



FINANCIAL INSTITUTIONS REGULATORY UPDATE

FDIC Approves Rules Regarding Resolution Plans

On September 13, 2011, the Board of the Federal Deposit Insurance Corporation (the “FDIC”) unanimously approved a final rule (the “DFA Resolution Plan Rule”) implementing Section 165(d)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”). Section 165(d)(1) of the Dodd-Frank Act requires every nonbank financial company supervised by the Federal Reserve Board under Title I of the Dodd-Frank Act¹ and every bank holding company with assets of \$50 billion or more (together “covered companies”) to submit a plan (a so-called “living will”) to the FDIC, the Federal Reserve Board and the Financial Stability Oversight Council (the “FSOC”) for its rapid and orderly resolution under the Federal Bankruptcy Code in the event of material financial distress or failure.² At the September 13 meeting, the FDIC Board also unanimously approved an interim final rule with request for comments (the “IDI Resolution Plan Rule”), meant to work in tandem with and complement the DFA Resolution Plan Rule, that requires every FDIC-insured depository institution with \$50 billion or more in total assets (“covered IDIs”) to submit periodically to the FDIC a plan for its resolution by the FDIC as receiver under the Federal Deposit Insurance Act in the event of its failure.³ The DFA Resolution Plan Rule and the IDI Resolution Plan Rule follow earlier proposed rules with respect to resolution plans (the “proposed rules”)⁴ and contain a number of modifications responsive to industry comments, including staggering initial resolution plan submission schedules based on the amount of a company’s nonbank assets and allowing certain covered companies to submit tailored plans that are subject to fewer requirements and concentrate on nonbank operations.

The FDIC characterizes the DFA Resolution Plan Rule, which addresses resolutions of covered companies under the Federal Bankruptcy Code, as focusing on minimizing systemic risk in the resolution of a covered company in order to protect the financial stability of the United States while maximizing recovery for creditors. It characterizes the IDI Resolution Plan Rule, which addresses resolutions of covered IDIs under the Federal Deposit Insurance Act, as focusing on ensuring that depositors of insured depository institutions receive access to their insured deposits rapidly, minimizing costs to the FDIC’s Deposit Insurance Fund and maximizing recovery for such institutions’ creditors. Significantly, neither the DFA Resolution Plan Rule nor the IDI Resolution Plan Rule directly addresses resolution

¹ Under Title I of the Dodd-Frank Act, the FSOC is charged with designating systemically important nonbank financial companies which, together with large bank holding companies, will be subject to heightened supervision by the Federal Reserve Board. The FSOC has not yet designated any such nonbank financial companies.

² The DFA Resolution Plan Rule is available at <http://www.fdic.gov/news/board/Sept13no4.pdf>.

³ The IDI Resolution Plan Rule is available at <http://www.fdic.gov/news/board/Sept13no6.pdf>.

⁴ The notice of proposed rulemaking (the “DFA NPR”) setting forth the proposed rule with respect to DFA resolution plans was published on April 22, 2011 and is available at [76 Fed. Reg. 22,648](http://www.fedreg.gov/2011/04/22/2011-08648). The notice of proposed rulemaking setting forth the proposed rule with respect to IDI resolution plans was published on May 17, 2010 and is available at [75 Fed. Reg. 27,464](http://www.fedreg.gov/2010/05/17/2010-10464).

planning for covered companies under the new orderly liquidation authority (the “OLA”) set forth in Title II of the Dodd-Frank Act. At the Board meeting, FDIC staff stated that it believes that resolution planning provided by the new rules, although developed under different insolvency frameworks from the OLA, will inform the FDIC in planning for resolutions under the OLA and should be useful in improving their quality.

The DFA Resolution Plan Rule must now be approved by the Federal Reserve Board and, thereafter, will become effective 30 days following publication in the Federal Register.⁵ The IDI Resolution Plan Rule will become effective January 1, 2012.

In the preface to the IDI Resolution Plan Rule, the FDIC solicits comments on 17 specific matters relating to the rule’s definitional terms, the rule’s strategic analysis, corporate governance and informational requirements, and other aspects of the rule. Such comments are due 60 days after publication of the rule in the Federal Register, which is expected to occur shortly.

The DFA Resolution Plan Rule

Covered Companies Required to Submit Resolution Plans. “Covered companies” that are required to submit resolution plans under the DFA Resolution Plan Rule are:

- nonbank financial companies (regardless of asset size) that have been designated by the FSOC for supervision by the Federal Reserve Board pursuant to Title I of the Dodd-Frank Act;
- bank holding companies (as defined in the Bank Holding Company Act of 1956) that have \$50 billion or more in total consolidated assets, as determined based on the average of the company’s four most recent consolidated financial statements on Federal Reserve Form FR Y-9C; and
- foreign banks or companies that are bank holding companies or are treated as bank holding companies under Section 8(a) of the International Banking Act (e.g., because they operate a U.S. branch, agency or commercial lending company in the United States or control an Edge corporation) and that have \$50 billion or more in total consolidated assets as determined based on the foreign bank’s or company’s most recent annual or, as applicable, the average of the four most recent quarterly, capital and asset reports for foreign banking organizations on Federal Reserve Form FR Y-7Q.

The FDIC indicates that, based on this criteria, it currently expects 124 companies (the majority of which are foreign banking organizations) will be covered companies.

Significantly, a foreign bank or company with less than \$50 billion in U.S. assets is not exempted from the resolution plan requirement if its total world-wide consolidated assets equal or exceed \$50 billion. In the preface to the DFA Resolution Plan Rule, the FDIC indicates that it chose to determine whether a foreign bank or company should be subject to the resolution plan requirement based on the firm’s world-wide consolidated assets, rather than only its U.S. assets, because a “plain reading” of Section 165 of the Dodd-Frank Act would appear to support that result. However, it indicates that it recognizes a resolution plan of a foreign-based company that has only limited assets or operations in the United States will be “significantly limited in its scope and complexity” and confirms that it and the Federal Reserve Board will take account of such company’s home country crisis management and resolution planning requirements in their review of such plans.

⁵ Section 165(d) of the Dodd-Frank Act also requires that the Federal Reserve Board require each nonbank financial company supervised by the Federal Reserve Board and large bank holding company to report periodically to the FDIC, the Federal Reserve Board and the FSOC on the nature and extent to which the company has credit exposure to other significant nonbank financial companies and bank holding companies and such companies have significant exposure to it. Although the DFA NPR contained proposed rules relating to this requirement, the FDIC and the Federal Reserve Board have decided to defer finalizing such rules pending separate rulemaking by the Federal Reserve Board on credit concentrations.

The Federal Reserve Board may, pursuant to a recommendation of the FSOC, raise any of the asset thresholds specified in the second and third bullet points above.

Once a company described in the second and third bullet points above meets any of the requirements to be a covered company, it will remain a covered company until it has less than \$45 billion in total consolidated assets, as determined based on the most recent annual or, as applicable, the average of the four most recent quarterly, reports made to the Federal Reserve Board.

In the case of multi-tiered holding companies, the covered company is deemed to be the top-tier company in the holding company.

Timing of Submission of Initial Resolution Plans. In response to comments that the proposed rules did not provide sufficient time to prepare initial resolution plans,⁶ the DFA Resolution Plan Rule staggers submission schedules for initial resolution plans based on the size (as of the effective date of the rule) of the covered company as follows:

- covered companies with \$250 billion or more in total nonbank assets (or, in the case of a foreign-based covered company, in total U.S. nonbank assets) must submit their initial resolution plans no later than July 1, 2012;
- other covered companies with \$100 billion or more in total nonbank assets (or, in the case of a foreign-based covered company, in total U.S. nonbank assets) must submit their initial resolution plans no later than July 1, 2013; and
- covered companies with less than \$100 billion in total nonbank assets (or, in the case of a foreign-based covered company, in total U.S. nonbank assets) must submit their initial resolution plans no later than December 31, 2013.

Notwithstanding the above, the FDIC and the Federal Reserve Board may determine that a covered company must submit its initial resolution plan on an earlier or later date. A company that becomes a covered company after the rule's effective date (e.g., because the FSOC designates it for supervision by the Federal Reserve Board, or because it is a bank holding company that has grown organically or by merger or acquisition over the \$50 billion threshold, after such date) must submit its initial resolution plan no later than the July 1 following the date the company becomes a covered company, provided such date occurs no earlier than 270 days after the date it becomes a covered company.

In the preface to the DFA Resolution Plan Rule, the FDIC acknowledges the burden associated with developing an initial plan and states it expects the process for submission and review of initial resolution plans will be iterative and include ongoing dialogue between the regulators and the covered company.

Required Subsequent Submissions and the Required Timing of Such Submissions. A covered company is required to submit an updated resolution plan annually, on or before the anniversary date for submission of its initial plan. In addition, a covered company is required to provide the FDIC and the Federal Reserve Board with a notice, no later than 45 days after any event, occurrence or change that results in, or could reasonably be foreseen to have, a material effect on its resolution plan. However, a covered company need not file such notice if the date on which the company would be required to submit the notice would be within 90 days prior to the date on which the covered company is required to file its annual update. In the preface to the DFA Resolution Plan Rule, the FDIC clarifies that a "material effect" means an effect of such significance as to render the company's resolution plan ineffective, in whole or in part, until revisions are made to the plan. The FDIC and the Federal Reserve Board may jointly require a covered company to make subsequent submissions more frequently or extend the time period that a covered company has to make a subsequent submission.

⁶ Under the DFA NPR, covered companies would have been required to submit their initial plans no later than 180 days after the rule became effective.

Informational Content of Resolution Plans. Under the DFA Resolution Plan Rule, the scope of the required resolution plan depends on whether the covered company is domiciled in the United States or is a foreign-based company and whether, in either case, it is eligible (as described below) to file a tailored resolution plan:

- *Domestic covered companies.* Covered companies (other than, to the extent specified below, those eligible to file tailored resolution plans) that are organized or incorporated in the United States are required to provide information with regard to subsidiaries and operations that are domiciled in the United States as well as their foreign subsidiaries, offices and operations.
- *Foreign-based covered companies.* Covered companies (other than, to the extent specified below, those eligible to file tailored resolution plans) organized in a jurisdiction other than the United States (other than bank holding companies) or that are foreign banking organizations⁷ are required to provide:
 - information with respect to subsidiaries, branches and agencies and critical operations⁸ and core business lines,⁹ as applicable, that are domiciled in the United States or that are conducted in whole or in material part in the United States,
 - a detailed explanation of how resolution planning for its U.S. operations is integrated into its overall contingency planning process, and
 - information regarding the interconnections and interdependencies of its U.S. operations and its foreign-based operations.
- *Covered Companies Eligible to File Tailored Resolution Plans.* In response to comments, the DFA Resolution Rule provides that covered companies with less than \$100 billion in total nonbank assets (or in the case of a foreign-based covered company, less than \$100 billion in total U.S. nonbank assets) that predominantly operate through one or more U.S. insured depository institutions¹⁰ may file tailored resolution plans that focus on the nonbank material entities and operations of the covered company. An eligible covered company that intends to file a tailored resolution plan must provide the FDIC and the Federal Reserve Board written notice of such intent and its eligibility no later than 270 days prior to the date on which the covered company is required to submit its resolution plan. The FDIC and the Federal Reserve Board may, in specific cases, require that a company that would otherwise be eligible to file a tailored resolution plan submit a full resolution plan.
- *General Requirements.* In general, all resolution plans are required to contain:
 - an executive summary covering:
 - the key elements of the company’s strategic plan for rapid and orderly resolution in the event of material financial distress¹¹ or the failure of the company,
 - material changes to the company’s resolution plan from its most recently filed plan, and
 - any actions taken since such plan to improve it or remediate its weaknesses.

⁷ “Foreign banking organizations” are (i) any “foreign bank” as defined in Section 1(b) of the International Banking Act, that (A) operates a branch, agency, or commercial lending company in the United States, (B) controls a bank in the United States, or (C) controls an Edge corporation acquired after March 5, 1987, and (ii) any company of which such foreign bank is a subsidiary.

⁸ “Critical operations” are defined as those operations the failure or discontinuance of which would pose a threat to the financial stability of the United States.

⁹ “Core business lines” are defined as those business lines that, in the firm’s view, upon failure would result in a material loss of revenue, profit or franchise value.

¹⁰ Specifically, the company’s insured depository institution subsidiaries must comprise at least 85% of the company’s total consolidated assets (or, in the case of a foreign-based covered company, the assets of the U.S. depository institution operations, branches, and agencies must comprise 85% or more of the company’s U.S. total consolidated assets).

¹¹ “Material financial distress” means that (i) the covered company has incurred, or is likely to incur, losses that will deplete all or substantially all of its capital and there is no reasonable prospect for the company to avoid such depletion, (ii) the assets of the covered company are, or are likely to be, less than its obligations to creditors and others, or (iii) the covered company is, or is likely to be, unable to pay its obligations in the normal course of business.

- a strategic analysis detailing how, in the event of material financial distress or the failure of the company, a reorganization or liquidation of the company (or, in the case of a covered company that is incorporated or organized in a jurisdiction other than the United States, its subsidiaries and operations that are domiciled in the United States) under the Bankruptcy Code could be accomplished within a reasonable time and in a manner that substantially mitigates the risk that the failure of the company would have serious adverse effects on the financial stability of the United States;¹²
- a description of the company's corporate governance structure for resolution planning;
- information regarding the company's overall organizational structure and related information, including an unconsolidated balance sheet for the company and a consolidating schedule for all material entities that are subject to consolidation;
- information regarding the covered company's management information systems, including a description of deficiencies in such systems and plans to address such deficiencies;
- a description of interconnections and interdependencies among the covered company and its material entities and among critical operations and the company's core business lines that, if interrupted, would materially affect funding or operations; and
- information concerning the identity of the company's supervisory authority and regulators, including information identifying any foreign agency or authority with significant supervisory authority over material foreign-based subsidiaries or operations.

The DFA Resolution Plan Rule requires that the resolution plan be approved by the covered company's board of directors and noted in the board's minutes. In the case of a foreign-based covered company, a delegee of the company's board of directors may approve the resolution plan. In the preface to the rule, the FDIC clarifies that, although required to approve the plan, the board of directors is not required to attest that the plan is accurate or that the information in it is correct.

Required and Prohibited Assumptions. In preparing its resolution plan, a covered company must:

- take into account that material financial distress or the failure of the covered company may occur under the baseline, adverse and severely adverse economic conditions set forth in the annual stress test of such company which is mandated under the Dodd-Frank Act (although the covered company may submit its initial resolution plan assuming the baseline conditions only, or, if the baseline scenario is not then available, a reasonable substitute developed by the covered company), and
- not rely on the provision of extraordinary support by the United States or any other government to the covered company or its subsidiaries to prevent the failure of the covered company.

Review of Resolution Plans and Resubmission of Deficient Plans. The DFA Resolution Plan Rule provides for the FDIC and the Federal Reserve Board to conduct a preliminary review of a resolution plan for informational completeness within 60 days of its submission. A covered company is required to resubmit an informationally incomplete plan, or provide additional information requested by the FDIC and the Federal Reserve Board to facilitate additional review, no later than 30 days (or such other time as the FDIC and the Federal Reserve Board jointly determine in a particular case) after receiving notice from the FDIC and the Federal Reserve Board that the plan is informationally incomplete or that additional information is needed. Following review of a plan, if the FDIC and the Federal Reserve Board jointly determine that the plan is not credible or would not facilitate an orderly liquidation of the

¹² Where the company has a subsidiary that conducts core business lines or critical operations of the covered company (a "material entity") and the material entity is subject to the Bankruptcy Code, then a resolution plan must assume the failure or discontinuation of such material entity and provide both the company's and the material entity's strategy. The covered company may limit the strategic analysis with respect to a material entity that is subject to an insolvency regime other than the Bankruptcy Code to a material entity that either had \$50 billion or more in total assets or conducts critical operations, and any such analysis is required to be by reference to that applicable insolvency regime.

covered company under the Bankruptcy Code, the covered company is required to submit a revised plan that addresses the deficiencies within 90 days (or such other time as the FDIC and the Federal Reserve Board jointly determine in a particular case) of receiving notice of the deficiency. If the covered company fails to submit a revised plan or the revised plan is deemed inadequate, then the FDIC and the Federal Reserve Board may jointly subject the covered company or any subsidiary of the covered company to more stringent capital, leverage or liquidity requirements, or to restrictions on growth, activities or operations. In addition, if the covered company fails to submit an adequate revised plan within a two-year period beginning on the date on which the determination to impose such requirements or restrictions is made, the FDIC and the Federal Reserve Board, in consultation with the FSOC, may direct the covered company to divest such assets or operations as the FDIC and the Federal Reserve Board jointly determine necessary to facilitate an orderly liquidation of the covered company in the event the company were to fail.

Confidentiality of Resolution Plans. Because resolution plans are required to contain highly detailed proprietary and sensitive information, the confidentiality of such plans has been a major industry concern. Although not fully addressing this concern, the DFA Resolution Plan Rule requires that resolution plans be divided into two portions: a public section (which will be made publicly available in accordance with applicable rules regarding the availability of information) and a confidential section. In the preface to the rule, the FDIC states that in its view a large portion of the information required to be submitted will be exempted from disclosure under the Freedom of Information Act (“FOIA”). That said, a covered company is required to submit a properly substantiated request for confidential treatment of any details in the confidential section it believes are entitled to an exemption from FOIA, and a formal determination as to the exemption will be made only if and when there has been a third-party FOIA request for the plan.

The IDI Resolution Plan Rule

Covered IDIs. Covered IDIs that are required to submit plans under the IDI Resolution Plan Rule consist of FDIC-insured depository institutions with \$50 billion or more in total assets, as determined based upon the average of the institution’s four most recent Reports of Condition and Income or Thrift Financial Reports, as applicable. (This represents a change from the FDIC’s proposed rule which had set the minimum asset amount for a covered IDI at \$10 billion and included a requirement that the covered IDI be owned or controlled by a holding company with \$100 billion or more in assets.) The FDIC indicates that based on this criteria it currently expects 37 IDIs (34 of which have parents that will be required to submit resolution plans under the DFA Resolution Plan Rule) will be covered IDIs under the IDI Resolution Plan Rule. To avoid duplication of effort, the IDI Resolution Plan Rule explicitly provides that a covered IDI may incorporate data and other information from its parent’s DFA resolution plan.

Timing of Submission of Initial Resolution Plans. The schedule for initial filings of resolution plans is staggered to correspond to the schedule for initial filings by parent companies under the DFA Resolution Plan Rule. Specifically:

- Covered IDIs whose parent companies, as of the effective date of the rule, had \$250 billion or more in total nonbank assets (or in the case of a parent company that is foreign-based, U.S. nonbank assets) must submit initial plans on or before July 1, 2012.
- Other covered IDIs whose parent companies, as of the effective date of the rule, had \$100 billion or more in total nonbank assets (or in the case of a parent company that is foreign-based, total U.S. nonbank assets) must submit initial plans on or before July 1, 2013.
- Covered IDIs whose parent companies, as of the effective date, had less than \$100 billion in total nonbank assets (or in the case of a parent company that is foreign-based, total U.S. nonbank assets) must submit initial plans on or before December 31, 2013.

Notwithstanding the above, the FDIC may require that a covered IDI submit its initial resolution plan by an earlier or later date. An IDI that becomes a covered IDI after the effective date of the IDI Resolution Plan Rule must submit its initial resolution plan by July 1 of the following calendar year.

Subsequent Submissions. The IDI Resolution Plan Rule largely parallels the DFA Resolution Plan Rule with respect to subsequent submissions. Thus, covered IDIs are required to submit updated resolution plans annually on or before the anniversary date for submission of their initial plans. In addition, a covered IDI is required to notify the FDIC no later than 45 days after any event, occurrence or change that results in, or could reasonably be foreseen to have, a material effect on the resolution plan of the covered IDI.

Informational Content of Resolution Plans. The resolution plan submitted must enable the FDIC, as receiver for the IDI, to resolve the IDI in the event of its insolvency under the Federal Deposit Insurance Act in a manner that:

- ensures depositors receive access to their insured deposits within one business day of the institution's failure (two business days if the failure occurs on a day other than a Friday);
- maximizes the net present value return from the sale or disposition of its assets; and
- minimizes the amount of any loss realized by creditors in the resolution (the "plan objectives").

The resolution plan must:

- include an executive summary describing key elements of the IDI's strategic plan for resolution under the Federal Deposit Insurance Act in the event of its insolvency, which is required to be updated annually to describe certain material events and changes;
- describe the covered IDI's, parent company's and affiliates' legal and functional structures, core business lines and overall deposit activities;
- identify critical services (i.e., those functions that must be kept operational during the resolution process to allow the receiver to conduct an orderly resolution) and providers of critical services and provide the covered IDI's strategy for continuing the services in the event of the IDI's failure;
- identify elements of the parent's operations that would, in the event the covered IDI was placed in receivership, obstruct its continued business operations or complicate the FDIC's resolution of the IDI;
- provide 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;
- provide a strategy for the sale or disposition of the deposit franchise, core business lines and major assets of the covered IDI in a manner that assures the plan objectives are achieved;
- demonstrate how a resolution that is least costly to the FDIC's Deposit Insurance Fund can be achieved under the strategy;
- provide a detailed description of processes the covered IDI employs for:
 - determining the current market values and marketability of core business lines and material asset holdings,
 - assessing the feasibility of the covered IDI's plans, under stress scenarios,
 - executing any sales, divestitures, restructurings or similar actions contemplated by the plan, and
 - assessing the impact of such actions on the covered IDI;
- identify major counterparties of the covered IDI, describe the relationship with them, and analyze whether the failure of the counterparty would likely impact the IDI;
- describe any material off-balance-sheet exposures;
- identify and describe the processes used by the covered IDI with respect to collateral the covered IDI has pledged;
- describe practices and procedures of the covered IDI and its core business lines relating to booking and trading derivatives;

- provide an unconsolidated balance sheet for the covered IDI, a consolidating schedule for all material entities that are subject to consolidation with the covered IDI, and financial statements (which need not be audited if not already) for material entities;
- provide information with respect to membership in payment, clearing and settlement systems;
- provide detailed descriptions of funding, liquidity and capital needs and resources of the covered IDI and its material entities;
- describe material affiliate funding relationships, accounts and exposures that the covered IDI or any of its subsidiaries have with the parent company or any parent company affiliate;
- describe systemically important functions that the covered IDI or its affiliates provide and critical vulnerabilities and exposures;
- describe the nature and extent of the covered IDI's cross-border operations and exposures;
- provide a detailed description of management information systems and applications, including any weaknesses and deficiencies;
- provide a detailed description of the corporate governance structure and processes as they relate to resolution planning;
- describe assessments of contingency planning conducted by the covered IDI since the date of filing of the most recent resolution plan; and
- discuss any other material factor that may impede the resolution of the IDI.

As under the DFA Resolution Plan Rule, the covered IDI's board of directors must approve the resolution plan.

Review of Resolution Plans and Resubmission of Deficient Plans; Confidentiality. The provision in the IDI Resolution Plan Rule with respect to review, resubmission of deficient plans and confidentiality are substantially similar to the provisions in the DFA Resolution Plan Rule.

If you have any questions with respect to this client alert, please contact the Sidley Austin LLP attorney with whom you normally work.

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