.g., Board of Governors of the Federal Reserve System, Consolidated Supervision Framework for Large Financial Institutions, SR 12–17 (Dec. 17, 2012).

Nine institutions filed initial Title I resolution plans and five filed initial IDI resolution plans on July 1, 2012 (“**Round 1 Filers**”).[12] Two additional institutions filed initial Title I and IDI resolution plans on October 1, 2012 (“**Round 1.5 Filers**”).[13] All of the Round 1 and Round 1.5 Filers have previously been designated by the Financial Stability Board (“**FSB**”) as global SIFIs (“**G-SIFIs**”).[14] The Round 1 Filers were originally required to file their first annual updates on July 1, 2013 or such other date as the regulators may specify,[15] and the Round 1.5 Filers were originally required to file their first annual updates on October 1, 2013 or such other date as the regulators may specify[16] but the regulators later specified October 1, 2013 for both groups.[17] Four additional institutions are expected to file their initial plans on July 1, 2013 (“**Round 2 Filers**”).[18] All the rest of the firms required to file plans are currently required to file their initial plans by the end

12 Bank of America, Barclays, Citigroup, Credit Suisse, Deutsche Bank, Goldman Sachs, JP Morgan Chase, Morgan Stanley and UBS filed Title I resolution plans. The public sections of their Title I resolution plans are available at http://www.federalreserve.gov/bankinforeg/resolution-plans.htm. Five of these institutions – Bank of America, Citigroup, Goldman Sachs, JP Morgan Chase and Morgan Stanley – were required to file IDI resolution plans because they all have IDI subsidiaries with $50 billion or more in assets. See FDIC, Bank Data and Statistics, http://www.fdic.gov/bank/statistical/ (searchable database with IDI asset size and other information). The public sections of their IDI resolution plans are available at http://www.fdic.gov/regulations/reform/resplans/index.html.

13 Bank of New York Mellon and State Street filed Title I and IDI resolution plans. The public sections of their Title I resolution plans are available at http://www.federalreserve.gov/bankinforeg/resolution-plans.htm. Both have IDI subsidiaries with $50 billion or more in total assets. See FDIC, Bank Data and Statistics, http://www.fdic.gov/bank/statistical/ (searchable database with IDI asset size and other information). The public sections of their IDI resolution plans are available at http://www.fdic.gov/regulations/reform/resplans/index.html.

14 See *Financial Stability* Board Update of group of globally systemically important banks (G-SIBs) (Nov. 1, 2012), available at http://www.financialstabilityboard.org/publications/r_121031ac.pdf (list of G-SIFIs consisting of 28 G-SIBs).

15 12 U.S. Code of Federal Regulations § 243.3(a)(3)–(4).

16 Id.

17 FDIC and Federal Reserve, *Guidance for 2013 § 165(d) Annual Resolution Plan Submissions by Domestic Covered Companies that Submitted Initial Resolution Plans in 2012* at 2 (Apr. 15, 2013), available at http://federalreserve.gov/newsevents/press/bcreg/bcreg20130415c2.pdf; FDIC and Federal Reserve, *Guidance for 2013 § 165(d) Annual Resolution Plan Submissions by Foreign-Based Covered Companies that Submitted Initial Resolution Plans in 2012* at 2 (Apr. 15, 2013), available at http://federalreserve.gov/newsevents/press/bcreg/joint_resolution_plans_foreign-based_guidance_20130415.pdf.

18 The Round 2 Filers are BNP Paribas, HSBC, Royal Bank of Scotland Group and Wells Fargo. See Statement of Federal Deposit Insurance Corporation by James R. Wigand, Director, Office of Complex Financial Institutions, and Richard J. Osterman, Jr., Acting General Counsel, Before the

of 2013 (“**Round 3 Filers**”).[19] The total number of firms required to submit Title I plans was initially estimated to be 124.[20] The vast majority of this number are foreign banking organizations with worldwide assets of $50 billion or more, but with relatively small U.S. footprints.[21]

The FDIC has announced that it is preparing its own resolution plans for systemically important bank holding companies under Title II of the Dodd-Frank Act.[22] The FDIC is also probably preparing its own resolution plans for large IDIs.

The Chairman of the FDIC has said that the FDIC’s preferred method for resolving the largest and most complex banking groups under Title II is called the single-point-of-entry (“**SPOE**”) recapitalization model.[23] The FDIC and the Bank of England have issued a joint paper endorsing the SPOE model for resolving banking organizations with cross-border operations.[24] The FDIC has also indicated that it intends to propose a policy statement or regulation describing

---

Subcommittee on Oversight and Investigations, Committee of Financial Services, U.S. House of Representatives (April 16, 2013).

19 12 U.S. Code of Federal Regulations § 243.3(a)(1)(iii).

20 See 76 U.S. Federal Register 67323, 67333 (Nov. 1, 2011) (124 estimated respondents in Paperwork Reduction Act analysis consisting of 20 full resolution plan filers and 104 tailored resolution plan filers).

21 See *Victoria McGrane and Alan Zibel* FDIC Drafts Rule on ‘Living Wills’ for Banks, Wall St. J., Mar. 29, 2011 (quoting FDIC officials as saying that 26 of the 124 institutions required to file Title I resolution plans would be U.S. bank holding companies and the remaining 98 would be subsidiaries of foreign-owned banks); Institute of International Bankers, Comment Letter to the Federal Reserve and the FDIC on the Joint Notice of Proposed Rulemaking Implementing the Resolution Plan and Credit Exposure Requirements of Section 165(d) of the Dodd-Frank Act (June 10, 2011), available at http://www.iib.org/associations/6316/files/20110610ResPlanNPR_IIB_final.pdf (estimating that of the approximately 98 foreign banking organizations required to file U.S. resolution plans, only approximately 20 have U.S. consolidated assets of $50 billion or more).

22 Video: FDIC Systemic Resolution Advisory Committee Meeting, Panel on Title II Orderly Liquidation Authority (Dec. 10, 2012), available at http://www.vodium.com/MediapodLibrary/index.asp?library=pn100472_fdic_SRAC. Presentation slides from the meeting are available at http://www.fdic.gov/about/srac/2012/2012-12-10_title-ii_orderly-liquidation-authority.pdf.

23 *Martin J. Gruenberg*, Acting Chairman, FDIC, Remarks to the Federal Reserve Bank of Chicago Bank Structure Conference (May 10, 2012), available at http://www.fdic.gov/news/news/speeches/chairman/spmay1012.html.

24 Resolving Globally Active, Systemically Important, Financial Institutions: A joint paper by the Federal Insurance Deposit Corporation and the Bank of England (Dec. 10, 2012), available at http://www.fdic.gov/about/srac/2012/gsifi.pdf; Martin Gruenberg & Paul Tucker, Op-Ed., Global Banks Need Global Solutions When They Fail, Financial Times, Dec. 10, 2012.

in more detail how it would use its authority under Title II to resolve a covered financial company under the SPOE model.[25]

Under the SPOE model, only the parent bank holding company of a banking group would be put into a resolution proceeding. All of the parent's assets, including its ownership interests in operating subsidiaries, would be transferred to a bridge financial company. The transferred business would be recapitalized by leaving the failed company's equity capital and a sufficient amount of its unsecured long-term debt behind in a receivership. The operating subsidiaries would be recapitalized and kept out of insolvency proceedings by converting loans or other extensions of credit from the parent into new equity in the operating subsidiaries or otherwise down-streaming available parent assets to the subsidiaries. If the bridge financial holding company or any of its operating subsidiaries were unable to obtain sufficient liquidity from the market, the Federal Reserve's discount window,[26] or Section 13(3) of the Federal Reserve Act,[27] the FDIC could provide such liquidity by borrowing from the U.S. Treasury subject to certain limits contained in Title II of Dodd-Frank.[28]

The Federal Reserve Board has indicated that it is likely to propose minimum long-term unsecured debt requirements for certain U.S. bank holding companies in order to ensure that they have sufficient loss-absorbing capacity to make the SPOE recapitalization method a viable one.[29] This mandate would supplement Basel capital requirements.

Although the Title I resolution plans prepared by members of the financial industry are available to the FDIC when it prepares its Title II plans, the initial Title I plans submitted in 2012 were required to be prepared with a very different set of assumptions from the Title II plans being prepared by the FDIC. For

25 See, e.g., Statement of *James Wigand*, Director of the FDIC's Office of Complex Financial Institutions, in Video: Banking Law Institute 2012, Panel on Systemic Risk – the Challenge of Systemically Important Financial Institutions (SIFIs), Living Wills and Orderly Liquidation Issues (Practicing Law Institute program Dec. 19, 2012), available at http://www.pli.edu/Content/OnDemand/Banking_Law_Institute_2012/_/N-4nZ1z12whl?fromsearch=false&ID=144553.

26 See, e.g., 12 U.S. Code of Federal Regulations Part 201; The Federal Reserve Discount Window (July 21, 2010), available at http://www.frbdiscountwindow.org/discountwindowbook.cfm?hdrID=14&dtlID=43#eligibilityps.

27 12 United States Code § 343.

28 See Dodd-Frank Act, U.S. Public Law No. 111–203, § 210(n), 124 U.S. Statutes at Large 1375, 1506–09 (2010).

29 *Daniel K. Tarullo*, Governor, Board of Governors of the Federal Reserve System, Industry Structure and Systemic Risk Regulation, Speech at the Brookings Institution Conference on Structuring the Financial Industry to Enhance Economic Growth and Stability (Dec. 4, 2012), available at http://www.federalreserve.gov/newsevents/speech/tarullo20121204a.htm.

example, as noted in the FDIC's December 2012 meeting with its Systemic Resolution Advisory Committee ("**SRAC**"),[30] and in the public portions of the Title I resolution plans submitted by Round 1 Filers,[31] the FDIC and the Federal Reserve required that the initial Title I plans assume that all material entities of a particular banking group would fail,[32] whereas the SPOE plans being prepared by the FDIC under Title II do not. The FDIC has not shared its Title II resolution plans with the relevant financial institutions or tried to validate them with input from these institutions.

The FDIC and the Federal Reserve are currently exploring whether it is possible for the industry and FDIC resolution planning processes to be more complementary of each other. For example, in guidance applicable for the first annual updates of the resolution plans of Round 1 and Round 1.5 Filers, the FDIC and the Federal Reserve relaxed the unrealistic assumption that all material entities must be assumed to fail in a Title I plan, and instead will allow these filers to assume that only the top parent holding company fails.[33] The purpose of relaxing this assumption is to allow these institutions to develop SPOE resolution strategies under the U.S. Bankruptcy Code if feasible and based on a reasonable set of alternative assumptions.

This paper is organized in four parts. Part I describes the purpose of resolution planning. Part II summarizes the U.S. legal and regulatory framework for resolution planning, and compares it to the typical resolution planning process outside the United States. Part III identifies some of the "lessons learned" from the initial rounds of U.S. resolution planning. Part IV attempts to forecast how the resolution planning process and related laws and regulations may evolve in the

---

30 The Federal Deposit Insurance Corporation Holds a Meeting of the Systemic Resolution Advisory Committee, Panel on Title I Resolution Plans, SEC Wire Transcript at 12 (Dec. 10, 2012). The assumption that all material entities must fail was also noted in the presentation slides from the December 10, 2012 SRAC meeting, available at http://www.fdic.gov/about/srac/2012/2012-12-10_title-i_resolution-plans.pdf.

31 See, e.g., Citigroup Title I Resolution Plan, Public Section, at 30 (July 1, 2012), available at http://www.federalreserve.gov/bankinforeg/citigroup-20120703.pdf. See also *Davis Polk & Wardwell LLP*, Living Wills: Key Lessons from the First Wave for Second and Third Round Filers (July 11, 2012), available at http://www.davispolk.com/files/Publication/cbadd86a-3680-4305-bf10-f3ea147b57c3/Presentation/PublicationAttachment/26191e6f-06dd-4d1b-ada8-f74a977be52e/071112_Living_Wills.pdf.

32 For a material entity subject to a specialized insolvency regime other than the U.S. Bankruptcy Code, a resolution plan should discuss strategies under that applicable regime (for example, under Sections 11 and 13 of the FDI Act in the case of a material entity that is an insured depository institution). 76 U.S. Federal Register 67323, 67328–29 (Nov. 1, 2011).

33 See footnote 17 above.

United States. The paper concludes that the separate Title I and Title II resolution planning processes are likely to converge in the future.

I. Purpose of Resolution Planning

The purpose of resolution planning is to develop, in advance of any crisis, strategies for resolving SIFIs and G-SIFIs that are credible alternatives to the Hobson's choice between taxpayer-funded bailouts and "disorderly" liquidations or other strategies that risk destabilizing the financial system.[34] It is an important component of the toolkit necessary to solve the too big to fail ("**TBTF**") problem. The TBTF problem arises when the only options available for resolving a particular SIFI are taxpayer-funded bailouts or "disorderly" liquidations or other destabilizing resolution strategies. Faced with such a choice, policymakers inevitably choose bailout as the lesser of two evils.[35]

Activating a resolution plan is a last-resort option, when various ex-ante solutions designed to reduce the likelihood of failure have been unsuccessful. Such ex-ante measures might include higher capital and liquidity requirements, better risk management and supervision, more frequent and better stress-testing, more effective early remediation, activities restrictions, size limitations, and recovery plans.[36]

II. U.S. Legal and Regulatory Framework

The U.S. legal and regulatory framework for resolution planning is comprehensive, but divergent. It currently requires certain banking organizations to prepare Title I resolution plans under one set of assumptions, while the FDIC is preparing Title II resolution plans under a different set of assumptions. This divergence is odd because one of the stated purposes for the Title I plans is to "support the

---

34 See *Randall D. Guynn*, Are Bailouts Inevitable?, 29 Yale Journal on Regulation 121, 123–24, (2012).

35 Id. at 127–29. See also *Hal S. Scott*, Interconnectedness and Contagion (Nov. 20, 2012), available at http://www.capmktsreg.org/pdfs/2012.11.20_Interconnectedness_and_Contagion.pdf.

36 *Randall D. Guynn*, Are Bailouts Inevitable?, 29 Yale Journal on Regulation 121, 130–35 (2012). See also Board of Governors of the Federal Reserve System, Consolidated Supervision Framework for Large Financial Institutions, SR 12–17 (Dec. 17, 2012).

[FDIC's] planning for the exercise of its resolution authority under [Title II]."[37] The FDIC and the Federal Reserve are exploring whether it is possible for these two resolution processes to be more complementary of each other. But in the meantime, the two processes are operating on separate tracks.

A. Title I Plans

Section 165(d) of the Dodd-Frank Act requires the Federal Reserve to cause certain large bank holding companies, foreign banking organizations and nonbank financial institutions to submit periodic resolution plans to the Federal Reserve, the FDIC and the Federal Systemic Oversight Council ("**FSOC**").[38] The statute requires the Federal Reserve to share the authority to review the credibility of the plans with the FDIC.[39]

If the Federal Reserve and the FDIC both determine that a particular resolution plan is either "not credible" or would not facilitate an orderly resolution under the U.S. Bankruptcy Code,[40] they are required to give the covered company a reasonable opportunity to cure the deficiency.[41] If the company fails to cure the deficiency, the agencies "may jointly impose more stringent capital, leverage, or liquidity requirements, or restrictions on growth, activities, or operations of the company, or any subsidiary thereof."[42] If the company fails to cure the deficiencies within two years after any of these sanctions are imposed on it, the agencies have the joint discretionary authority, after consultation with the FSOC, to force the company to divest certain assets or operations – that is, break it up.

It is important to note, however, that Section 165(d) does not authorize either agency to take unilateral action against a covered company based on a deficient resolution plan. Instead, it requires both agencies to agree that the plan is not credible or does not otherwise facilitate an orderly resolution, that action should be taken and on what that action should be in order for either of them to take any

37 76 U.S. Federal Register 67323, 67323 (Nov. 1, 2011).
38 Dodd-Frank Act, U.S. Public Law No. 111-203, § 165(d)(1), 124 U.S. Statutes at Large 1375, 1426 (2010).
39 Id. § 165(d)(3)–(4).
40 If the covered company is not subject to the U.S. Bankruptcy Code, then the review would be under the insolvency regime to which the covered company is ordinarily subject. See 76 U.S. Federal Register 67323, 67327 note 8 (Nov. 15, 2011).
41 Id. § 165(d)(4)–(5).
42 Id. § 165(d)(5).

action based on Section 165(d); if either agency disagrees on any of these points, the other agency has no authority to impose any sanctions under the statute.[43]

The Federal Reserve and the FDIC have also issued a regulation implementing Section 165(d). That regulation provides further details about the resolution planning requirement, including which companies are subject to it, when initial and subsequent plans must be filed, what sort of board approvals are required, what sort of information and data the resolution plans must contain, what portions of the plans will be treated as confidential, how the agencies will review the plans to determine whether they are "not credible," how the cure process will work, and whether and how any sanctions will be imposed for a plan that is found to be "not credible."

The regulators also advised the initial filers that they did not intend to conduct a credibility review of any of the initial plans, but instead would reserve their credibility reviews for future updates.[44]

1. Applicability

The regulation defines the institutions that are subject to the Title I resolution planning requirement through its definition of the term "covered company."[45] That term is defined to include any bank holding company that has total consoli-

43 The FDIC does, of course, have the unilateral authority to take certain actions against a covered company's IDI subsidiary for filing a deficient resolution plan under the IDI Rule if authorized to do so under the Federal Deposit Insurance Act ("**FDI Act**"). If the FDIC is not the IDI subsidiary's appropriate federal banking agency, however, its authority to take actions under the FDI Act may be severely limited. Instead, the authority to take such actions would typically lie with the IDI subsidiary's appropriate federal banking agency. 12 United States Code §1813(q). The Office of the Comptroller of the Currency ("**OCC**") is the appropriate federal banking agency for all national banks and other federally chartered IDIs, id. § 1813(q)(1), and the Federal Reserve is the primary federal banking regulator for state-chartered banks that are members of the Federal Reserve System ("**member banks**"). Id. § 1813(q)(3). Because the IDI subsidiaries of most U.S. SIFIs are national banks or member banks, the FDIC's authority to act unilaterally against them may be quite limited.

44 76 U.S. Federal Register 67323, 67331 (Nov. 1, 2011) ("There is no expectation by the [Federal Reserve] and the [FDIC] that the initial resolution plan iterations submitted after this rule takes effect will be found to be deficient, but rather the initial resolution plans will provide the foundation for developing more robust annual resolution plans over the next few years following that initial period.").

45 12 U.S. Code of Federal Regulations § 243.2(f).

dated assets of $50 billion or more.[46] It also includes any foreign banking organization that has worldwide consolidated assets of $50 billion or more, even if its U.S. footprint is relatively small.[47] Finally, the term includes any non-bank financial company that has been designated as systemically important by the FSOC.[48] The term expressly excludes any bank holding company that is majority owned by the United States or any state and any bridge financial company organized under Title II of the Dodd-Frank Act.[49] Under both the statute and the regulation, the Federal Reserve may, pursuant to a recommendation of the FSOC, raise the $50 billion threshold applicable to any bank holding company or to any foreign banking organization.[50]

2. Timing

The regulation creates a staggered schedule for the submission of both initial plans and periodic updates. To do so, it creates three categories of filers. The first category is any covered company with $250 billion or more in nonbanking assets, or in the case of a foreign-based covered company with $250 billion or more in U.S. nonbanking assets.[51] This category of banking organization was required to file initial plans on July 1, 2012.[52] Nine banking institutions fell within the first category and filed initial plans.[53] The second category is any covered company with less than $250 billion in nonbanking assets but at least $100 billion of such assets, or in the case of a foreign-based covered company with at least $100 billion of U.S. nonbanking assets.[54] This category of filers is required to file initial

46 Id. § 243.2(f)(1)(ii).
47 Id. § 243.2(f)(1)(iii); see also 76 U.S. Federal Register 67,323, 67,326 (Nov. 1, 2011) (explaining that the assets test is based on a foreign bank's worldwide consolidated assets, but that foreign banks with relatively small nonbanking operations in the U.S. are permitted to file tailored resolution plans with reduced information requirements).
48 12 U.S. Code of Federal Regulations § 243.2(f)(1)(i).
49 Id. § 243.2(b), (f)(5).
50 Dodd-Frank Act, U.S. Public Law No. 111-203, § 165(a)(2)(b), 124 U.S. Statutes at Large 1375, 1424; 12 U.S. Code of Federal Regulations § 243.2(f)(4).
51 12 U.S. Code of Federal Regulations § 243.3(a)(1)(i).
52 Id.
53 Bank of America, Barclays, Citigroup, Credit Suisse, Deutsche Bank, Goldman Sachs, JP Morgan Chase, Morgan Stanley and UBS.
54 12 U.S. Code of Federal Regulations § 243.3(a)(1)(ii).

plans on July 1, 2013.[55] Four banking institutions fall within this category.[56] All other covered companies fall in the third category and are required to file their initial plans by the end of 2013.[57] The Federal Reserve and the FDIC also have the authority to accelerate or delay the schedule for initial resolution plans for any particular banking institution.[58]

Each covered company must submit updated resolution plans on each anniversary of its initial submission date,[59] although the agencies have the discretionary authority to accelerate or delay any deadlines, including the timing of updated annual resolution plans and they extended the due date for the first annual update for Round 1 and Round 1.5 Filers to October 1, 2013, and announced that both Round 1 and Round 1.5 Filers would in the future both file annual updates on July 1 of each year.[60]

Each covered company is also required to give the agencies notice of any event that does or could result in a material effect on the company's resolution plan, unless the event occurs within 90 days before the company's next annual submission date.[61] The agencies have the joint discretion to require a company to file an interim update of its resolution plan within a reasonable time after a material event occurs.[62] Because this authority is joint, neither agency has the unilateral authority to require a covered company to file an interim update without the consent of the other agency.

3. Board Approvals

The initial and annual resolution plans must be approved by the covered company's board of directors and noted in the board minutes.[63] In the case of a foreign-based covered company, it is sufficient to have the plans approved by a person or body that has delegated authority from the foreign company's board of directors.[64]

55 Id.
56 BNP Paribas, HSBC, Royal Bank of Scotland Group and Wells Fargo.
57 12 U.S. Code of Federal Regulations § 243.3(a)(1)(iii).
58 Id. § 243.3(a)(4).
59 12 U.S. Code of Federal Regulations § 243.3(a)(3).
60 Id. § 243.3(a)(4). See footnote 17 above.
61 Id. § 243.3(b)(2)–(3).
62 Id. § 243.3(b)(1).
63 Id. § 243.3(e)(1).
64 Id. § 243.3(e)(2).

4. Required Content – Generally

a. Public and Private Sections

The regulation requires each resolution plan to be divided between a public section and confidential section.[65] The public section must contain an executive summary of the resolution plan of the covered company that describes the business of the covered company and, to the extent material to understanding the covered company, includes the following information[66]:

- Names of covered company's material entities;
- A description of the group's core business lines;
- Consolidated or segment financial information about the group's assets, liabilities, capital and major funding sources;
- A description of the group's derivative and hedging activities;
- A list of the covered company's direct or indirect memberships in any material payment, clearing and settlement systems;
- A description of any foreign operations;
- The identities of material supervisory authorities;
- The identities of the principal officers of the covered company;
- A description of the corporate governance structure and processes related to resolution planning;
- A description of material management information systems; and
- A description, at a high level, of the covered company's resolution strategy, covering such items as the range of potential purchasers of the covered company, its material entities and the group's core business lines.

The confidential section of the resolution plan must include far more extensive information, including a confidential executive summary. It must also include detailed information about organizational structure, resolution strategies, corporate governance, management information systems, interconnections and interdependencies, supervisory and regulatory issues and contact information.[67] The Federal Reserve and the FDIC, however, may jointly exempt a covered company from one or more of these requirements.[68] The Federal Reserve and the FDIC also supplemented these information requirements for the initial plans of the Round 1 and Round 1.5 filers by providing them with other supervisory guidance, includ-

---

65 Id. § 243.8(c).
66 Id.
67 Id. § 243.4.
68 Id. § 243.4(k).

ing a requirement that all material entities must be assumed to fail and be placed into applicable resolution proceedings; but in April 2013, the regulators relaxed this mandatory assumption for the first annual update and provided updated formatting and informational requirements.[69]

b. Material Entities, Critical Operations and Core Business Lines

In the case of domestic covered companies, the information is required for their worldwide operations, including their material entities, critical operations and core business lines.[70] The regulation defines material entity, critical operations and core business lines as follows:

- "**Material entity**" means a subsidiary or foreign office of the covered company that is significant to the activities of a critical operation or core business line.[71]
- "**Critical operations**" means those operations of the covered company and its material entities, including associated services, functions, and support, the failure or discontinuation of which, in the view of the covered company or as jointly directed by the Federal Reserve and the FDIC, would pose a threat to the financial stability of the United States.[72]

---

69 See footnote 17 above. See also the Federal Deposit Insurance Corporation Holds a Meeting of the Systemic Resolution Advisory Committee, Panel on Title I Resolution Plans, SEC Wire Transcript at 12 (Dec. 10, 2012). The assumption that all material entities must fail was also noted in the presentation slides from the December 10, 2012 SRAC meeting, available at http://www.fdic.gov/about/srac/2012/2012-12-10_title-i_resolution-plans.pdf. Neither the statute nor the text of the implementing regulation requires this assumption, and the release accompanying the regulation only says that covered company "should" assume the failure of all material entities under certain circumstances. See 76 U.S. Federal Register 67323, 67328 (Nov. 1, 2011) ("When the covered company utilizes a material entity and that material entity is subject to the Bankruptcy Code, then a resolution plan should assume the failure or discontinuation of such material entity and provide both the covered company's and the material entity's strategy, and the actions that will be taken by the covered company to prevent or mitigate any adverse effects of such failure or discontinuation on the financial stability of the United States.") (emphasis added). For a material entity subject to a specialized insolvency regime other than the U.S. Bankruptcy Code, a resolution plan should discuss strategies under that applicable regime (for example, under Sections 11 and 13 of the FDI Act in the case of a material entity that is an insured depository institution). Id. at 67328–29.

70 12 U.S. Code of Federal Regulations § 243.4(a)(1).

71 Id. § 243.2(l).

72 Id. § 243.2(g).

– “**Core business lines**” means those business lines of the covered company and its material entities, including associated operations, services, functions and support, that, in the view of the covered company, upon failure would result in a material loss of revenue, profit or franchise value.[73]

In the case of foreign-based covered companies, the information is only required with respect to their operations that are domiciled or conducted in whole or in part in the United States, together with information about any interconnections or interdependencies between the U.S. and foreign operations and a description of how the U.S. resolution plan is integrated into the covered company’s overall resolution or other contingency planning process.[74]

c. Tailored Plans

The regulation contains certain exemptions from its minimum content requirements for U.S. bank holding companies with relatively small nonbanking operations and for foreign-based covered companies with relatively small nonbanking operations in the United States.[75] Resolution plans that reflect these exemptions are called “tailored resolution plans.”[76] To qualify for the tailored plan exemptions with respect to any particular resolution plan, a covered company must submit a request with the Federal Reserve and the FDIC to file a tailored plan at least 270 days before the relevant plan is due[77] and satisfy two additional conditions[78]:

– **Nonbanking Assets**. It must have less than $100 billion in total nonbanking assets (or, in the case of a foreign-based covered company, in total U.S. nonbanking assets); and
– **Banking Assets**. 85% or more of its total consolidated assets must be attributable to its insured depository institution subsidiaries (or, in the case of a foreign-based covered company, 85% or more of its total U.S. consolidated assets must be attributable to its U.S. insured depository institution subsidiaries, branches or agencies).

If the banking institution qualifies for the tailored plan exemptions, the required content of its plan is limited to the following[79]:

---

73 Id. § 243.2(d).
74 Id. § 243.4(a)(2).
75 Id. § 243.4(a)(3).
76 Id.
77 Id. § 243.4(a)(3)(iii).
78 Id. § 243.4(a)(3)(i).
79 Id. § 243.4(a)(3)(ii).

- **Executive Summary**. An executive summary satisfying the requirements described below;
- **Information about Nonbanking Operations**. The information specified below about organizational structure, resolution strategies, corporate governance, management information systems, supervisory and regulatory issues, but only with respect to the covered company and its nonbanking material entities and operations (*i.e.*, excluding any such information about its insured depository institution subsidiaries or, in the case of a foreign bank, its U.S. branches or agencies); and
- **Interdependencies and Interconnections, and Contact Information**. The information specified below about interdependencies and interconnections, as well as contact information, with respect to the covered company and its insured depository institution subsidiaries (or, in the case of a foreign-based covered company, its U.S. insured depository institution subsidiaries, branches or agencies) and nonbank material entities and operations, which shall be discussed in the covered company's section on resolution strategies.

d. Macroeconomic Scenarios

Each plan is required to explain how it would work under the most recent "baseline," "adverse" and "severely adverse" macroeconomic scenarios provided to the covered company by the Federal Reserve in connection with the Comprehensive Capital Analysis and Review ("**CCAR**") stress-testing process,[80] except that the initial plan only needs to address the baseline scenario.[81] The plans are not permitted to rely on "extraordinary support" from the U.S. or foreign governments.[82] Although the regulation does not define what constitutes "extraordinary support," the release accompanying the final rule states that this assumption "is intended to prohibit the covered company from assuming in its resolution plan that the United States or any other government will provide the covered company funding or capital other than in the ordinary course of business."[83]

---

80 Id. § 243.4(a)(4)(i). See also Dodd-Frank Act, § 165(i)(1), 124 U.S. Statutes at Large 1375, 1430 (2010); *Davis Polk & Wardwell LLP*, 2013 CCAR Process Begins and U.S. Basel III Rules are Delayed (Nov. 14, 2012), available at http://www.davispolk.com/files/Publication/a531f098-49f8-4d38-a462-37ba2a1805d2/Presentation/PublicationAttachment/78874f7c-8fe8-40c2-a6fe-39335c0f6835/111412_CCAR.pdf.

81 12 U.S. Code of Federal Regulations § 243.4(a)(4)(i).

82 Id. § 243.4(a)(4)(ii).

83 76 U.S. Federal Register 67323, 67328 (Nov. 1, 2011).

5. Required Content – Specific Items

The following sections summarize the information that is required to be included in the confidential portion of each resolution plan, subject to the exemptions for tailored resolution plans discussed above.[84]

a. Confidential Executive Summary

Each plan must include a confidential executive summary describing the key elements of the plan, any material changes from the most recently filed plan, and any actions taken by the covered company to improve the effectiveness of the plan or to remediate or mitigate any material weaknesses or impediments to the effective and timely execution of the plan.[85]

b. Organizational Structure

The regulation requires the following information about a covered company's organizational structure[86]:

- **Organizational Chart**. A detailed description of the group's organizational structure, including a hierarchical list of all material entities (including intermediate holding companies) that identify the direct holder and the percentage of voting and nonvoting equity of each legal entity and foreign office listed and the location, jurisdiction of incorporation, licensing, and key management associated with each material entity and foreign office.
- **Mapping of Critical Operations and Core Business Lines to Material Entities**. A mapping of the group's critical operations and core business lines to material entities.
- **Unconsolidated and Consolidating Financial Information**. An unconsolidated balance sheet of the covered company and a consolidating schedule for all material entities.
- **Liabilities**. A description of the material components of the liabilities of the covered company, its material entities, critical operations and core business lines that, at a minimum, separately identifies short-term and long-term liabilities, secured and unsecured liabilities, and subordinated liabilities.

---

84 See 12 U.S. Code of Federal Regulations § 243.4(a)(3).
85 Id. § 243.4(b).
86 Id. § 243.4(e).

- **Collateral**. A list and description of the processes used by the group to determine the persons to which the covered company or any material entity has pledged collateral, the persons who hold the collateral and the jurisdictions in which the collateral is located, and, if different, the jurisdictions in which the collateral is enforceable against the covered company or any material entity.
- **Off-Balance Sheet Exposures**. A description of material off-balance sheet exposures (including guarantees and contractual obligations) of the covered company and its material entities, including a mapping to the group's critical operations and core business lines.
- **Booking Practices**. A description of the practices of the covered company, its material entities and the group's core business lines related to the booking of trading and derivatives activities.
- **Material Hedges**. A list and description of the material hedges of the covered company, its material entities and its core business lines related to the booking of trading and derivatives activities, including a mapping to legal entity.
- **Hedging Strategies**. A description of the hedging strategies of the group.
- **Exposure Limits**. A description of the process used by the covered company and its material entities to establish exposure limits.
- **Major Counterparties**. A list of the major counterparties of the covered company and its material entities, and a description of the interconnections, interdependencies and relationships with such major counterparties.
- **Failure of Major Counterparty**. An analysis of whether the failure of each major counterparty would likely have an adverse impact on or result in material financial distress to or failure of the covered company.
- **Financial Market Utilities**. A list of each trading, payment, clearing or settlement system of which the covered company, directly or indirectly, is a member and on which the covered company or any material entity conducts a material number or value of trades or transactions, including a mapping of membership in each such system to the covered company, its material entities, and the group's critical operations and core business lines.

c. Resolution Strategies

The regulation also requires the information set forth below about a covered company's resolution strategies.[87] The purpose of the strategies is to describe the

87 Id. § 243.4(c).

covered company's plan for its "rapid and orderly resolution,"[88] which is defined as "a reorganization or liquidation of the covered company (or, in the case of a covered company that is incorporated or organized in a jurisdiction other than the United States, the subsidiaries and operations of such foreign company that are domiciled in the United States) under the Bankruptcy Code[89] that can be accomplished within a reasonable period of time and in a manner that substantially mitigates the risk that the failure of the covered company would have serious adverse effects on financial stability in the United States."[90]

- **Resolution Strategies**. A description of the covered company's resolution strategy, including a detailed description of the:
  - **Key assumptions and supporting analyses**, including of economic or financial conditions.
  - **Range of specific actions** to be taken to facilitate a rapid and orderly resolution of the covered company, its material entities, and the group's critical operations and core business lines in the event of material financial distress or failure of the covered company.
  - **Funding, liquidity and capital needs** of, and resources available to, the covered company and its material entities, a mapping of such needs to the group's critical operations and core business lines in the ordinary course of business and in the event of material financial distress to or failure of the covered company.
  - **Strategy for maintaining the operations of, and funding**, for the covered company and its material entities, and a mapping of such operations and funding to the group's critical operations and core business lines.
  - **Strategy for the failure or discontinuation of any material entity, core business line or critical operation**, and the actions to be taken to prevent or mitigate any adverse effects of such failure or discontinuation on the financial stability of the United States, except that no such strategy is required for any material entity that is not subject to the U.S. Bankruptcy Code (but instead is subject to another insolvency regime

88 Id.

89 If the covered company is not subject to the U.S. Bankruptcy Code, then rapid and orderly resolution means a reorganization or liquidation of the company under the insolvency regime to which the covered company is ordinarily subject. See 76 U.S. Federal Register 67323, 67327 note 8 (Nov. 15, 2011).

90 12 U.S. Code of Federal Regulations § 243.2(o).

such as the FDI Act or the Securities Investor Protection Act), has less than $50 billion in assets and does not conduct a critical operation.[91]
  - **Strategy for insulating any insured depository institution subsidiary** from risks arising from the activities of nonbank subsidiaries (other than subsidiaries of the IDI).
- **Timing**. A description of the time period(s) expected to successfully execute each material aspect and step of the plan.
- **Material Weaknesses or Impediments**. A list of the potential material weaknesses or impediments to the effective and timely execution of the plan, and the actions or steps to be taken to remediate or otherwise mitigate the weaknesses or impediments, including a timeline for such action.
- **Processes**. A description of the processes used by the covered company to:
  - **Value and Marketability.** Determine current market values and marketability of the core business lines, critical operations and material asset holdings of the covered company.
  - **Feasibility**. Assess the feasibility of the covered company's plans for executing any sales, divestitures, restructurings, recapitalizations or other actions contemplated in the plan.
  - **Impact.** Assess the impact of any sales, divestitures, restructurings, recapitalizations or other similar actions on the value, funding and operations of the covered company, its material entities, critical operations and core business lines.

d. Corporate Governance

The regulation also requires the following information about corporate governance[92]:

- **Integration of Resolution Planning.** A detailed description of how resolution planning is integrated into the covered company's corporate governance structure and processes.
- **Resolution Leader(s)**. A description of the senior management official(s) (including title) who is(are) primarily responsible for overseeing the develop-

91 Id. § 243.4(c)(1)(v). For a material entity subject to a specialized insolvency regime other than the U.S. Bankruptcy Code that has $50 billion or more in assets or conducts a critical operation, a resolution plan should discuss strategies under that applicable regime (for example, under Sections 11 and 13 of the FDI Act in the case of a material entity that is an insured depository institution). 76 U.S. Federal Register 67323, 67328–29 (Nov. 1, 2011).
92 Id. § 243.4(d).

ment, maintenance, implementation, and filing of the plan and the covered company's compliance with the applicable regulations.
- **Reporting**. A detailed description of the nature, extent and frequency of reporting to senior executive officers and the board of directors regarding the development, maintenance and implementation of the plan.
- **Contingency Planning**. A description of the nature, extent and results of any contingency planning or similar exercise (*e.g.*, a simulation of the failure and resolution of the covered company) conducted by the covered company since the date of its most recent resolution plan to assess the viability of or improve the plan.
- **Risk Measures**. A list and description of the relevant risk measures used to report credit risk exposures both internally to senior management and board of directors, as well as to investors or to federal regulators.

e. Management Information Systems

The regulation requires the following information about the company's management information systems[93]:
- **Key Systems and Applications**. A detailed inventory and description of the key management information systems and applications, including systems and applications for risk management, accounting and financial and regulatory reporting, used by the covered company and its material entities, including the name of the legal owner or licensor, the use and function of the system or application, service level agreements related thereto, any software or system licenses, and any intellectual property associated with it.
- **Mapping**. A mapping of the key management information systems and applications to the covered company, its material entities, and the group's critical operations and core business lines.
- **Reports**. Identification of the scope, content and frequency of the key internal reports used by senior management of the covered company, its material entities, and the group's critical operations and core business lines to monitor the financial health, risks and operations of the covered company, its material entities, and the group's critical operations and core business lines.
- **Access of Regulators**. A description of the process for the appropriate regulators to access these management information systems and applications.

93 Id. § 243.4(f).

– **Capabilities and Weaknesses**. A description and analysis of the capabilities of the management information systems to collect, maintain and report in a timely manner to management of the covered company and to the Federal Reserve the information and data underlying the resolution plan, and any deficiencies, gaps or weaknesses in such capabilities and the actions to be taken to promptly address any deficiencies, gaps or weaknesses and the time frames for doing so.

f. Interconnections and Dependencies

The regulation requires a list and mapping of any interconnections and interdependencies among the covered company, its material entities, and the group's critical operations and core business lines that, if disrupted, would materially affect the funding or operations of the covered company, its material entities, and the group's critical operations or core business lines.[94] The regulation identifies the following as examples of interconnections and interdependencies that should be included:

– common or shared personnel, facilities or systems (including information technology platforms, management information systems, risk management systems, and accounting and recordkeeping systems);
– capital, funding, or liquidity arrangements;
– existing or contingent credit exposures;
– cross-guarantee arrangements, cross-collateral arrangements, cross-default provisions, and cross-affiliate netting agreements;
– risk transfers; and
– service level agreements.[95]

The release accompanying the adoption of the final regulation also stated that "the continued availability of key services and supporting business operations to core business lines and critical operations in an environment of material financial distress and after insolvency should be a focus of resolution planning. Steps to ensure that service level agreements for such services, whether provided by internal or external service providers, survive insolvency should be demonstrated in the resolution plan."[96]

94 Id. § 243.4(g).
95 Id.
96 76 U.S. Federal Register 67323, 67329–30 (Nov. 1, 2011).

g. Supervisory and Regulatory Issues

Each resolution plan must identify the covered company's federal, state and foreign supervisors with authority over the safety and soundness of the covered company, its material entities, and the group's critical operations and core business lines, as well as any foreign supervisors responsible for resolving any foreign-based material entity, critical operation or core business line.[97] The plan must also include contact information for each supervisory or regulatory authority identified.[98]

h. Contact Information

Each resolution plan must identify a senior management official responsible for serving as the point of contact for the plan, as well as a senior management official at each material entity.[99]

i. Incorporation by Reference

Any plan other than a covered company's initial plan may incorporate by reference informational elements (but not strategic analysis or executive summary elements) from a resolution plan previously submitted to the Federal Reserve and the FDIC, provided that the plan seeking to incorporate such information by reference clearly indicates the informational element and which of the previous resolution plans contains the information, and the covered company certifies that the incorporated information is still accurate.[100]

6. Confidential Treatment

Section 112(d)(5)(A) of the Dodd-Frank Act requires the Federal Reserve and the FDIC to "maintain the confidentiality of any data, information, and reports submitted under" Title I of the Dodd-Frank Act,[101] which includes resolution plans submitted under Section 165(d) of that Act. The regulation implementing Section

---

97 12 U.S. Code of Federal Regulations § 243.4(h).
98 Id.
99 Id. § 243.4(i).
100 Id. § 243.4(j).
101 Dodd-Frank Act, U.S. Public Law No. 111-203, § 112(d)(5)(A), 124 U.S. Statutes at Large 1375, 1397–98 (2010).

165(d) further provides that confidentiality of resolution plans and related materials will be determined in accordance with applicable exemptions contained in the U.S. Freedom of Information Act ("**FOIA**").[102] As noted above, the regulation requires resolution plans to be divided between a public section and a confidential section.[103] It also provides that the confidential section will be treated as confidential to the extent permitted by law,[104] if a proper request for confidential treatment has been filed along with the resolution plan.[105] The regulation also provides that the submission of nonpublic information in a resolution plan will not constitute the waiver of, or otherwise affect, any privilege arising under Federal or state law, such as attorney-client privilege, to the extent permitted by law.[106]

The U.S. FOIA generally requires disclosure of any information filed with the U.S. government or any federal agency, including the Federal Reserve and the FDIC, unless it qualifies for one of several statutory exemptions.[107] In their release accompanying the regulation implementing Section 165(d) of the Dodd-Frank Act, the Federal Reserve and the FDIC indicated that the statutory exemptions for which information in the confidential portions of resolution plans are most likely to qualify are the exemptions for trade secrets and confidential or privileged commercial or financial information or for confidential supervisory information.[108] The Federal Reserve and the FDIC also acknowledged in the release that resolution plans would likely include "highly detailed, internal proprietary information" that "covered companies would not customarily make available to the public and that an agency typically would have access to and could review as part of the supervisory process in assessing, for example, the safety and soundness of a regulated institution."[109] They also acknowledged that "release of this information would impede the quality and extent of information provided by covered companies and could significantly impact the efforts of the

102 12 U.S. Code of Federal Regulations § 243.8(d)(1).
103 Id. § 243.8(c).
104 Id. § 243.8(d)(3).
105 Id. § 243.8(d)(2).
106 Id. § 243.8(d)(4).
107 5 United States Code § 552.
108 76 U.S. Federal Register 67323, 67332 (Nov. 1, 2011). See also 5 United States Code §§ 552(b)(4) (exemption for trade secrets and privileged or confidential commercial or financial information) and 552(b)(8) (exemption for confidential supervisory information); *Annette L. Nazareth & Margaret E. Tahyar*, Transparency and Confidentiality in the Post-Financial Crisis World—Where to Strike the Balance?, 1 Harvard Bus. L. Rev. 146 (2011).
109 76 U.S Federal Register 67323, 67332 (Nov. 1, 2011).

[Federal Reserve] and the [FDIC] to encourage effective and orderly unwinding of the covered companies in a crisis."[110]

7. Credibility Reviews

In order to facilitate review of a covered company's resolution plan, a covered company must provide the Federal Reserve and the FDIC with such information and access to personnel as the Federal Reserve and the FDIC jointly determine is necessary to assess the credibility of the resolution plan and the ability of the covered company to implement the resolution plan.[111] The Federal Reserve and the FDIC must rely to the fullest extent possible on examinations conducted by or on behalf of the appropriate Federal banking agency for the relevant company.[112]

Within 60 days of receiving an initial or annual resolution plan, the Federal Reserve and the FDIC must jointly determine whether the resolution plan satisfies the minimum informational requirements.[113] If the Federal Reserve and the FDIC jointly determine that it is incomplete or that substantial additional information is required to facilitate review, they must jointly inform the covered company in writing of the areas with respect to which additional information is required.[114] The covered company must resubmit its resolution plan or any additional information jointly requested no later than 30 days after receiving notice, unless the Federal Reserve and the FDIC jointly prescribe otherwise.[115]

If the Federal Reserve and the FDIC jointly determine that a resolution plan is not credible or would not facilitate an orderly resolution under the U.S. Bankruptcy Code (or other applicable insolvency law), they must jointly notify the covered company in writing of such determination.[116] As noted above, neither agency may unilaterally give such notice of deficiencies without the consent of the other. Before issuing any notice of deficiencies with respect to a covered company that is likely to have a significant impact on a functionally regulated subsidiary or a depository institution subsidiary of a covered company, the Federal Reserve ***must*** consult with each FSOC member that primarily supervises such subsidiary.[117] The Federal Reserve ***may*** also

110 Id.
111 12 U.S. Code of Federal Regulations § 243.3(d).
112 Id.
113 Id. § 243.5(a)(1).
114 Id. § 243.5(a)(2).
115 Id.
116 Id. § 243.5(b). See also 76 U.S. Federal Register 67323, 67327 note 8 (Nov. 1, 2011).
117 12 U.S. Code of Federal Regulations § 243.7(a).

consult with any other federal, state or foreign supervisor as it considers appropriate.[118] Before issuing any notice of deficiencies with respect to the U.S. operations of a foreign-based covered company, the Federal Reserve ***may***, but is not required to, consult with any foreign supervisor as it considers appropriate.[119]

The covered company must submit a revised resolution plan within 90 days of receiving notice of any deficiencies, or within such shorter or longer period as the Federal Reserve and the FDIC may jointly determine.[120] The revised resolution plan must address all deficiencies identified and discuss the following in detail:
- the revisions made to address the deficiencies;
- any changes to business operations and corporate structure the covered company proposes to undertake to facilitate implementation of the revised resolution plan (including a timeline for execution of such changes); and
- why the covered company believes the revised resolution plan is credible and would result in an orderly resolution under the U.S. Bankruptcy Code (or other applicable insolvency law).[121]

A covered company may request an extension of time to submit a revised resolution plan in response to a notice of deficiencies.[122] Such extension request must be supported by a written statement describing the basis and justification for the request.[123]

8. Sanctions for Failure to Cure Deficiencies

As an initial consequence of failure to cure deficiencies in a resolution plan, the Federal Reserve and the FDIC may jointly impose on a covered company, or any subsidiary of a covered company, more stringent capital, leverage or liquidity requirements or restrictions on growth, activities or operations.[124] The Federal Reserve and the FDIC may jointly impose such restrictions or requirements if either the covered company fails to submit a revised resolution plan within the required time period or the Federal Reserve and the FDIC jointly determine that the revised resolution plan does not adequately remedy the deficiencies identi-

118 Id. § 243.7(b).
119 Id.
120 Id. § 243.5(c).
121 Id. See also 76 U.S. Federal Register 67323, 67327 note 8 (Nov. 1, 2011).
122 Id. § 243.5(d).
123 Id.
124 Id. § 243.6(a).

fied.[125] Any requirements or restrictions imposed in response to a failure to cure resolution plan deficiencies would only apply until the date when the Federal Reserve and the FDIC jointly determine that the covered company has submitted a revised resolution plan that adequately remedies the deficiencies.[126] As noted above, neither agency may unilaterally take any action under Section 165(d) of the Dodd-Frank Act without the consent of the other.

A covered company on which the foregoing types of requirements or restrictions are imposed faces the further threat of mandated divestitures (*i.e.*, break-up) if it fails, within the first two years following the imposition of such requirements and restrictions, to submit a revised resolution plan that adequately remedies the deficiencies. After two years, the Federal Reserve and the FDIC may jointly require the covered company to divest assets or operations upon a joint determination that the divestiture of such assets or operations is necessary to facilitate an orderly resolution of the covered company under the U.S. Bankruptcy Code or other applicable insolvency law.[127]

Before making a joint determination to impose any requirements or restrictions or require any divestitures with respect to a covered company that are likely to have a significant impact on a functionally regulated subsidiary or a depository institution subsidiary of a covered company, the Federal Reserve ***must*** consult with each FSOC member that primarily supervises such subsidiary.[128] The Federal Reserve ***may*** also consult with any other federal, state or foreign supervisor as it considers appropriate.[129] Before determining to jointly impose any requirements or restrictions or require any divestitures with respect to the U.S. operations of a foreign-based covered company, the Federal Reserve ***may***, but is not required to, consult with any foreign supervisor as it considers appropriate.[130]

The Federal Reserve and the FDIC may jointly enforce any order imposing initial requirements or restrictions or divestitures.[131] The Federal Reserve, in consultation with the FDIC, may take any enforcement action under Section 8 of the Federal Deposit Insurance Act (the "**FDI Act**") to address any violation.[132]

A resolution plan submitted under Section 165(d) of the Dodd-Frank Act has no binding effect on a court or trustee in a proceeding under the U.S. Bankruptcy

125 Id.
126 Id. § 243.6(b).
127 Id. § 243.6(c). See also 76 U.S. Federal Register 67323, 67327 note 8 (Nov. 1, 2011).
128 12 U.S. Code of Federal Regulations § 243.7(a).
129 Id. § 243.7(b).
130 Id.
131 Id. § 243.9.
132 Id.

Code, a receiver appointed or a bridge financial company chartered under Title II of the Dodd-Frank Act or any other authority that is authorized to resolve a covered company.[133]

B. IDI Plans

The requirements for IDI resolution plans are substantially similar to the requirements for Title I plans, but there are a few important differences. Because of the similarities, a covered company that has a covered insured depository institution ("**covered IDI**") subsidiary can file the IDI chapter from its Title I plan as its IDI plan,[134] together with a cross-reference sheet showing where the information and data required by the IDI Rule is located. To the extent the IDI Rule requires additional information, filers would need to include the additional information in both their Title I and IDI plans.

1. Most Important Differences from Title I Plans

The most important differences between Title I and IDI plans relate to their objectives, scope, credibility review and consequences of submitting a deficient resolution plan.

a. Objectives

As noted above, the purpose of a Title I resolution plan is to show how a covered company can be resolved in a rapid and orderly manner.[135] The regulation implementing the Title I requirement defines a "rapid and orderly resolution" as "a reorganization or liquidation of the covered company (or, in the case of a covered company that is incorporated or organized in a jurisdiction other than the United States, the subsidiaries and operations of such foreign company that are domi-

---

133 Id. § 243.8(a).

134 See *Davis Polk & Wardwell LLP*, Credible Living Wills Under the U.S. Regulatory Framework (Sept. 19, 2011), available at http://www.davispolk.com/files/Publication/d0e11d7b-2f4b-45e4-849c-2320b1e0d9c5/Presentation/PublicationAttachment/7426ca31-e687-482b-a8e0-24c3cdbc5564/091911_Credible_Living_Wills_US_Framework.pdf (describing expectation that most financial institutions will submit one integrated U.S. resolution plan with separate chapters).

135 Id.

ciled in the United States) under the Bankruptcy Code[136] that can be accomplished within a reasonable period of time and in a manner that substantially mitigates the risk that the failure of the covered company would have serious adverse effects on financial stability in the United States." [137] The focus is directly on mitigating the risk that the failure of a covered company could destabilize the U.S. financial system as a result of interconnectedness and contagion.[138]

In contrast, the purpose of an IDI resolution plan is to show how a covered IDI can be resolved by the FDIC under the principal bank resolution provisions of the FDI Act[139] "in a manner that ensures that depositors receive access to their insured deposits within one business day of the IDI's failure (or two business days if the failure occurs on a day other than Friday), maximizes the net present value return from the sale or disposition of the IDI's assets and minimizes the amount of any loss realized by the creditors in the resolution."[140] While the direct focus of IDI plans is on access to deposits, value maximization and loss minimization, the release accompanying the IDI Rule indicated that resolving IDIs in this manner will serve the additional purpose of strengthening the stability of and public confidence in the U.S. banking system.[141]

b. Scope

Another important difference relates to scope. One aspect of this difference relates to the definitions of the terms "critical operations" and "critical services." The

---

136 If the covered company is not subject to the U.S. Bankruptcy Code, then rapid and orderly resolution means a reorganization or liquidation of the company under the insolvency regime to which the covered company is ordinarily subject. See 76 U.S. Federal Register 67323, 67327 note 8 (Nov. 15, 2011).

137 12 U.S. Code of Federal Regulations § 243.2(o).

138 See, e.g., *Hal S. Scott*, Interconnectedness and Contagion (Nov. 20, 2012), available at http://www.capmktsreg.org/pdfs/2012.11.20_Interconnectedness_and_Contagion.pdf.

139 Sections 11 and 13 of the FDI Act, 12 United States Code §§ 1821, 1823.

140 12 U.S. Code of Federal Regulations § 360.10(a). See also id. § 360.10(c)(2). In the preamble accompanying the IDI Rule, the FDIC stated that "[b]ased on its experience resolving failed insured depository institutions (and in particular, large and complex insured depository institutions), the FDIC has concluded that Resolution Plans for large and complex insured depository institutions are essential for their orderly and least-cost resolution and the development of such plans should begin promptly." 77 U.S. Federal Register 3075, 3075 (Jan. 23, 2012).

141 77 U.S. Federal Register 3075, 3075 (Jan. 13, 2012) ("In implementing the deposit insurance program and efficiently and effectively resolving failed depository institutions, the FDIC strengthens the stability of, and helps maintain public confidence in, the banking system in the United States.").

regulation implementing Title I requires covered companies to identify their "critical operations" and develop strategies for the continuation of such operations despite the failure of the covered companies. In contrast, the IDI Rule requires covered IDIs to identify their "critical services" and develop strategies to ensure the continuation of those services despite the failure of the covered IDIs. It makes no mention of critical operations and defines critical services quite differently than how critical operations is defined in the Title I regulation.[142] As noted above, the Title I regulation defines "critical operations" as follows:

– "**Critical operations**" means those operations of the covered company and its material entities, including associated services, functions, and support, the failure or discontinuation of which, in the view of the covered company or as jointly directed by the Federal Reserve and the FDIC, would pose a threat to the financial stability of the United States.[143]

In contrast, the IDI Rule defines "critical services" as follows:

– "**Critical services**" means services and operations of the covered IDI, such as servicing, information technology support and operations, human resources and personnel that are necessary to continue the day-to-day operations of the covered IDI.[144]

As so defined, the term critical services has a very different meaning than critical operations because, in essence, critical services are internal to the covered IDI and include all services (including shared services) and operations that are "necessary" to continue the day-to-day operations of the covered IDI. In sharp contrast, critical operations relate to the covered company's external relationships with the U.S. financial sector which, if discontinued, would pose a threat to financial stability in the United States. The two terms are about very different concepts, and they should not be confused even though they share the word "critical."

Another aspect of the difference in scope between Title I and IDI plans relates to the least-cost test. Under the FDI Act, the FDIC is required to resolve insured depository institutions in a manner that results in the least cost to the U.S. Deposit Insurance Fund of all of the alternatives,[145] unless the FDIC invokes

---

142 In its preamble accompanying the IDI Rule, the FDIC observed that the definition of "the term 'critical services' differs substantially from the term 'critical operations' as used in the Section 165(d) rule." Id. at 3079.

143 12 U.S. Code of Federal Regulations § 243.2(g).

144 Id. § 360.10(a)(5).

145 12 United States Code § 1823(c)(4).

the "systemic risk" exception to the least-cost test.[146] As a result, the IDI Rule requires each covered IDI to explain how its resolution strategies would satisfy the least-cost test.[147] In its release accompanying the IDI Rule, the FDIC acknowledged that more than one strategy might satisfy the least-cost test depending on the circumstances, and it encouraged covered IDIs to include as many alternative strategies as they wished as long as all proposed strategies are "reasonable" and at least "one is least costly relative to liquidation or other resolution methods."[148] Although nothing in the IDI Rule or the accompanying release specifically addresses whether a covered IDI may include a resolution strategy based on an assumption that the systemic risk exception has been invoked, such a strategy should be permissible as long as it is "reasonable" and the plan includes at least one alternative strategy that satisfies the least-cost test.

In contrast, Title I plans are not required to explain how their strategies would satisfy the least-cost test or any similar cost-minimization test. Instead, they are only required to explain how their strategies would result in a "reorganization or liquidation of the covered company (or, in the case of a covered company that is incorporated or organized in a jurisdiction other than the United States, the subsidiaries and operations of such foreign company that are domiciled in the United States) under the Bankruptcy Code [or other applicable insolvency law][149] that can be accomplished in a reasonable period of time and in a manner that substantially mitigates the risk that the failure of the company would have serious adverse effects on financial stability in the United States."[150] It is possible that this objective may be feasible only if the strategy minimizes creditor losses, or at least short-term creditor losses, but this cost-minimization goal is apparently only a second-order concern compared to the primary concern of mitigating destabilizing risks.

---

146 Id. § 1823(c)(4)(G).

147 12 U.S. Code of Federal Regulations § 360.10(c)(2)(vii).

148 77 U.S. Federal Register 3075, 3081 (Jan. 23, 2012). The FDIC identified a number of strategies as potentially satisfying the least-cost test depending on the circumstances, including purchase and assumption transactions in which the entire business of a covered IDI is sold to a third party or broken up and sold in pieces to one or more third parties, the use of a bridge bank to buy extra time for such a sale or series of sales, or the recapitalization of a failed covered IDI's business by transferring all of the failed SIFI's assets to a bridge bank and distributing the shares of the bridge bank to the d claimants left behind in the failed covered IDI's receivership in satisfaction of their claims. Id.

149 If the covered company is not subject to the U.S. Bankruptcy Code, then rapid and orderly resolution means a reorganization or liquidation of the company under the insolvency regime to which the covered company is ordinarily subject. See 76 U.S. Federal Register 67323, 67327 note 8 (Nov. 15, 2011).

150 12 U.S. Code of Federal Regulations § 243.2(o).

c. Credibility Review

Unlike the Title I regulation which does not expressly require Title I plans to be credible, the IDI Rule requires that all IDI plans be credible.[151] In addition, unlike the Title I regulation, the IDI Rule defines the credibility standard. An IDI plan "is credible if its strategies for resolving the [covered IDI], and the detailed information required by [the IDI Rule], are well-founded and based on information and data related to the [covered IDI] that are observable and otherwise verifiable and employ reasonable projections from current and historical conditions within the broader financial markets."[152] The process for reviewing the credibility of an IDI plan is similar to the process for reviewing the credibility of Title I plans, except that the FDIC alone (rather than the FDIC and the Federal Reserve acting jointly) determines whether an IDI plan is credible or not.

d. Consequences

In contrast to Title I, which expressly authorizes the FDIC and the Federal Reserve to jointly impose various sanctions on a covered company for failing to file a Title I plan that survives a credibility review, the IDI Rule does not specify any consequences for failure to submit a credible IDI plan. The FDIC may view itself as having general supervisory authority to impose sanctions on a covered IDI for which it is the appropriate federal banking agency if it determines that failure to file a credible IDI plan constitutes an unsafe or unsound operational or managerial practice.[153] But the FDIC is only the appropriate federal banking agency for state-chartered banks and thrifts that are not members of the Federal Reserve System.[154] The Office of the Comptroller of the Currency is the appropriate federal banking agency for federally chartered banks and thrifts,[155] and the Federal Reserve is the appropriate federal banking agency for state-chartered banks that are members of the Federal Reserve System.[156] As a result, the FDIC would appear to have no direct authority to take any action against these institutions for failure to file a credible IDI plan. Instead, it would appear that the FDIC would have to persuade the OCC or the Federal Reserve to take such action. This is an important limitation on the FDIC's power to impose sanctions on a covered IDI for failing

151 Id. § 360.10(c)(4)(i).
152 Id.
153 See, e.g., 12 United States Code § 1818.
154 12 United States Code § 1813(q)(2).
155 Id. § 1813(q)(1).
156 Id. § 1813(q)(3).

to submit a credible IDI plan since most systemically-important U.S. banks are either national banks or state-chartered banks that are members of the Federal Reserve System.

2. Other Differences

The IDI Rule[157] is a separate regulation from the Title I regulation. The IDI Rule was issued by the FDIC acting alone pursuant to its authority under the FDI Act. Under the FDI Act, the FDIC is charged with responsibility for insuring the deposits of U.S. insured depository institutions and with serving as the receiver of such institutions if they should fail. One of the key purposes of the IDI Rule is to ensure that the FDIC has access to all of the material information it needs to efficiently resolve a covered IDI in the event of its failure.[158]

The FDIC had begun to focus on resolution planning and its responsibilities as the receiver for failed insured depository institutions even before the enactment of the Dodd-Frank Act. Indeed, the FDIC proposed an earlier version of the IDI Rule in May 2010, two months before the Dodd-Frank Act was enacted.[159] The FDIC delayed finalizing the IDI Rule to allow for harmonization with the Title I regulation. The FDIC has stated that the final IDI Rule "is intended to complement the resolution plan requirements of the Dodd-Frank Act."[160]

a. Applicability

The IDI Rule applies to all insured depository institutions with $50 billion or more in total assets, and it refers to such institutions as covered IDIs.[161] At the time the rule was finalized, the FDIC calculated that there would be 37 covered IDIs, of which 34 have holding companies that are also subject to the Dodd-Frank Act's resolution planning requirements under Section 165(d).[162]

---

157 12 U.S. Code of Federal Regulations § 360.10.
158 12 U.S. Federal Register 3075, 3075 (Jan. 23, 2012).
159 75 U.S. Federal Register 27,464 (May 17, 2010).
160 77 U.S. Federal Register 3075, 3076 (Jan. 23, 2012).
161 12 U.S. Code of Federal Regulations § 360.10(a), (b)(4).
162 77 U.S. Federal Register 3075, 3076, 3084 (Jan. 23, 2012).

b. Timing

The timing for the submission of initial and annual resolution plans under the IDI Rule is aligned to the three filing categories created under the Title I regulation. Five of the nine banking organizations that filed resolution plans on July 1, 2012 were subject to the IDI Rule requirements,[163] as were the two additional Round 1.5 Filers.[164] All other covered IDIs are required to file their initial IDI plans by the middle or end of 2013.[165]

Each covered IDI must submit updated resolution plans on each anniversary of its initial submission date or such other date as the FDIC may specify.[166] Each is also required to give the FDIC notice of any event that results or could result in a material effect on the covered IDI's resolution plan, unless the event occurs within 90 days before the covered IDI's next annual submission date or such other date as the FDIC may specify.[167] However, unlike the Dodd-Frank Act's resolution planning regulation, the IDI Rule does not provide for interim updates of a resolution plan following a material event. A covered IDI would be required to address any material event, occurrence or change with respect to which it provides notice in its next annual resolution plan submission.[168]

c. Board Approvals

A covered IDI's initial and annual resolution plans must be approved by the covered IDI's board of directors (not its holding company's board) and noted in the board minutes.[169]

d. Additional Information about Resolution Strategies

The IDI Rule requires the following information about a covered IDI's resolution strategy, in addition to what is required in a Title I plan:

- **Critical Services.** Identification of critical services and providers of critical services, and a mapping of critical services to the covered IDI's material entities and core business lines. The IDI resolution plan must describe the covered IDI's strategy for continuing critical services in the event of the

163 Bank of America, Citigroup, Goldman Sachs, JP Morgan Chase and Morgan Stanley.
164 Bank of New York Mellon and State Street.
165 12 U.S. Code of Federal Regulations § 360.10(c)(1)(i)(C).
166 Id. § 360.10(c)(1)(iii)–(iv).
167 Id. § 360.10(c)(1)(v).
168 Id.
169 Id. § 360.10(c)(3).

covered IDI's failure. When critical services are provided by the covered IDI's parent company or a parent company affiliate, the resolution plan must describe the covered IDI's strategy for continuing critical services in the event of the parent company's or affiliate's failure, and the plan must assess the ability of any parent company affiliate to continue providing critical services on a standalone basis in the event of the parent company's failure.[170]

– **Interconnectedness to Parent Company's Organization.** Identification of aspects of the organizational structure, interconnectedness of its legal entities, the structure of legal or contractual arrangements of the covered IDI's parent company, or its overall business operations that would, in the event the covered IDI were placed in receivership, diminish the covered IDI's franchise value, obstruct its continued business operations or increase the operational complexity to the FDIC as receiver.[171]
– **Strategy to Separate from Parent Company's Organization.** A strategy to unwind or separate the covered IDI and its subsidiaries from the organizational structure of its parent company in a cost-effective and timely fashion, including possible remediation or mitigation steps that could be taken to eliminate or mitigate obstacles to separation.[172]
– **Strategy for the Sale or Disposition of Deposit Franchise, Business Lines and Assets.** A strategy for the sale or disposition of the deposit franchise, including branches, core business lines, and major assets of the covered IDI in a manner that ensures that depositors receive access to their insured deposits within one business day of failure (or two business days if the failure occurs on a day other than Friday), maximizes the net present value return from the sale or disposition of such assets, and minimizes the amount of any loss realized in the resolution of cases.[173]
– **Least Costly Resolution Method.** Description of how the strategies for separation of the covered IDI and its subsidiaries from the parent company's organization and the sale or disposition of the deposit franchise, core business lines, and major assets can be demonstrated to be the least costly to the FDIC's Deposit Insurance Fund of all possible methods for resolving the covered IDI.[174]

---

170 Id. § 360.10(c)(2)(iii).
171 Id. § 360.10(c)(2)(iv).
172 Id. § 360.10(c)(2)(v).
173 Id. § 360.10(c)(2)(vi).
174 Id. § 360.10(c)(2)(vii).

e. Other Additional Information

The IDI Rule also requires the following information, in addition to what is required in a Title I plan:

- **Overview of Deposit Activities and Branch Structure.** Description of the covered IDI's overall deposit activities, including unique aspects of the deposit base or underlying systems that may create operational complexity for the FDIC or result in extraordinary resolution expenses in the event of failure, and description of the covered IDI's U.S. and foreign branch organization, including identification of key personnel tasked with managing core business lines and deposit activities and the covered IDI's branch organization.[175]
- **Systemically Important Functions.** Description of systemically important functions that the covered IDI, its subsidiaries, and its affiliates provide, including the nature and extent of the IDI's involvement in payment systems, custodial or clearing operations, large sweep programs, and capital markets operations in which the IDI plays a dominant role. The IDI resolution plan must discuss critical vulnerabilities, estimated exposure and potential losses, and why certain aspects of the covered IDI's businesses could pose a systemic risk to the broader economy.
- **Cross-Border Elements.** Description of material components of the covered IDI's structure that are based or located outside the United States, including foreign branches, subsidiaries, and offices. The IDI resolution plan must provide detail on the location and amount of foreign deposits and assets, discuss the nature and extent of the covered IDI's cross-border assets, operations, interrelationships, and exposures, and map to legal entities and core business lines.

f. Confidential Treatment

Similar to the Title I regulation, the IDI Rule provides that an IDI resolution plan must be divided into public and confidential sections.[176] The public section consists of an executive summary of the IDI resolution plan that describes the business of the covered IDI and includes certain specified information. To the extent material to an understanding of the covered IDI, the public section must include[177]:

175 Id. § 360.10(c)(2)(ii).
176 See id. § 360.10(f)(1).
177 Id.

- The names of a covered IDI's material entities;
- A description of the covered IDI's core business lines;
- Consolidated financial information regarding assets, liabilities, capital, and major funding sources;
- A description of derivative activities and hedging activities;
- A list of memberships in material payment, clearing and settlement systems;
- A description of foreign operations;
- The identities of material supervisory authorities;
- The identities of the covered IDI's principal officers;
- A description of the corporate governance structure and processes related to resolution planning;
- A description of material management information systems; and
- A description, at a high level, of the covered IDI's resolution strategy, covering such items as the range of potential purchasers of the covered IDI, its material entities and core business lines.

The public sections of the IDI resolution plans of the Round 1 and Round 1.5 filers are available on the FDIC's website.[178] Some filers submitted standalone public sections for their covered IDIs, while others submitted a single public section in satisfaction of both the IDI Rule and Title I resolution planning requirements.

C. Title II Plans

As noted above, the FDIC has announced that it is preparing its own resolution plans for systemically important bank holding companies under Title II of the Dodd-Frank Act.[179] Other than very broad announcements, however, the FDIC has disclosed very little about the details of its plans for specific institutions or groups of institutions. FDIC Chairman Martin Gruenberg has announced that the FDIC's preferred strategy for resolving the largest and most complex banking groups under Title II is the single-point-of-entry ("**SPOE**") recapitalization strat-

178 FDIC, Title I and IDI Resolution Plans, http://www.fdic.gov/regulations/reform/resplans/index.html.

179 Video: FDIC Systemic Resolution Advisory Committee Meeting, Panel on Title II Orderly Liquidation Authority (Dec. 10, 2010), available at http://www.vodium.com/MediapodLibrary/index.asp?library=pn100472_fdic_SRAC. Presentation slides from the meeting are available at http://www.fdic.gov/about/srac/2012/2012-12-10_title-ii_orderly-liquidation-authority.pdf.

egy.[180] The FDIC has also issued a joint paper with the Bank of England endorsing the SPOE strategy for resolving G-SIFIs,[181] and Chairman Gruenberg and Paul Tucker, the Deputy Governor, Financial Stability, at the Bank of England, published an editorial in the *Financial Times* lauding the virtues of the SPOE recapitalization model for resolving G-SIFIs without a taxpayer-funded bailout.[182] The FDIC has also indicated that it intends to propose a policy statement or regulation later this year describing in more detail how it would use its authority under Title II to resolve a covered financial company under the SPOE model.[183]

Under the SPOE model, only the parent bank holding company of a banking group would be put into a resolution proceeding. All of the parent's assets, including its ownership interests in operating subsidiaries, would be transferred to a bridge financial company. The transferred business would be recapitalized by leaving the failed company's equity capital and a sufficient amount of its unsecured long-term debt behind in a receivership. The operating subsidiaries would be recapitalized and kept out of insolvency proceedings by converting loans or other extensions of credit from the parent into new equity in the operating subsidiaries or otherwise down-streaming available parent assets to the subsidiaries. If the bridge financial holding company or any of its operating subsidiaries were unable to obtain sufficient liquidity from the market, the Federal Reserve's discount window,[184]

180 *Martin J. Gruenberg*, Acting Chairman, FDIC, Remarks to the Federal Reserve Bank of Chicago Bank Structure Conference (May 10, 2012), available at http://www.fdic.gov/news/news/speeches/chairman/spmay1012.html.

181 Resolving Globally Active, Systemically Important, Financial Institutions: A joint paper by the Federal Insurance Deposit Corporation and the Bank of England (Dec. 10, 2012), available at http://www.fdic.gov/about/srac/2012/gsifi.pdf.

182 *Martin Gruenberg & Paul Tucker*, Op-Ed., Global Banks Need Global Solutions When They Fail, Financial Times, Dec. 10, 2012.

183 For example, *James Wigand*, Director of the FDIC's Office of Complex Financial Institutions, mentioned the possibility of such a policy statement as part of a panel discussion in December 2012. Video: Banking Law Institute 2012, Panel on Systemic Risk - the Challenge of Systemically Important Financial Institutions (SIFIs), Living Wills and Orderly Liquidation Issues (Practicing Law Institute program Dec. 19, 2012), available at http://www.pli.edu/Content/OnDemand/Banking_Law_Institute_2012/_/N-4nZ1z12whl?fromsearch=false&ID=144553 ("[E]ngaging in small discussions is helpful, but we need obviously broader outreach. And one way to do that is to either issue a policy statement or perhaps a rule, and we're considering doing that. It's something that we haven't made an explicit decision on, but we do think that some mechanism such as that – a policy statement, for example, that would be issued for comment – would be helpful because it would engage a broader market in understanding what that presumptive path would be in looking at the application of the Title II authority.").

184 U.S. depository institutions have the right to borrow from the Federal Reserve's discount window as long as they are in generally sound financial condition and pledge collateral that is

or Section 13(3) of the Federal Reserve Act,[185] the FDIC could provide such liquidity by borrowing from the U.S. Treasury subject to certain limits contained in Title II of Dodd-Frank.[186]

The SPOE model provides a structural solution to at least three of the most important impediments that would otherwise apply to the successful resolution of a U.S. G-SIFI. First, by forcing a group's losses up to a parent holding company's creditors and equity holders, the SPOE model is able to keep the group's bank and other operating company subsidiaries out of resolution proceedings. This avoids the need to obtain foreign counterparty or judicial consents for transfers of assets made over resolution weekend, which might otherwise be impossible to obtain

---

satisfactory to the Federal Reserve and subject to the relevant haircuts established by the Federal Reserve. The main statutory provisions authorizing and governing discount window borrowing by depository institutions are in Sections 10B, 13 and 19(7) of the Federal Reserve Act, 12 United States Code §§ 347b (Section 10B); 342–347 and 372 (Section 13); 461(b) (Section 19(7)). The implementing regulations are contained in 12 U.S. Code of Federal Regulations Part 201, especially §§ 201.3(a) (general authority); 201.4(a) (primary credit); 201.4(b) (secondary credit); 201.4(c) (seasonal credit). See also Federal Reserve Banks Operating Circular 10 – Lending (Effective October 15, 2006); Federal Reserve Banks Operating Circular 8 – Collateral (Effective December 12, 2011); The Federal Reserve Discount Window (July 21, 2010), available at http://www.frbdiscountwindow.org/discountwindowbook.cfm?hdrID=14&dtlID=43#eligibilityps; James A. Clouse, Recent Developments in Discount Window Policy, 80 Federal Reserve Bulletin 965 (Nov. 1994), available at http://www.federalreserve.gov/monetarypolicy/1194lead.pdf; Brian F. Madigan & William R. Nelson, Proposed Revisions to the Federal Reserve's Discount Window Lending Programs, 88 Federal Reserve Bulletin 313 (July 2002), available at http://www.federalreserve.gov/pubs/bulletin/2002/0702lead.pdf.

185 Section 13(3) of the Federal Reserve Act, 12 United States Code § 343, provides the Federal Reserve with authority to extend secured lender-of-last-resort liquidity to non-depository institutions, including bank holding companies, broker-dealers and insurance companies, if the Federal Reserve determines that "unusual and exigent" circumstances exist. Section 1101 of the Dodd-Frank Act amended Section 13(3) to limit this authority to liquidity provided as part of a "program or facility with broad-based eligibility." Dodd-Frank Act, U.S. Public Law No. 111-203, § 1101(a), 124 U.S. Statutes at Large 1375, 2113–15 (2010). See also 12 U.S. Code of Federal Regulations § 201.4(d).

186 Dodd-Frank Act, U.S. Public Law No. 111-203, § 210(n), 124 U.S. Statutes at Large 1375, 1506–09 (2010) (orderly liquidation fund, which refers to borrowing by the FDIC from the U.S. Treasury for purposes of Title II). Section 210(n)(6) of the Dodd-Frank Act limits the exposure that the FDIC may incur on loans or guarantees made to a covered company in receivership under Title II to 10% of the book value of the covered company's total consolidated assets for up to 30 days after being put in receivership and to 90% of the fair value of the company's total assets "available for repayment" after that 30-day period (or earlier if the assets have been revalued by the FDIC in less than 30 days). See also 77 U.S. Federal Register 37554 (June 22, 2012) (final FDIC rule on calculation of its maximum obligation amount under Title II).

without multinational law reform, which could take decades to achieve if it were achievable at all. The cross-border operations of a U.S. G-SIFI are invariably at the subsidiary bank level, where foreign branches exist, and not at the holding company level. If a systemically important bank with foreign branches (“**G-SIB**”) were put into an FDIC receivership, and the FDIC attempted to resolve the G-SIB through a traditional purchase and assumption transaction or a recapitalization within resolution transaction involving the transfer of all or some of the bank’s assets to a third party or a bridge bank, it would trigger these foreign counterparty and judicial consent requirements. No such consent requirements would arise, in contrast, when the assets of a bank holding company are transferred to a bridge holding company under Title II because bank holding companies do not have foreign branches. Such transfers would still require foreign regulatory approvals for any change in control of material foreign branches and subsidiaries, but such regulatory approvals would be far easier to obtain over a resolution weekend than counterparty or judicial consents for the transfer of assets.

Second, by putting only the parent bank holding company into receivership, and keeping the bank and other operating subsidiaries out of resolution or insolvency proceedings, the SPOE approach avoids triggering the right to terminate or close-out any derivative or other financial contracts as a result of the resolution or failure of the contracting party. Financial contracts entered into by U.S. G-SIFIs are virtually always entered into at the subsidiary bank or other operating subsidiary level, and not at the level of the parent bank holding company. In addition, to the extent such contracts are guaranteed by the parent holding company or contain cross-defaults to the receivership or failure of the parent holding company, Title II of the Dodd-Frank Act purports to override such rights that arise as a result of the parent holding company being put into a Title II receivership.[187] Of course, a combination of the SPOE model and Title II is not a complete solution to the cross-default problem because Title II does not apply extraterritorially. As a result, it cannot stop foreign counterparties from exercising their termination rights under contracts with respect to property outside the United States, at least if the contracts are governed by non-U.S. law. A proposed solution to the remaining cross-default problem is discussed in Section IV below.

Third, by structurally subordinating unsecured debt at the bank holding company level to unsecured debt at the bank and other operating subsidiary level and providing a mechanism for holding company-level assets to be down-streamed to recapitalize the bank and other operating subsidiaries, the SPOE model reduces

187 Dodd-Frank Act, U.S. Public Law No. 111-203, § 210(c)(16), 124 U.S. Statutes at Large 1375, 1493–94 (2010); see also 12 U.S. Code of Federal Regulations § 380.12.

or eliminates the incentive of short-term creditors at the operating company level to run when a banking group fails. It also reduces or eliminates the risk of contagion throughout the financial system. The reason is that most of the unsecured long-term debt issued by U.S. SIFIs is held at the parent bank holding company level, and most of their unsecured short-term debt is held at the bank or other operating subsidiary level.[188] Indeed, many U.S. G-SIFIs have already reduced the amount of short-term debt that they have outstanding at the holding company level to improve their liquidity ratios, and the SPOE model creates a further incentive to move all short-term debt to the operating subsidiary level.[189] In addition, most U.S. G-SIFIs already have enough long-term unsecured debt so that they could be fully recapitalized at Basel III levels after suffering losses that wipe out all of their tangible common equity at levels equal to the fully effective Basel III requirements, including applicable buffers.[190] This structural subordination effectively turns long-term unsecured debt at the holding company level into a loss-absorbing shield for short-term and other unsecured debt at the operating subsidiary level, greatly reducing or eliminating the incentive of short-term creditors to run during a financial crisis. It also does so without creating moral hazard by providing a clear structural priority rule in advance. With such clarity, the market will price each class of debt efficiently, forcing the short-term creditors to internalize the costs of their structural priority in the form of lower interest rates.

The Federal Reserve Board has indicated that it is likely to propose minimum long-term unsecured debt requirements for certain U.S. bank holding companies in order to ensure that they have sufficient loss-absorbing capacity to make the SPOE recapitalization method a viable one.[191] The proposal may also include minimum unconsolidated asset requirements at the holding company level, including intercompany loans, that could be contributed to operating subsidiar-

---

188 See, e.g., The Clearing House Association, Report on the Orderly Liquidation Authority Resolution Symposium and Simulation, p. 10 (Jan. 2013), available at http://www.theclearinghouse.org/index.html?f=074709.

189 See The Clearing House Association, Banking Brief White Paper Series, Ending "Too Big to Fail": Title II of the Dodd-Frank Act and the Approach of "Single-Point-of-Entry" Private Sector Recapitalization of a Failed Financial Company, pp. 6–9 (Jan. 2013), available at http://www.theclearinghouse.org/index.html?f=074717.

190 See, e.g., Goldman Sachs Investment Banking Division, FDIC Orderly Liquidation Authority and Bail-in (Nov. 2012); J.P. Morgan North America Credit Research, Tarullo Speech Increases Momentum for Debt Buffers (Dec. 6, 2012).

191 *Daniel K. Tarullo*, Governor, Board of Governors of the Federal Reserve System, Industry Structure and Systemic Risk Regulation, Speech at the Brookings Institution Conference on Structuring the Financial Industry to Enhance Economic Growth and Stability (Dec. 4, 2012), available at http://www.federalreserve.gov/newsevents/speech/tarullo20121204a.htm.

ies to recapitalize them in an SPOE receivership. Such a proposal could be issued for public notice and comment as early as the first quarter of 2013. This new mandate would supplement Basel capital requirements.

Perhaps the most detailed disclosure about the FDIC's Title II planning process was provided in a December 2012 presentation by John Simonson, Deputy Director of the FDIC's Office of Complex Financial Institutions, to the FDIC's Systemic Resolution Advisory Committee ("**SRAC**").[192] In that public presentation, Mr. Simonson disclosed that the FDIC had developed Title II resolution plans for each of the top five U.S. G-SIFIs.[193] In those plans, the FDIC applied its SPOE recapitalization strategy to each of these institutions in order to "gain comfort that [they] could in fact implement such resolution if necessary."[194] According to Simonson, the FDIC has shared summaries of those plans and apparent simulations "with some domestic and international regulators."[195] Judging by the Bank of England's willingness to issue a joint paper with the FDIC endorsing the SPOE recapitalization model and the urgency with which the Federal Reserve is considering a proposal for new long-term debt requirements to ensure the feasibility of the SPOE recapitalization strategy, the FDIC's plans and apparent simulations under Title II must have been convincing. Simonson said that the FDIC is now developing similar Title II plans for "the next group of SIFIs which includes processing and custody banks, what could be termed as large regionals, as well as foreign banking organizations."[196]

It may be possible to infer certain additional characteristics about the FDIC's Title II planning process from a simulation of the resolution of a G-SIFI under Title II that was conducted by The Clearing House Association (the "**TCH Simulation**") in early November 2012.[197] The TCH Simulation applied the FDIC's SPOE recapitalization strategy to the resolution of a hypothetical U.S. SIFI that had a large U.S. bank subsidiary with foreign branches and a large U.K. broker-dealer subsidiary. The G-SIFI was put into a Title II receivership because of a run on its

---

192 Video: FDIC Systemic Resolution Advisory Committee Meeting, Panel on Title II Orderly Liquidation Authority (Dec. 10, 2010), available at http://www.vodium.com/MediapodLibrary/index.asp?library=pn100472_fdic_SRAC. Presentation slides from the meeting are available at http://www.fdic.gov/about/srac/2012/2012-12-10_title-ii_orderly-liquidation-authority.pdf.
193 Id.
194 Id.
195 Id.
196 Id.
197 See The Clearing House Association, Report on the Orderly Liquidation Authority Resolution Symposium and Simulation (Jan. 2013), available at http://www.theclearinghouse.org/index.html?f=074709.

commercial paper and the short-term liabilities of its U.S. bank and U.K. broker-dealer subsidiaries. The run arose because of substantial losses incurred in both subsidiaries and market uncertainty about the true value of the group's assets and its liquidity position. A determination was made by the hypothetical Secretary of the Treasury to invoke Title II because the failure of the hypothetical G-SIFI would create a substantial risk of destabilizing the U.S. financial system if it were allowed to be resolved under the U.S. Bankruptcy Code and the other conditions for invoking Title II were satisfied.[198]

The report of the simulation issued by TCH concluded that the simulation was successful,[199] and TCH contemporaneously issued a white paper explaining in more detail why the SPOE model would end "too big to fail" if certain conditions are satisfied.[200] The report of the TCH Simulation includes a list of lessons learned from this simulation,[201] many of which are important. But perhaps the most important lesson was that short-term creditors are likely to immediately panic and run, and foreign regulators are likely to immediately ring-fence foreign operations, in the absence of a clearly articulated, pre-existing "presumptive path" of how the FDIC will use its authority under Title II to resolve a particular SIFI, as well as general public confidence that claims on long-term debt will be structurally or legally subordinated to claims on short-term debt. As a result, it is crucial that the FDIC and regulators around the world develop and disclose "presumptive paths" for how they will use their resolution powers, as well as methods to ensure that long-term debt is structurally or legally subordinated to short-term debt, with the line between long-term and short-term debt drawn at an original or remaining maturity of at least six months to one year.

198 Dodd-Frank Act, U.S. Public Law No. 111-203, § 203(b), 124 U.S. Statutes at Large at 1375, 1451 (2010).

199 The Clearing House Association, Report on the Orderly Liquidation Authority Resolution Symposium and Simulation, p. 6 (Jan. 2013), available at http://www.theclearinghouse.org/index.html?f=074709.

200 The Clearing House Association, Banking Brief White Paper Series, Ending "Too Big to Fail": Title II of the Dodd-Frank Act and the Approach of "Single-Point-of-Entry" Private Sector Recapitalization of a Failed Financial Company (Jan. 2013), available at http://www.theclearinghouse.org/index.html?f=074717.

201 See The Clearing House Association, Report on the Orderly Liquidation Authority Resolution Symposium and Simulation, pp. 7–15 (Jan. 2013), available at http://www.theclearinghouse.org/index.html?f=074709.

Indeed, the principal criticism leveled against Title II, including calls for its repeal[202] and challenges to its validity under the U.S. Constitution,[203] arise from the broad discretion it gives to the FDIC, the lack of predictability that arises from that discretion, and alleged lack of adequate due process safeguards for creditors and other stakeholders.[204] While the FDIC has the discretionary power under Title II to resolve a G-SIFI using the SPOE recapitalization model, nothing in Title II or its regulations or official policies compels it to do so or even creates a reliable presumption that it will do so. Even some of the supporters of Title II admit that these criticisms have some legitimacy, and argue that statutory amendments, regulations or policy statements are needed to constrain the FDIC's discretion, improve legal certainty and predictability,[205] and provide better due process safeguards for creditors and other stakeholders so that the FDIC's discretion under Title II cannot be abused in a manner that results in a sort of regulatory Court of Star Chamber.[206]

The critics have been particularly focused on the FDIC's broad discretion under Title II to discriminate among creditors within the same class,[207] as long as all creditors receive at least what they would have received in a liquidation of

202 See, e.g., *Jeb Hensarling*, Op-Ed., Dodd-Frank's Unhappy Anniversary, Wall Street Journal, July 25, 2012 (characterizing Title II as a "taxpayer-funded safety net for institutions deemed too big to fail," and calling for its repeal), available at http://online.wsj.com/article/SB10000872396390443437504577547320318621132.html.

203 See State National Bank of Big Spring v. Geithner, Case No. 1:12-cv-01032, First Amended Complaint, pp. 35–41, 48–54 (U.S. District Court for the District of Columbia, Sept. 20, 2012).

204 See, e.g., *James H. M. Sprayregon & Stephen E. Hessler*, Too Much Discretion to Succeed: Why a Modified Bankruptcy Code is Preferable to Title II of the Dodd-Frank Act (June 7, 2011), available at http://www.federalreserve.gov/SECRS/2011/June/20110607/OP-1418/OP-1418_053111_80002_310357154312_1.pdf; John B. Taylor, Preface, in Bankruptcy Not Bailout, p. x (2012); Kenneth E. Scott, A Guide to Resolution of Failed Financial Institutions: Dodd-Frank Title II and Proposed Chapter 14, in Bankruptcy Not Bailout, pp. 7–9, 11–12, 22 (2012); *David Skeel*, The New Financial Deal: Understanding the Dodd-Frank Act and Its (Unintended) Consequences, Chapters 7–8 (2011) (arguing that Title II and the bank resolution provisions on which it is modeled give the FDIC nearly unfettered discretion).

205 Global Financial Markets Association, Comment Letter to the Financial Stability Board on the Consultative Document, Recovery and Resolution Planning: Making the Key Attributes Requirements Operational (Dec. 7, 2012), available at http://www.gfma.org/correspondence/item.aspx?id=386.

206 See, e.g., *Randall D. Guynn*, Are Bailouts Inevitable?, 29 Yale Journal on Regulation 121, 152–154 (2012).

207 *Kenneth E. Scott*, A Guide to Resolution of Failed Financial Institutions: Dodd-Frank Title II and Proposed Chapter 14, in Bankruptcy Not Bailout, pp. 17–19 (2012).

the company under Chapter 7 of the U.S. Bankruptcy Code.[208] One critic argues that this type of open-ended discretion to discriminate among creditors within the same class will result in a type of bailout even if taxpayer money is not used because it will result in a subsidy or bailout of the favored class of creditors by the disfavored class, creating the same type of moral hazard as a taxpayer-funded bailout.[209] Since the main purpose of the discretion to treat similarly situated creditors differently is to permit the FDIC to discriminate in favor of short-term unsecured claims during a financial panic in order to reduce the risk of runs and contagion at other financial institutions, one way to address this criticism would be to replace the FDIC's open-ended discretion in Title II with a priority rule that clearly subordinates long-term unsecured debt to short-term unsecured debt. Another way is to make it clear that enough long-term unsecured debt is structurally subordinated to short-term unsecured debt, as is done in the SPOE recapitalization model.

The structural or legal subordination of long-term unsecured debt to short-term unsecured debt can be justified on the grounds that creditors holding these two types of claims are not similarly situated during a financial panic. Short-term creditors have negotiated and paid for the legal and practical right to run during a financial crisis by accepting a lower interest rate than would be available on long-term debt, and they can and will run unless their claims are treated as structurally or legally senior to long-term debt. In contrast, long-term creditors have not negotiated or paid for the right to run during a financial crisis and cannot do so, and they have arguably been compensated for this higher risk by receiving a higher interest rate than short-term debt. Moreover, as long as this structural or legal priority scheme is known to the market in advance, the market should price each class of debt efficiently so that short-term and long-term creditors fully internalize all of the costs and benefits of this priority scheme. This should eliminate any alleged subsidy or bailout of the short-term creditors by the long-term creditors.

208 Dodd-Frank Act, U.S. Public Law No. 111-203, § 210(b)(4), (d)(2), 124 U.S. Statutes at Large 1375, 1476–77, 1494 (2010).

209 *Kenneth E. Scott*, A Guide to Resolution of Failed Financial Institutions: Dodd-Frank Title II and Proposed Chapter 14, in Bankruptcy Not Bailout, pp. 17–19 (2012).

D. Comparison of U.S. Resolution Plans to Non-U.S. Resolution Plans

The resolution plans required under Title I of the Dodd-Frank Act and the FDIC's IDI Rule are substantially different from the resolution requirements currently imposed by non-U.S. jurisdictions. It appears that the FDIC and the Federal Reserve are the only regulators that currently require any financial institutions to submit comprehensive resolution plans that contain both resolution strategies and information and data. To the extent non-U.S. regulators require financial institutions to submit resolution plans, it appears that they only require the institutions to provide information and data on which the regulators can develop their own resolution strategies.[210] It also appears that non-U.S. regulators have not disclosed the resolution plans they have prepared for particular institutions, either to the institutions themselves or the broader market. As a result it will be difficult for foreign banking organizations to satisfy the requirement in the Title I regulation to show how the resolution strategies for their U.S. subsidiaries and operations fit into their group's overall resolution strategy, because in many instances the home-country regulators will not have required the group to prepare an overall resolution strategy or disclosed the regulator's strategy to the institution. Instead, the regulators will only have required financial institutions to collect and report to the regulators various types of information and data on which the regulators can build their own resolution plans, or to prepare recovery (as opposed to resolution) plans.

III. Lessons Learned

As noted above, the Round 1 and 1.5 filers have now filed their Title I and IDI resolution plans, and the public portions of those plans have been posted on the FDIC's and the Federal Reserve's websites. Based on advising a number of the

210 See, e.g., U.K. Financial Services Authority, RRP Information Pack, Supplement to FS12/1 (May 2012), available at http://www.fsa.gov.uk/pubs/discussion/fs12-01-info-pack.pdf (outlining U.K. requirements for firms to develop recovery plans and a "resolution pack" of information); see also Financial Stability Board, Key Attributes of Effective Resolution Regimes for Financial Institutions, Annex III, paragraphs 1.6, 1.9 (Oct. 2011), available at http://www.financialstabilityboard.org/publications/r_111104cc.pdf (stating that responsibility for developing and maintaining a recovery plan lies with a firm's senior management, while responsibility for developing and maintaining a resolution plan lies with the authorities).

Round 1 and 1.5 filers on their resolution plans, and based on the public portions of their plans, a number of lessons can be drawn from this process. At the same time, these lessons should be drawn carefully in light of the fact that the business models and legal structures of many financial institutions that have not yet filed an initial plan are somewhat to very different from those of the initial filers. Any lessons learned from the initial filers should also be tempered by the fact that the standard format for the living wills that the regulators required the initial filers to use may change for subsequent filers, as has already been the case for the first annual updates for Round 1 and Round 1.5 Filers as discussed in the April 2013 guidelines referred to in footnote 17 above. With that in mind, the following are some of the key lessons from the initial filers based on what was known immediately after their public filings.

- **The Regulators Are Still in Learning Mode and Standards Are Still Evolving.** Resolution planning is as new to the regulators as it is to the banking sector, and many staff at different levels of both the Federal Reserve and the FDIC are involved. In addition, for some banking institutions, international regulators are also part of the discussion. Subsequent filers are likely to benefit from the regulators' increased experience, including improvements in the standardized format for filing that was required of the initial filers, as well as increased consistency in the messages about expectations.
- **Resolution Planning Will Continue to Evolve After the Initial Submissions.** Resolution planning will take more than one year to fully develop. As noted in the public portions of the resolution plans filed to date, the regulators provided a number of baseline assumptions to the initial filers, including:
  - No exercise of their recovery plan;
  - An idiosyncratic scenario specific to the banking institution that does not affect the global financial markets generally;
  - The baseline stress assumptions from the Federal Reserve's CCAR stress tests;
  - All material entities have failed; and
  - No reliance on extraordinary government support.

  In future years, Title I plans will be required to address all three of the scenarios provided in the Federal Reserve's CCAR stress-testing process, namely "baseline," "adverse" and "severely adverse." In addition, the regulators have relaxed some of the mandatory assumptions for the first annual updates of the Round 1 and Round 1.5 Filers as discussed in the April 2013 guidelines referred to in footnote 17 above. This expectation of different assumptions in later years means that senior management will need to look ahead to how

different resolution plan strategies might fare in a more stressed environment and possibly adjust resolution planning accordingly.

- **No Credibility Reviews of Initial Plans**. The Federal Reserve and the FDIC indicated that they did not expect to perform credibility reviews of initial resolution plans, but instead expected to reserve credibility reviews for future updates.
- **Initial Assumptions Not Realistic**. The assumptions for the initial plans, especially the assumption that all material entities fail, were not realistic, but were designed to force the initial filers to identify as many of the potential impediments to resolution as possible.
- **Resolution Planning is Driven by Legal Entity Not Business Units.** Banking institutions are business lines in life but are legal entities at death. This fundamental mismatch between the most efficient way to manage a business and create shareholder value and the most efficient way to resolve it at the point of non-viability requires a temporary paradigm shift by business leaders. It is best to develop a preliminary top-down resolution strategy first by focusing both on how systemic risk can be minimized and how the value of the business lines can be preserved in a resolution that occurs on a legal entity basis. This requires, as a first step, that core business lines, critical operations, critical services and shared services be mapped to legal entities. The second step is to map each material legal entity to its applicable insolvency regime and to evaluate the interactions of the legal regimes and other resolution processes as well as major impediments by considering the fate of the core business lines, critical operations, critical services and shared services on a legal entity basis. Firms need to prepare for some surprises in the interconnections and interdependencies among legal entities. These unexpected interconnections and interdependencies will reveal the risks of what might be cut off during a resolution proceeding.
- **Create a Preliminary Top-down Strategy First and Then Create the Focused Data Gathering Plan.** Resolution planning is data heavy, and the FDIC and Federal Reserve regulations require a rich array of data. This data will have to be gathered, be evaluated and be reliable not only every year but also after a material change in the banking institution. Most of the initial filers found that it was more efficient for a banking institution to first develop a well-defined top-down resolution strategy on a preliminary basis before beginning the data-gathering process. That strategy can later be changed if the data provides a different picture than expected. Without an initial overarching strategy, however, there is a risk of expensive back-tracking or the gathering of data that is neither relevant nor useful. The data-gathering plan

during the first year should create processes that are repeatable and that can become systems-driven in later years.

- **Internal Education and Buy-in at an Early Stage Makes for a Less Intrusive and More Efficient Process.** Key people in the business units should be educated about the objectives of resolution planning and the entity-by-entity nature of the process before being asked to provide input. This means that some initial education, including senior business manager involvement from the critical business units and demonstrated support from top corporate management, will save time and make the process for creating the resolution plan much more efficient in the long run.
- **There Are a Finite Number of Resolution Strategies.** There are only a limited number of resolution strategies. As included in the public portions and discussed publicly by the regulators, they include:
  - The sale of assets and business lines, either before a bankruptcy proceeding or under the supervision of the bankruptcy court;
  - The recapitalization of the insured depository institution outside of an FDIC receivership;
  - The purchase and assumption of some or all of the assets and liabilities by a third party buyer out of an FDIC receivership;
  - The creation of a bridge bank for the insured depository institution followed by a sale or public offering, or a recapitalization of the bridge through a conversion of debt for equity; and
  - An orderly wind-down.[211]
- **There are Many Ways to Mix and Match Resolution Strategies Among the Bank and Non-bank Affiliates.** The art, and the challenge, for a credible resolution plan is in finding the right mix and match of available resolution strategies among the bank and non-bank affiliates. To accomplish this, an understanding of both bank resolution and bankruptcy laws is essential. For example:

---

211 In addition, at least for Round 1 and Round 1.5 Filers a single-point-of-entry or a partial multiple-point-of-entry reorganization strategy might be possible under Chapter 11 of the U.S. Bankruptcy Code since the Federal Reserve and the FDIC have relaxed the unrealistic assumption mandated for the initial plans that all material entities must fail. See footnote 17 above. Such a strategy would involve putting the parent holding company into a Chapter 11 bankruptcy proceeding, transferring its assets and certain liabilities including interests in subsidiaries to a newly formed holding company pursuant to Section 363 of the Bankruptcy Code, and keeping the operating subsidiaries out of resolution, bankruptcy or other insolvency proceedings as in the FDIC's SPOE recapitalization model under Title II.

  - At what point does the publicly-listed holding company or service company enter a Chapter 11 proceeding?
  - If there is a runway period leading up to the Chapter 11 proceeding, what liquidity would be placed where among the non-bank affiliates?
  - What other assumptions should be made in any runway period?
  - Does it make sense to delay a proceeding for a broker-dealer under the Securities Investor Protection Act (“**SIPA**”) or to start it at the same time as the Chapter 11 proceeding of its holding company parent?
  - How should cross-defaults, cross-collateral and netting be treated?
  - Should asset sales be made before bankruptcy or with the blessing of the bankruptcy court?
  - How should international cooperation be modeled?
  - Where are shared services, technology and intellectual property located and how can their continuity be assured?

  The answers to these questions will vary widely among banking institutions based on differences in business models, legal entity structures and past business and legal decisions.
- **There Will Be Impediments, and the Resolution Plan Should Propose Some Solutions.** As banking institutions are developing their resolution plans and formulating their resolution strategies, it is helpful to also develop a list of potential actions that could be taken, either by the banking institution or the regulators, in the future to address impediments to resolution. Thinking about solutions signals to the regulators that the banking institution has taken the resolution planning process seriously and anticipates issues that the regulators are likely to identify, as well as provides the banking institution an opportunity to define the solution.
- **Tailored Plans for U.S. Regional Banking Institutions.** One key way in which the plans of the large U.S. regional banking institutions will differ from those of the initial filers is that many of the largest U.S. regional banking institutions will be able to use a tailored Title I plan with the result that the focus of their Title I plans will be on their nonbanking operations.[212]
- **Tailored Plans for Foreign Banking Organizations.** Foreign banking organizations with a relatively small U.S. footprint, should also be able to file tailored plans that focus mainly on their U.S. nonbanking operations.

212 For a description of the qualifications for submitting a tailored plan, see Section II.A.4.c above.

IV. The Road Ahead

The U.S. and non-U.S. G-SIFIs that filed their initial Title I and IDI plans are currently scheduled to file their first annual updated plans by the middle of 2013. The Round 2 and Round 3 filers are scheduled to file their initial plans by the middle or end of 2013. This Part IV attempts to anticipate and describe the road ahead.

A. Key Assumptions

The assumptions applicable to the ***initial*** plans will almost certainly continue to include the mandatory assumption that all material entities fail. They will also continue to include the permissible assumptions that the macroeconomic scenario is the "baseline" scenario provided by the Federal Reserve in the 2012 CCAR process and that the covered company's failure is idiosyncratic rather than part of a marketwide crisis.[213] In contrast, the regulators are likely to require the ***updated*** plans to address all three of the macroeconomic scenarios from the 2012 CCAR process – namely, the "baseline," "adverse" and "severely adverse" scenarios – and to require them to assume that the covered company's failure could occur during a marketwide crisis instead of being an idiosyncratic event.[214] As discussed in the April 2013 guidelines referred to in footnote 17 above, the regulators have now relaxed the mandatory assumption that all material entities fail for all plans other than the initial plans, in order to be more realistic and to permit covered companies to develop SPOE or partial multiple-point-of-entry recapitalization strategies under Chapter 11 of the U.S. Bankruptcy Code.

B. Evolution of Guidelines, Scrutiny and Consequences

The U.S. regulators will continue to be in learning mode, and their guidelines and expectations will probably continue to evolve over time as illustrated by the differences between their guidelines for the initial plans and their April 2013 guidelines for the first annual updated plans to be submitted by the Round 1 and Round 1.5 Filers, which are referred to in footnote 17 above. It is not clear when

213 See 12 C.F.R. § 243.4(a)(4)(i) (permitting initial resolution plan to assume baseline economic conditions only).

214 See id. (requiring annual resolution plan updates to take into account that failure may occur under baseline, adverse and severely adverse economic conditions).

the regulators will start subjecting the plans to credibility reviews or whether the FDIC and the Federal Reserve have agreed on when that scrutiny should begin. Perennial critics of U.S. G-SIFIs, including FDIC board member Thomas Hoenig and Federal Reserve Bank of Dallas president Richard Fisher, will continue to call for the break-up of the U.S. G-SIFIs,[215] almost certainly regardless of how resolvable their resolution plans show them to be. The increasing burden of new regulations will also continue to put downward pressure on the market value of the U.S. G-SIFIs, which could eventually result in shareholder pressure to downsize or restructure.

C. Cross-Defaults

The U.S. regulators will try to find a solution to the problem of cross-defaults, which arises when a group's financial contracts not only link termination rights to the failure of the direct counterparties, but also link them to the failure of certain affiliates. Such cross-defaults can be an impediment to a successful resolution in either a Title II or U.S. Bankruptcy Code proceeding. Title II purports to override any such rights that arise as a result of a parent holding company being put into a Title II receivership,[216] but Title II does not apply extraterritorially. As a result, it cannot stop foreign counterparties from exercising their termination rights under contracts with respect to property located outside the United States, at least under contracts governed by non-U.S. law. The regulators and the G-SIFIs are likely to focus on solving this problem through amendments to ISDA master agreements and other contracts that eliminate or limit these cross-default rights, or by requiring guarantees to be moved or cross-defaults to relate only to an intermediate holding company that is not put into receivership. Although this problem could be solved by international regulatory reform that overrides such cross-defaults, the U.S. regulators are unlikely to want to rely on such reform because it might take decades to achieve, if it is achievable at all.

215 See, e.g., *Thomas M. Hoenig*, Director, FDIC, Financial Stability Through Properly Aligned Incentives, Remarks to the Exchequer Club, Washington, D.C. (Sept. 19, 2012), available at http://www.fdic.gov/news/news/speeches/chairman/spsep1912.html; Richard W. Fisher, Introduction, in Financial Stability: Traditional Banks Pave the Way (Jan. 2013), available at http://www.dallasfed.org/microsites/fed/annual/2012/1201e.pdf. See also *Simon Johnson*, Op-Ed., Fed Should Push to Cut Biggest Banks Down to Size, Bloomberg, Oct. 14, 2012, available at http://www.bloomberg.com/news/2012-10-14/fed-should-push-to-cut-biggest-banks-down-to-size.html.

216 Dodd-Frank Act, U.S. Public Law No. 111-203, § 210(c)(16), 124 U.S. Statutes at Large 1375, 1493–94 (2010); see also 12 U.S. Code of Federal Regulations § 380.12.

D. Shared Services

The U.S. regulators are likely to encourage U.S. G-SIFIs to centralize their shared services in one or more U.S. bank subsidiaries or bankruptcy-remote companies. They will also likely encourage the SIFIs to make sure the shared service providers have the economic incentive to continue providing the services to the various members of the group, including any material entities in a resolution proceeding. This may involve amending service level agreements to make sure they work during both business-as-usual and resolution periods.

E. Private Sector Emergency Liquidity Facilities

The U.S. regulators may well try to persuade the U.S. financial industry to establish a large, private sector liquidity facility that could provide emergency secured liquidity to a well-capitalized bridge financial company (or its equivalent) in a resolution or reorganization proceeding under either Title II or the U.S. Bankruptcy Code. The FDIC could use its orderly liquidation fund authority under Title II to guarantee the obligations of the bridge financial company in a Title II proceeding.[217] The authority of any U.S. government agency to provide secured or unsecured credit or liquidity support would be much more limited in a bankruptcy proceeding.

F. Recognition of Foreign Resolution Proceedings

The U.S. and non-U.S. regulators will probably eventually decide that they need to strengthen international comity doctrines or amend the local laws that implement the United Nations Commission on International Trade Law's (UNCITRAL) Model Law on Cross-Border Insolvency, to make sure they apply to the local recognition of foreign resolution proceedings as well as foreign bankruptcy proceedings. In the U.S., that could involve amending Chapter 15 of the U.S. Bankruptcy Code[218] so that it expressly applies to resolution proceedings, including with respect to foreign banks that have branches or agencies in the United States.

217 See Dodd-Frank Act, U.S. Public Law No. 111-203, § 210(n), 124 U.S. Statutes at Large 1357, 1506–09 (2010).

218 11 United States Code § 1501 et seq. (incorporating UNCITRAL Model Law on Cross-Border Insolvency).

G. Single-Point-of-Entry under Chapter 11 of the U.S. Bankruptcy Code

The U.S. regulators are now encouraging the U.S. G-SIFIs to develop SPOE recapitalization strategies under Chapter 11 of the U.S. Bankruptcy Code and have relaxed the mandatory assumptions to facilitate such strategies as discussed in the April 2013 guidelines referred to in footnote 17. Such a strategy would involve creating a new company ("**Newco**"), and transferring all of the assets of a failed bank holding company, including its operating subsidiaries, to a Newco in a court-approved transfer under Section 363 of the U.S. Bankruptcy Code.[219] Newco would be held by an independent private trustee for the benefit of the bankruptcy estate. If appropriately structured, free assets at the banking holding company level, including intercompany loans to operating subsidiaries, could be contributed to the operating subsidiaries before the Chapter 11 filing to the extent necessary to recapitalize them. If the U.S. G-SIFIs were able to develop such SPOE strategies under the U.S. Bankruptcy Code, this would result in the Title I and Title II resolution planning process converging instead of proceeding down separate roads, which is largely the case at the present time.

H. Proposed New Chapter 14 of the U.S. Bankruptcy Code

Congress and the U.S. regulators may decide to amend the U.S. Bankruptcy Code to include a new Chapter 14 that is designed specifically for the reorganization of U.S. SIFIs, including possibly making the SPOE recapitalization model more feasible under the U.S. Bankruptcy Code if there are impediments under existing Chapter 11. This new chapter, if enacted, would likely be used as a supplement to Title II rather than as a substitute for it. If properly designed, such a new Chapter 14 could limit the need to invoke Title II to a smaller set of the most extreme cases. Professor Thomas Jackson has already proposed such a new Chapter 14.[220] It could be used as a starting point for such legislation.

---

219 See id. § 363 (use, sale or lease of property of a bankruptcy estate).
220 See *Thomas H. Jackson*, Bankruptcy Code Chapter 14: A Proposal, in Bankruptcy Not Bailout 25 (2012).

I. Policy Statement

The FDIC will likely issue for public notice and comment a proposed policy statement or regulation that will attempt to provide more legal certainty and predictably to the market about how it will exercise its authority under Title II. The policy statement is likely to focus on fleshing out the details of its SPOE recapitalization strategy. While the timing of any such proposal is uncertain, it is likely to be issued sometime this year.

J. Minimum Debt Requirement

The Federal Reserve is likely to issue for public notice and comment a proposed minimum long-term unsecured debt requirement applicable to the U.S. G-SIFIs and certain other large U.S. bank holding companies. The purpose of this new requirement is to make sure large U.S. bank holding companies have enough loss-absorbing capacity to make the SPOE recapitalization strategy feasible. The Federal Reserve is likely to issue such a proposal in the first half of this year.

K. Repeal, Invalidation or Amendments to Title II

Jeb Hebsarling, the Chairman of the House Financial Services Committee, is on record calling for the repeal of Title II.[221] Certain state pension funds are also seeking to have Title II, or certain portions of it, invalidated as inconsistent with the U.S. Constitution.[222] These efforts are unlikely to result in the repeal or invalidation of Title II, but they could result in amendments to Title II designed to reduce the FDIC's discretion, increase legal certainty and predictability, and strengthen due process safeguards. These amendments could be considered in the context of adding a new Chapter 14 to the U.S. Bankruptcy Code or separately as part of an overall set of technical corrections to the Dodd-Frank Act.

221 See, e.g., *Jeb Hensarling*, Op-Ed., Dodd-Frank's Unhappy Anniversary, Wall Street Journal, July 25, 2012 (characterizing Title II as a "taxpayer-funded safety net for institutions deemed too big to fail," and calling for its repeal), available at http://online.wsj.com/article/SB10000872396390443437504577547320318621132.html.

222 See State National Bank of Big Spring v. Geithner, Case No. 1:12-cv-01032, First Amended Complaint, pp. 35–41, 48–54 (U.S. District Court for the District of Columbia, Sept. 20, 2012).

V. Conclusion

The resolution planning process has developed rapidly in the United States, but it is still in the process of developing. It is similar to the resolution planning processes in other countries in that it requires covered companies to provide information and data to the regulators to support regulator-prepared resolution plans. But in addition to providing such information and data to the regulators, U.S. banking groups are required to develop resolution strategies under the U.S. Bankruptcy Code and other applicable insolvency laws. For the time being, the Title I and Title II resolution planning processes are running down separate paths, but the U.S. regulators are taking steps to encourage the two paths to converge and be more supportive of each other.