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FDIC AND FEDERAL RESERVE ISSUE JOINT NOTICE OF PROPOSED RULEMAKING UNDER THE DODD-FRANK ACT: RESOLUTION PLANS AND CREDIT EXPOSURE REPORTS

On March 29, 2011, the Federal Deposit Insurance Corporation (the "FDIC") and the Board of Governors of the Federal Reserve System (the "Fed") jointly released a notice of proposed rulemaking ("NPR") proposing rules relating to the resolution plan (also known as the "living will") and credit exposure report requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "DFA"). Both the resolution plan and credit exposure report requirements apply to nonbank financial companies ("NBFCs") designated by the Financial Stability Oversight Council (the "Council" or "FSOC") for Fed supervision and bank holding companies ("BHCs") (including any foreign bank or company that is treated as a bank holding company under U.S. law) with $50 billion or greater in consolidated assets (such BHCs, together with the Fed-supervised NBFCs, the "Covered Companies").[1]

The text of the March 29, 2011 NPR (the "March 29 NPR") is available at http://www.fdic.gov/news/board/29Marchno4.pdf.

Resolution plans, along with entity-executing "recovery" plans and the complementary credit exposure analyses that are a key element of such plans, are among the most significant aspects of the financial reform sweeping leading economies following the recent financial crisis. Legislative efforts to introduce resolution plan requirements result directly from the failure of financial firms such as Bear Stearns and Lehman Brothers and the use of public funds to rescue others such as Northern Rock and AIG. The political need to disavow the use of public funds in the rescue of "too-big-to-fail" financial institutions in the future led to the resolution planning effort, and specifically to its focus on anticipating and preparing for a "Chapter 11" or similar process. That the exercise of preparing resolution plans will be impactful – and that for many firms it may go beyond mere information gathering and reporting – is widely acknowledged. A financial industry leader was recently quoted as noting that a living will is an "enormous burden" that puts banks on a course "that differs dramatically from the way they currently look at their business."[2] Such comments are characteristic of the wider public discourse on resolution plans – expectations that the March 29 NPR is likely to confirm.

The March 29 NPR would require Covered Companies to submit, as early as year-end 2011, detailed resolution plans that would provide a roadmap for regulators to wind down the business in an environment of extreme economic stress, without the use of public funds. In addition, recent comments by regulators indicate that some may be inclined to use the resolution

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[1] DFA § 165(d).

[2] Mark Tenhundfeld, senior vice president at the American Bankers Association, *quoted in* Rebecca Christie and Ian Katz, *Banks, Insurers Resist U.S. 'Funeral Plan' Crisis Breakup Rules*, BLOOMBERG, Mar. 23, 2011, http://www.bloomberg.com.

planning process to mandate corporate structure changes at Covered Companies, rather than limiting the resolution planning exercise to an information gathering and reporting function. In a speech on November 17, 2010, FDIC Chairman Sheila Bair, stated:

> *If the [resolution] plans are not found to be credible, the FDIC and the Fed can even compel the divestiture of activities that would unduly interfere with the orderly liquidation of these companies. ... And let us be clear: we will require these institutions to make substantial changes to their structure and activities if necessary to ensure orderly resolution. If we fail to follow through, and don't ensure that these institutions can be unwound in an orderly fashion during a crisis, we will have fallen short of our goal of ending Too Big To Fail.*[3]

Chairman Bair expressed similar sentiments on February 28, 2011 at the *Reuters Future Face of Finance Summit*. At that forum, Chairman Bair commented that Covered Companies should be required to make changes if they are unable to file recovery plans acceptable to the Fed and FDIC. She stated: "If [an institution] can't show that they can be resolved in a bankruptcy-like process…then they should be downsized now."[4]

Indications that the resolution plan process may be used by regulators to effect corporate changes should be taken seriously. The DFA provides regulators with meaningful enforcement mechanisms relating to resolution plans. Under the Act, the Fed and FDIC may "jointly impose more stringent capital, leverage, or liquidity requirements, or restrictions on the growth, activities, or operations of" any company that fails to resubmit a workable resolution plan after receiving notice of an initial plan's deficiencies.[5] Moreover, the Fed and the FDIC, in consultation with the Council, may jointly direct a Covered Company "to divest certain assets or operations" that the Fed and FDIC identify "to facilitate an orderly resolution of such company under Chapter 11."[6] The Fed and FDIC may require such divestiture if the agencies previously notified the company of a deficiency in its filed plan, and the company failed to rectify that deficiency within two years.

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[3] Sheila C. Bair, Chairman, Fed. Deposit Ins. Corp., The Financial Crisis and Regulatory Reform, at the AICPA - SIFMA National Conference on the Securities Industry (Nov. 17, 2010), *available at* http://www.fdic.gov/news/news/speeches/archives/2010/spnov1710.html.

[4] Interview with Sheila Bair, Chairman, Fed. Deposit Ins. Corp., Reuters Future Face of Finance Summit (Feb. 28, 2011). *See also* Rebecca Christie and Ian Katz, *Banks, Insurers Resist U.S. 'Funeral Plan' Crisis Breakup Rules*, BLOOMBERG, Mar. 23, 2011, http://www.bloomberg.com ("'In certain cases, divestiture of portions of the financial company may be required,' said Bair.").

[5] DFA § 165(d)(5)(A).

[6] DFA § 165(d)(5)(B).

This alert sets out the key elements of the DFA and the March 29 NPR issued pursuant to it. It then provides context for the proposed rules by discussing the history of and international approaches to recovery and resolution planning. Finally, the alert discusses some of the practical issues regarding compliance with the resolution planning requirement.

I. Dodd-Frank and the March 29 NPR

A. Resolution Plan and Credit Exposure Report Requirements

The DFA, enacted July 21, 2010, requires Covered Companies to periodically file:

- a "plan for such company for rapid and orderly resolution in the event of material financial distress or failure;" and
- a "report concerning the nature and extent to which the company has credit exposure to other significant nonbank financial companies and significant bank holding companies and the nature and extent to which other significant nonbank financial companies and significant bank holding companies have credit exposure to the company."[7]

The DFA requires that both the resolution plan and credit exposure report be filed with the Fed, the FDIC, and the Council.[8]

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[7] DFA § 165(d).

[8] DFA § 165(d)(1) and (2). While authority is granted to each of the Fed, FDIC, and Council under Dodd-Frank with regard to living wills, the authority granted to each is different. The Council has discretion to make recommendations to the Fed concerning the requirement that "Title I Companies" (those subject to the resolution plan and credit exposure report requirements of DFA Title I) report periodically to the Council, Fed, and FDIC on their resolution plans. DFA § 115(d)(1). The Fed, in turn, is required to establish prudential standards for Title I Companies that include resolution plan and credit exposure reporting requirements. DFA § 165(b)(1). In addition, the Fed must require that each Title I Company periodically report to the Council, Fed and FDIC on their resolution plans. DFA § 165(d)(1). The FDIC is given joint authority alongside the Fed to determine what "other information" must be included in such resolution plans, DFA. § 165(d)(1)(D), as well as joint authority with the Fed to review such plans, DFA § 165(d)(3), and determine if there are deficiencies in the filed plans. DFA § 165(d)(4). In addition, a final provision within the living wills subsection states that, within 18 months after the date of enactment, the Fed and FDIC "shall jointly issue final rules implementing this subsection". DFA § 165(d)(8). Indeed, it appears to be this final provision that the FDIC is relying upon in connection with its initiative to expedite implementing the living wills requirement.

The DFA broadly outlines the required content of resolution plans but delegates to the FDIC and Fed joint authority to require additional information. The DFA provides that resolution plans must include:

> *(A) information regarding the manner and extent to which any insured depository institution ("IDI") affiliated with the company is adequately protected from risks arising from the activities of any nonbank subsidiaries of the company;*
> *(B) full descriptions of the ownership structure, assets, liabilities, and contractual obligations of the company;*
> *(C) identification of the cross-guarantees tied to different securities, identification of major counterparties, and a process for determining to whom the collateral of the company is pledged; and*
> *(D) any other information that the Fed and the FDIC jointly require by rule or order.*[9]

The DFA also broadly outlines the required contents of credit exposure reports; however, the Act notably does not contain the same language as appears in the section regarding resolution plans to the effect that the Fed and FDIC may require additional information. The DFA provides that credit exposure reports must include:

> *(A) the nature and extent to which the company has credit exposure to other significant nonbank financial companies and significant bank holding companies; and*
> *(B) the nature and extent to which other significant nonbank financial companies and significant bank holding companies have credit exposure to that company.*[10]

B. Entities Subject to Resolution Plan and Credit Exposure Report Requirements

The DFA provides that enhanced Fed supervision under Title I of the DFA (including the resolution plan and credit exposure report requirements) applies to two types of systemically important financial institutions:

- nonbank financial companies designated by the Council to be supervised by the Fed; and
- bank holding companies with total consolidated assets equal to or greater than $50 billion.[11]

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[9] DFA § 165(d)(1).

[10] DFA § 165(d)(2).

[11] DFA § 165(a)(1).

Additionally, under the DFA, the requirements of Title I (including the resolution plan and credit exposure report requirements) apply to certain foreign entities. The DFA states that "a foreign bank or company that is treated as a bank holding company pursuant to the International Banking Act of 1978" will be treated as a bank holding company for purposes of Title I of the DFA.[12]

The March 29 NPR provides more detailed criteria for determining which companies are subject to the resolution plan and credit exposure report requirements. The proposed rule defines the term "Covered Companies" to include:

- any BHC with $50 billion or more in total consolidated assets, as determined based on the average of the company's four most recent Consolidated Financial Statements for Bank Holding Companies as reported on the Federal Reserve's FR Y-9C;

- any foreign bank or company that is treated as a BHC under section 8(a) of the International Banking Act of 1978 (the "IBA") and that had $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 as reported on the Federal Reserve's Form FR Y-7Q; or

- any NBFC that the Council has determined under DFA § 113 must be supervised by the Board and for which such determination is in effect.[13]

The March 29 NPR appears to define "Covered Companies" broadly to include all legal entities below the "bank holding company" or "nonbank financial company". There is no provision in the NPR addressing the treatment of commercial subsidiaries of a bank holding company. Additionally, the NPR makes no reference as to how to apply the resolution plan and credit exposure report requirements to entities that employ an intermediate holding company ("IHC") structure to house all or part of their activities that are "financial in nature" under BHC Act § 4(k), as the Fed is authorized to require under the DFA.[14]

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[12] DFA § 102(a)(1).

[13] Resolution Plans and Credit Exposure Reports Required, Notice of Proposed Rulemaking at 5-6 (Mar. 29, 2011, as yet unpublished in the Federal Register), *available at* http://www.fdic.gov/news/board/29Marchno4.pdf (hereinafter cited as "March 29 NPR").

[14] DFA § 167(b)(1)(B) (The Fed may require such "siloing" of financial activities in an IHC if it determines that supervising a NBFC would be difficult if such an IHC were not created).

1. Foreign Entities Subject to Resolution Plan Requirements

The regulation of non-U.S. domiciled banks and companies, treated as bank holding companies under U.S. law, is critical given the dominance of non-U.S. financial conglomerates in global finance today. The FDIC has stated that of the 124 bank holding companies that will be required to produce resolution plans, only 26 are U.S. bank holding companies.[15]

As indicated above, Covered Companies are defined in the proposed rule to include foreign-domiciled companies that are treated as BHCs under United States law and have $50 billion or more in global consolidated assets. Additionally, foreign-domiciled NBFCs may also be designated for Fed supervision and become Covered Companies. However, while these foreign entities are "covered" by the resolution planning and credit exposure report requirements, the scope of that coverage differs from domestic U.S. financial companies.

a) Orderly Resolution of U.S. Operations Only

The March 29 NPR requires that each resolution plan provide for the rapid and orderly resolution of the Covered Company. In the case of Covered Companies incorporated outside of the United States, however, the proposed rule only focuses on the rapid and orderly resolution of U.S.-based operations or subsidiaries. The proposed rule states that the resolution plan need only address how "in the event of material financial distress or failure" a "reorganization or liquidation of the… *subsidiaries or operations of such foreign company that are domiciled in the United States*" could be accomplished under the U.S. Bankruptcy Code.[16]

b) Information Limited to U.S. Operations and Integration

While a Covered Company domiciled in the United States is required under the March 29 NPR to provide information relating to all of its global (U.S. and foreign) operations, the proposed rule provides that a foreign-based Covered Company is only "required to provide information regarding its U.S. operations, an explanation of how resolution planning for its U.S. operations is integrated into the foreign-based Covered Company's overall contingency planning process and information regarding the interconnections and interdependencies" among its U.S.-based and foreign operations.[17]

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[15] Meera Louis, *FDIC Seeks Comment on 'Living Wills' for Complex Financial Firms*, BLOOMBERG, Mar. 29, 2011, http://www.bloomberg.com/news/2011-03-29/fdic-seeks-comment-on-living-wills-for-complex-financial-firms.html.

[16] March 29 NPR at 12 (emphasis added).

[17] March 29 NPR at 11. As will become more clear below in Section II.D, a foreign company must provide information relating only to its U.S. operations in the "Strategic Analysis," "Organizational Structure," and most of the other resolution plan sections mandated by the NPR. However, in the plan, such a company must provide information regarding

[Footnote continued on next page]

c) Considering Foreign Regulation

The proposed rule does not provide meaningful insight into efforts by the Fed and FDIC to coordinate with other global regulators on resolution planning, but it does lay the groundwork for interaction. The DFA requires that the Fed "take into account the extent to which the foreign financial company is subject on a consolidated basis to home country standards that are comparable."[18] The March 29 NPR reiterates this statutory requirement and also proposes that each resolution plan (for either foreign or domestic companies) identify the Covered Company's regulators including "identifying any foreign agency or authority with supervisory authority over material foreign-based subsidiaries or operations."[19]

d) Credit Exposure Reports

The proposal also clarifies that credit exposure reports will be required of non-U.S. domiciled companies only to the extent of their U.S. operations. The NPR provides that "[a] Credit Exposure Report submitted by a Covered Company that is a company incorporated or organized in a country other than the United States (other than a bank holding company) or that is a foreign banking organization would be required to include only information with respect to its subsidiaries and operations that are domiciled in the United States."[20]

2. Foreign Operations of U.S. Financial Firms

The NPR provides that "A Covered Company that is domiciled in the United States would be required to provide information with regard to both its U.S. operations and its foreign operations."[21] For a Covered Company with foreign operations, the proposal states that "the plan should identify the extent of the risks related to its foreign operations and the Covered Company's strategy for addressing such risks".[22] The March 29 NPR further proposes that resolution plans "should take into consideration, and address through practical responses, the complications created by differing national laws, regulations and policies."[23] Finally, the

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"Interconnections and Interdependencies" as it relates to *both* U.S. *and* foreign operations, and the company must describe its overall global contingency planning.

[18] DFA § 165(b)(2)(B).

[19] March 29 NPR at 16.

[20] March 29 NPR at 16-17.

[21] March 29 NPR at 11.

[22] March 29 NPR at 14.

[23] March 29 NPR at 14.

proposed rule would require that companies with foreign operations map core business lines and critical operations to legal entities operating in, or connected to, foreign jurisdictions.[24]

3. NBFC Designation for Fed Supervision

The DFA provides that NBFCs will be subjected to Fed supervision upon the affirmative vote of 2/3 of the voting members of the Council (including an affirmative vote of the Chairperson, who is the Secretary of the Treasury). Under the Act, a U.S. or foreign NBFC is to be subject to enhanced Fed supervision if it presents a risk to U.S. financial stability. As described in our previous Alert "Financial Stability Council Releases Proposed Framework to Designate Financial Companies as Systemically Significant Under the Dodd-Frank Act,"[25] the Council issued a January 18, 2011 NPR, published in the Federal Register on January 26, 2011,[26] proposing an analytical framework through which it would make such designations (the "January 18 NPR").

The statutory guidelines for subjecting a NBFC to Fed supervision are broad. DFA § 113 requires that the Council consider the following non-exclusive factors in determining whether to designate a NBFC for Fed supervision and enhanced prudential standards:

- The extent of leverage of the company;
- The extent and nature of the off-balance-sheet exposures of the company;
- The extent and nature of the transactions and relationships of the company with other significant NBFCs and significant BHCs;
- The importance of the company as a source of credit for households, businesses, and State and local governments, and as a source of liquidity for the U.S. financial system;

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[24] March 29 NPR at 14-15.

[25] *Financial Stability Council Releases Proposed Framework to Designate Financial Companies as Systemically Significant Under the Dodd-Frank Act*, Gibson, Dunn & Crutcher LLP, Jan. 20, 2011, *available at* http://www.gibsondunn.com/Publications/Pages/FinancialStabilityOversightCouncil-ProposedFrameworktoDesignateFinancialCompaniesasSystemicallySignificantUnderDodd-Frank.aspx.

[26] Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 76 Fed. Reg 4555, 4560 (proposed January 18, 2011), *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-01-26/pdf/2011-1551.pdf.

- The importance of the company as a source of credit for low-income, minority, or underserved communities, and the impact that the failure of such company would have on the availability of credit in such communities;

- The extent to which assets are managed rather than owned by the company, and the extent to which ownership of assets under management is diffuse;

- The nature, scope, size, scale, concentration, interconnectedness, and mix of the activities of the company;

- The degree to which the company is already regulated by one or more primary financial regulatory agencies;

- The amount and nature of the financial assets of the company;

- The amount and types of the liabilities of the company, including the degree of reliance on short-term funding; and

- Any other risk-related factors the Council deems appropriate.[27]

The Council's January 18 NPR proposes an analytical framework comprised of six criteria that are based on the above-described considerations set out in the DFA. The Council would apply these categories in assessing whether a NBFC should be designated for Fed supervision. These six categories are:

1) Size;

2) Lack of substitutes for the financial services and products the company provides;

3) Interconnectedness with other financial firms;

4) Leverage;

5) Liquidity risk and maturity mismatch; and

6) Existing regulatory scrutiny.[28]

The six criteria can be bifurcated into those related to the potential of the company to cause widespread systemic distress, and those related to determining whether the company is at risk of failure. The first three criteria seek to assess the potential for spillovers from the firm's

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[27] DFA § 113(a)(2).

[28] Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, *supra* note 26, at 4560.

distress to the broader financial system or real economy. The second three categories seek to assess how vulnerable a company is to financial distress. The Council, applying its judgment, would evaluate NBFCs against each of the six categories, using quantitative metrics where possible.

The January 18 NPR is not limiting, however, as it would reserve for the Council discretion to consider other factors that are not included on the list in individual cases. The January 18 NPR states that the Council would "consider any other risk-related factors that the Council deems appropriate, either by regulation or on a case-by-case basis," as allowed by DFA § 113.[29]

While comments on the January 18 NPR were due by February 25, 2011, the Council had not issued a final rule adopting a framework for designating NBFCs for Fed supervision as of the date of this alert. However, the FDIC appears interested in seeing NBFC designation move forward apace. In Senate testimony on February 17, 2011, Chairman Bair echoed a sense of urgency, stating: "The FSOC is committed to adopting a final rule on this issue later this year, with the first designations to occur shortly thereafter."[30]

4. Categories of NBFCs Considered for Fed Supervision

In February 17, 2011 Senate testimony, Chairman Bair suggested that the Council is in the process of categorizing NBFCs that may potentially be subject to Fed supervision into four separate buckets. The existence of these buckets suggests that they will be filled, which may indicate a reasonable expectation that at least one company representing each category will be designated for Fed supervision. Chairman Bair stated:

> *The nonbank financial sector encompasses a multitude of financial activities and business models, and potential systemic risks vary significantly across the sector. A staff committee working under the FSOC has segmented the nonbank sector into four broad categories: 1) the hedge fund, private equity firm, and asset management industries; 2) the insurance industry; 3) specialty lenders; and 4) broker-dealers and futures commission merchants. The Council has begun developing measures of potential risks posed by these firms. Once these measures are agreed upon, the FSOC may need to request data or information that is not currently collected or otherwise available in public filings.*[31]

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[29] *Id.*

[30] Sheila C. Bair, Chairman, Fed. Deposit Ins. Corp., Implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act, before the Committee on Banking, Housing, and Urban Affairs, U.S. Senate (Feb. 17, 2011), *available at* http://www.fdic.gov/news/news/speeches/chairman/spfeb1711.html.

[31] *Id.*

Additionally, DFA § 113 contains an "anti-evasion" provision through which the Council may subject the financial activities of companies that are not NBFCs to prudential Fed supervision (with the financial activities going into an intermediate holding company). One question that should be resolved during the rulemaking process is whether this anti-evasion provision could be used to subject companies that are not technically nonbank financial companies to the resolution planning and credit exposure reporting requirements of the DFA.

C. Timing for the Submission of Resolution Plans and Credit Exposure Reports

The DFA requires that the Fed and FDIC jointly issue final rules implementing the resolution plan and credit exposure report requirements of the Act within 18 months of enactment of the DFA. However, the Act does not dictate how long Covered Companies have after final rules are issued to submit their initial plans. In addition, while the DFA requires that Covered Companies "report periodically" to regulators regarding resolution plans and credit exposure reports, it does not specify how frequently or under what circumstances plans or amended plans and credit exposure reports must be submitted.[32]

The March 29 NPR addresses both the deadline by which initial resolution plans must be filed, and the frequency with which resolution plans and credit exposure reports must be submitted going forward. Moreover, the proposal suggests a timeline under which Covered Companies could be required to submit resolution plans by as early as the end of 2011.

1. Resolution Plans

a) Filing of Initial Resolution Plans

That Covered Companies could be required to submit their initial resolution plans by the end of 2011 is supported by both the March 29 NPR and recent comments by senior regulators. The March 29 NPR would require a Covered Company to submit its initial resolution plan "within 180 days of the effective date of the final rule, or within 180 days of such later date as the company becomes a Covered Company."[33] The comment period for the March 29 NPR is set to run for 60 days from the date of the proposal's publication in the Federal Register. In theory, then, the initial submission date could be as early as 240 days following the date the rules are published. In an interview at the *Reuters Future Face of Finance Summit*, FDIC Chairman Bair stated that "I would hope that if we can get the rule out and final this summer that by the end of the year we would have the first round of plans filed with the FDIC and the Fed."[34] For the submission deadline to fall before the end of 2011, however, the Fed and FDIC would need to issue a final rule within about a month after the end of the comment period.

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[32] *See* DFA § 165(d)(1) and (2).

[33] March 29 NPR at 8.

[34] Interview with Sheila Bair, *supra* note 4.

b) Filing of Annual Resolution Plans and Updates

Following the filing of their initial resolution plans, under the proposed rule Covered Companies would be required to submit updated resolution plans within 90 days after the end of each calendar year. In addition, Covered Companies would be required to file updated resolution plans "after any event, occurrence, change in conditions or circumstances or change which results in, or could reasonably be foreseen to have, a material effect on the Resolution Plan of the Covered Company."[35] The March 29 NPR provides that plans updated due to a material event must be filed within 45 days following the event, but would grant the Fed and FDIC discretion to waive the filing requirement or grant additional time.

The NPR includes the following non-exclusive list of "material" changes that will trigger the requirement to re-file a resolution plan:

- A significant acquisition, or series of such acquisitions, by the Covered Company;
- A significant sale, other divestiture, or series of such transactions, by the Covered Company;
- A discontinuation of the business of, or dissipation of the assets of the Covered Company, a material entity, core business line or critical operation;
- The bankruptcy or insolvency of a material entity;
- A material reorganization of the Covered Company;
- The loss of a material servicing subsidiary or material servicing contract;
- The unavailability or loss of a significant correspondent or counterparty relationship, source of funding or liquidity utilized by the Covered Company, a material entity, a core business line or critical operation;
- The transfer or relocation of 5 percent or more of the total consolidated United States (domestic) assets of the Covered Company to a location(s) outside of the United States;
- A reduction in the market capitalization or book value of the consolidated capital of 5 percent or more of the Covered Company as of the end of the previous calendar yearend; and

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[35] March 29 NPR at 9.

- The transfer, termination, suspension or revocation of any material license or other regulatory authorization required to conduct a core business line or critical operation.[36]

This long list of triggers suggests that resolution plans may be required to be updated often, and also that there may be some uncertainty whether any particular transaction or occurrence triggers the need to submit an updated plan. For example, determining what regulators are likely to consider to be a "material" reorganization or a "significant" sale may prove elusive and require advance dialogue with regulators.

The updating requirement may also provide an incentive for firms to prepare initial resolution plans that are particularly robust. Consider, for example, the requirement that plans be updated within 45 days following a "significant acquisition" by a Covered Company. Confidence in the ability of a plan to remain workable following an acquisition could be an advantage to a bidder since the Fed, FDIC and Council would have the joint authority to ultimately require the divestiture of an acquisition that they found rendered a resolution plan for the Covered Company unworkable.

2. Credit Exposure Reports

The March 29 NPR also sets forth the frequency with which Covered Companies must submit credit exposure reports. While the DFA merely states that such reports are to be filed "periodically", the proposed rule states that Covered Companies must submit credit exposure reports on a quarterly basis. Specifically, companies would have to submit credit exposure reports "[n]o later than 30 days after the end of each calendar quarter."[37]

D. Minimum Information in Resolution Plans

As discussed in greater detail in the sections that follow, the March 29 NPR would require that each resolution plan contain:

- An executive summary;
- A strategic analysis of the resolution plan's components;
- A description of the company's corporate governance structure for resolution planning;
- Information regarding the company's overall organization structure and related information;

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[36] March 29 NPR at 9-10.

[37] March 29 NPR at 47.

- Information regarding the company's management information systems;
- A description of interconnections and interdependencies among the company and its material entities; and
- Supervisory and regulatory information.[38]

1. Strategic Analysis of the Resolution Plan's Components

The March 29 NPR provides that the Strategic Analysis section should describe the company's "critical thinking detailing how, in practice, it could be resolved under the Bankruptcy Code."[39] The proposed rule suggests that the Strategic Analysis include analytical support for its plan and its key assumptions, including any assumptions made concerning the economic and financial conditions that would be present at the time the company sought to implement such plan (likely through stress testing). Most importantly, the rule would require detailed information as to how, in the event of material financial distress or failure of the company, a reorganization or liquidation of the company under the Bankruptcy Code could be accomplished within a reasonable period of time and in a way that "substantially mitigates" the risk that the failure of the company would have serious adverse effects on U.S. financial stability.[40]

The proposed rule indicates that this analysis should focus on the company's:

- "core business lines," that are essential to the revenue, profit, or franchise value of the company;
- "critical operations," that are essential to the stability of the United States economy and financial system; and
- "material entities," that are subsidiaries or foreign offices of the company which are significant to its critical operations or core business lines.

Specifically, the Strategic Analysis must include detailed descriptions of:

- The analytical support for the resolution plan as a whole, along with key assumptions (including economic and financial condition assumptions) underlying the plan;

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[38] March 29 NPR at 11.

[39] March 29 NPR at 11-12.

[40] March 29 NPR at 12.

- The range of specific actions to be taken by the company to facilitate a rapid and orderly resolution of the company, its material entities, critical operations and core business lines in the event of material financial distress or failure of the company;

- An identification of funding, liquidity, capital and other needs of the company and its material entities, and a mapping of these needs to the core business lines and critical operations, in ordinary times and in times of distress;

- The company's strategy for maintaining operations of, and funding for, the company and its material entities, which is mapped to the company's critical operations and core business lines;

- The company's strategy in the event of a failure or discontinuation of a material entity, core business line or critical operation, including the actions the company would take to prevent or mitigate resulting adverse effects to both the company itself, and U.S. financial stability;

- An analysis of how resources would be utilized to facilitate an orderly resolution in an environment of material financial distress; and

- A strategy for ensuring that any of the company's insured depository institution subsidiaries will be adequately protected from risks arising from the activities of any nonbank subsidiaries of the company.[41]

The Strategic Analysis must also address the Covered Company's views on matters relating to bank regulators' ability to execute the proposed resolution plan, including:

- the timelines necessary to execute the company's resolution plan;

- any potential impediments to timely execution (and steps the company has taken or will take to remediate these impediments);

- the company's valuation of and the marketability of its core business lines, critical operations, and material asset holdings; and

- assessments of the feasibility and impacts of any potential sales or restructurings of these core business lines, critical operations, and material entities.[42]

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[41] March 29 NPR at 11-13, 40-41.

[42] March 29 NPR at 41.

a) Focus on Resolution through Bankruptcy

Both the DFA and the March 29 NPR refer to Chapter 11 as the benchmark by which regulators will determine whether a resolution plan is workable. The March 29 NPR states that the Strategic Analysis must describe how the Covered Company "can be resolved under Title 11 of the U.S. Code (the 'Bankruptcy Code') in a way that would not pose systemic risk to the financial system."[43] This language is consistent with the DFA which explains that resolution plans will be deemed deficient if they are "not credible or would not facilitate an orderly resolution of the company under Title 11."[44] The statute, moreover, describes that resubmitted plans must "demonstrat[e] that the plan is credible and would result in an orderly resolution under Title 11,"[45] and that the Fed and FDIC can order divestiture "to facilitate an orderly resolution of such company under Title 11."[46] Consequently, the DFA establishes a "bankruptcy" framework for assessment of credible resolution plans, a framework that the NPR adopts.

One question arising out of this focus on a "bankruptcy" framework in the DFA and March 29 NPR is whether successfully taking a Covered Company through a bankruptcy is the sole anticipated application for a resolution plan, or whether resolution plans should instead be designed to avoid bankruptcy. Indeed, strategies for addressing scenarios of financial distress, including asset sales and recapitalizations, could be used by an enterprise to avoid a Chapter 11 filing. It may be that the legislative and regulatory focus on bankruptcy reflects the desire that resolution plans be sufficiently robust to facilitate the wind-down of financial firms without the need of government to commit public funds.

2. Organizational Structure and Related Information

The proposed rule would require detailed information regarding the company's structure and financial positions, including:

- A hierarchical list of all material legal entities, including jurisdictional and ownership information,
- A mapping of the company's core business lines and critical operations to the above-described material entities and others;

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[43] March 29 NPR at 5.

[44] DFA § 165(d)(4).

[45] DFA § 165(d)(4)(B).

[46] DFA § 165(d)(5)(B).

- An unconsolidated balance sheet for the company, as well as a consolidating schedule;
- Information regarding material assets, liabilities, derivatives, hedges, capital and funding sources (including off-balance sheet exposures) and major counterparties;
- A mapping of the above information (material assets, liabilities, and the like) to material entities, critical operations, and core business lines, along with location information;
- Information regarding pledged collateral and its location;
- Descriptions of the practices and processes of the company in regard to the booking of trading and derivatives activities, and in regard to the establishment of exposure limits;
- A description of the company's hedging strategy;
- Identification of major counterparties and a description of the interconnections, interdependencies, and relationships with such parties;
- An analysis of whether the bankruptcy of a major counterparty would likely have an adverse effect on and result in the material financial distress or failure of the company;
- An identification of trading, payment, clearing, and settlement systems utilized by the company, and a mapping of these memberships to material entities, critical operations, and core business lines;[47]
- For companies with foreign operations:[48]
    - the extent of risks related to foreign operations and strategies for addressing these risks;
    - complications created by differing national laws, regulations, and policies;
    - a mapping of core business lines and critical operations to legal entities operating in or in connection with foreign jurisdictions; and

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[47] March 29 NPR at 14, 42-44.

[48] March 29 NPR at 14.

- an assessment of the company's ability to maintain core business lines and critical operations in foreign jurisdictions during material financial distress and insolvency proceedings.

3. Interconnections and Interdependencies between the Company and Its Material Entities

Additionally, Covered Companies must describe the interconnections and interdependencies of the company with its "material entities and affiliates, and among the critical operations and core business lines of the Covered Company that, if disrupted, would materially affect the funding or operations of the Covered Company, its material entities, or its critical operations or core business lines."[49]

These interconnections may include:

- Common or shared personnel, facilities, or systems;
- Capital, funding, or liquidity arrangements;
- Credit exposures;
- Cross-guarantee arrangements, cross-collateral arrangements, cross-default provisions, and cross-affiliate netting agreements;
- Risk transfers; and
- Service level agreements.[50]

4. Other Required Information

The proposed rule requires the following additional information:

- Executive Summary. An "Executive Summary" should summarize: a) the key elements of the strategic plan; b) material changes from the most recent filed plan; and c) any actions taken to improve the effectiveness of the plan or to remediate any material weaknesses or impediments to effective and timely execution of the plan.
- Corporate Governance Structure for Resolution Planning. A description of the company's corporate governance structure for resolution planning should: a) include information regarding how resolution planning is integrated into the

[49] March 29 NPR at 15.

[50] March 29 NPR at 46.

corporate governance structure and processes of the company; b) identify the senior management official primarily responsible for the development, maintenance, implementation and filing of the resolution plan; and c) describe the extent of reporting on resolution planning to the company's board and senior officers.

- Management Information Systems. A Covered Company must provide information regarding its management information systems (MIS) supporting core business lines and critical operations. It should also address the continued availability of key MIS during material financial distress and insolvency proceedings.

- Supervisory and Regulatory Information. Each resolution plan is required to identify the Federal, state, and foreign authorities with supervisory authority over the company, including "any foreign agency or authority with supervisory authority over material foreign-based subsidiaries or operations."[51]

The proposed rule additionally requires that Covered Companies provide contact information for the senior management official responsible for resolution planning, as well as contact information for the material entities, critical operations, and core business lines of the company.[52] A Covered Company must also be able to "demonstrate its capability to promptly produce, in a format acceptable to the Board and the Corporation, the data underlying the key aspects" of the resolution plan.[53]

5. Internal Corporate Approval Required for Plans

The Board of Directors of a Covered Company must approve the company's initial resolution plan and its subsequent annual plans. With regard to updated plans, however, a delegee of the Board of Directors may approve the plan. In the case of foreign-based Covered Companies, a delegee of the Board of Directors may approve initial plans as well as any updates.[54]

E. Iterative Review Process under the Proposed Rule

The resolution planning process will require a close collaboration and exchange of information with banking regulators. The DFA provides that the Fed and FDIC are to review

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[51] March 29 NPR at 16.

[52] March 29 NPR at 46.

[53] March 29 NPR at 47.

[54] March 29 NPR at 37.

resolution plans, give notice of deficiencies to companies lacking a credible plan, and impose stringent requirements and, possibly, divestiture, on such deficient companies.[55]

The March 29 NPR confirms the iterative nature of the resolution planning process. Under the proposed rule, Covered Companies will spend much time sharing plans and information with regulators within short time frames. Therefore, it is important that companies subject to a resolution planning requirement have experience dealing with bank regulators, and that they consider engaging advisors that have experience managing complex financial restructurings under the supervision of bank regulators.

The March 29 NPR proposes a multi-step, iterative process for the submission and agency review of resolution plans. Under the proposed rule, the following process would apply to the submission and approval of plans:

1) The Covered Company submits its plan.

2) The Fed and FDIC review the plan "to determine whether it appears to contain the elements set forth in the proposed rule and to be informationally complete."[56] The agencies have 60 calendar days to make this initial determination.

    a. If the Fed and FDIC determine that the plan is deficient, the company has 30 days to resubmit a complete plan, after receipt of a written notice of deficiency.

3) After accepting a plan as complete for further review, the Fed and FDIC review the plan to determine jointly whether it is in "compliance with the requirements of the proposed rule."

    a. If the Fed and FDIC determine that the plan is "not credible or would not facilitate an orderly resolution"[57] of the company, they must notify the company in writing, identify the deficiencies, and request resubmission.

    b. The company then has 90 days to resubmit a revised plan. The resubmitted plan must detail revisions made to address the deficiencies identified by the Fed and FDIC. It must also describe "any changes to the Covered Company's business operations and corporate structure that the Covered Company proposes to undertake to facilitate implementation of the revised Resolution Plan." Finally, a resubmitted plan must include a statement as to why the

[55] DFA § 165(d)(3)-(5).

[56] March 29 NPR at 17.

[57] March 29 NPR at 52.

company believes the revised plan is credible and would result in an orderly liquidation of the company under the Bankruptcy Code.

4) Upon resubmission, the agencies then re-review the resolution plan. The NPR does not provide details of next steps, but presumably:

   a. If a plan is jointly determined by the agencies to be acceptable, the review process ends.

   b. If a plan is jointly determined by the agencies to be deficient, the resubmission process is repeated.

1. Case-by-Case Assessments

The March 29 NPR proposes that plan adequacy be determined on a case-by-case basis. The NPR indicates that the above-described requirements constitute "the minimum content" of a plan, and that the Fed and FDIC will assess each company's plan individually:

> *The proposed rule specifies the minimum content of a Resolution Plan. The Board and the Corporation recognize that plans will vary by company and, in their evaluation of plans, will take into account variances among companies in their core business lines, critical operations, foreign operations, capital structure, risk, complexity, financial activities (including the financial activities of their subsidiaries), size and other relevant factors.*[58]

F. Enforcement Authority under the Proposed Rule

The March 29 NPR calls for the imposition of the following sanctions in the event a company fails to timely resubmit an acceptable and credible revised plan:

1) The Fed and FDIC would have the authority to jointly impose more stringent capital, leverage or liquidity requirements, or restrictions on the growth, activities or operations of a company that fails to resubmit a rejected plan or that submits a plan that the Fed and FDIC determine continues to be deficient.[59]

2) If a company fails to submit a workable plan within two years of the above-described sanctions, the Fed and FDIC, in consultation with the Council, would have the authority to jointly direct the company to divest assets or operations as needed to

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[58] March 29 NPR at 8-9.

[59] March 29 NPR at 19.

facilitate an orderly resolution of the company under the Bankruptcy Code in the event the company were to fail.[60]

Presumably these mechanisms would also apply if a company failed to submit an initial plan, but the proposed rule does not make this clear.

Also, the March 29 NPR provides that, prior to issuing a notice of deficiency and imposing restrictions or issuing a divestiture order with respect to a Covered Company, which action is "likely to have a significant impact on a functionally regulated subsidiary or a depository institution subsidiary", the Fed is required to consult with each Council member that primarily supervises the subsidiary.[61] The Fed may also consult with any other Federal, state, or foreign supervisors that the Fed deems appropriate.

G. Minimum Information Required in Credit Exposure Reports

The DFA provides that the Council may recommend to the Fed that Covered Companies be required to report periodically to the Council, the Fed, and the FDIC on the nature and extent "to which the company has credit exposure to other significant nonbank financial companies and significant bank holding companies" and "to which other significant nonbank financial companies and significant bank holding companies have credit exposure to that company."[62] The DFA does not set out the detailed contents of a credit exposure report.

The March 29 NPR would require that a Company submit the following information (current as of the end of the given calendar quarter) in a credit exposure report:

- The aggregate credit exposure associated with all extensions of credit, including loans, leases, and funded lines of credit, by:
    - The Covered Company and its subsidiaries to each significant company [defined in the NPR to mean a significant NBFC or a significant BHC] and its subsidiaries; and
    - Each significant company and its subsidiaries to the Covered Company and its subsidiaries.
- The aggregate credit exposure associated with all committed but undrawn lines of credit by:

[60] March 29 NPR at 19.

[61] March 29 NPR at 54.

[62] DFA § 165(d)(2).

  - The Covered Company and its subsidiaries to each significant company and its subsidiaries; and
  - Each significant company and its subsidiaries to the Covered Company and its subsidiaries.

- The aggregate credit exposure associated with all deposits and money placements by:
  - The Covered Company and its subsidiaries with each significant company and its subsidiaries; and
  - Each significant company and its subsidiaries with the Covered Company and its subsidiaries.
- The aggregate credit exposure associated with (on both a gross and net basis) all repurchase agreements between the Covered Company and its subsidiaries and each significant company and its subsidiaries;
- The aggregate credit exposure associated with all reverse repurchase agreements (on both a gross and net basis) between the Covered Company and its subsidiaries and each significant company and its subsidiaries;
- The aggregate credit exposure associated with all securities borrowing transactions (on both a gross and net basis) between the Covered Company and its subsidiaries and each significant company and its subsidiaries;
- The aggregate credit exposure associated with all securities lending transactions (on both a gross and net basis) between the Covered Company and its subsidiaries and each significant company and its subsidiaries;
- The aggregate credit exposure associated with all guarantees, acceptances, or letters of credit (including endorsement or standby letters of credit) issued by:
  - The Covered Company and its subsidiaries on behalf of each significant company and its subsidiaries;
  - Issued by each significant company and its subsidiaries on behalf of the Covered Company and its subsidiaries;
- The aggregate credit exposure associated with all purchases of or investments, as of the last day of the reporting quarter, in securities issued by each significant company or its subsidiaries by the Covered Company and its subsidiaries;
- The aggregate credit exposure associated with all counterparty credit exposure (on both a gross and net basis) in connection with a derivative transaction between the Covered Company and its subsidiaries and each significant company and its subsidiaries;

- A description of the systems and processes that the Covered Company uses to:
  - Collect and aggregate the data underlying the Credit Exposure Report; and
  - Produce and file the Credit Exposure Report;
- The credit exposure associated with intra-day credit extended, as specified by paragraph (i) [above, relating to extensions of credit, including loans, leases, and funded lines of credit], by the Covered Company to each significant company and its subsidiaries during the prior quarter; and
- Any other transactions that result in credit exposure between a Covered Company and its subsidiaries and each significant company and its subsidiaries that the Board, by order or regulation, determines to be appropriate.[63]

1. Defining "Significant" Institutions for the Purposes of Counterparty Reporting

The March 29 NPR does not define what "significant bank holding companies" or "significant nonbank financial companies" would qualify as a "significant company" counterparty for the purposes of credit exposure reports. However, the Fed issued a separate NPR on February 8, 2011, published in the Federal Register on February 11, 2011, proposing to define these terms.[64] The February 8 NPR defines a "significant nonbank financial company" to include:

- any nonbank financial company supervised by the Board;[65] and
- any other nonbank financial company that had $50 billion or more in total consolidated assets as of the end of its most recently completed fiscal year.

The February 8, 2011 NPR also defines a "significant bank holding company" as any bank holding company, or foreign bank that is treated as a bank holding company, that had $50 billion or more in total consolidated assets as of the end of the most recently completed calendar year. Comments on this NPR were due March 30, 2011. The final rule, when issued, will establish

[63] March 29 NPR at 48-50.

[64] Definitions of "Predominantly Engaged in Financial Activities" and "Significant" Nonbank Financial Company and Bank Holding Company, 76 Fed. Reg. 7731 (proposed Feb. 8, 2011), *available at* http://www.federalreserve.gov/reportforms/formsreview/RegY2_20110211_ifr.pdf.

[65] *See supra* Section I.B.3 (regarding the Council's designation of Fed-supervised NBFCs).

what counterparties will be deemed to be "significant" and thus required to be included on a Covered Company's credit exposure report.

2. Reporting Requirements for Foreign-Domiciled Covered Companies

The March 29 NPR additionally proposes that "A Credit Exposure Report submitted by a Covered Company that is a company incorporated or organized in a country other than the United States (other than a bank holding company) or that is a foreign banking organization shall include the information [required under the rule] only with respect to the subsidiaries, offices, and operations that are domiciled in the United States."[66]

H. Confidential Treatment of Resolution Plans

Resolution plans and credit exposure reports will contain highly sensitive, detailed information that many respondents would assert constitutes trade secrets and commercial information. There is general concern that this information, once provided to regulators, could be publicly disclosed under the Freedom of Information Act (the "FOIA"). One former Securities and Exchange Commission ("SEC") Commissioner is quoted as having commented at a March 8, 2011 *National Association for Business Economics* conference in Washington, DC that companies are concerned about whether the information in their living wills can be kept confidential, and that "[f]or firms that have never provided this level of granular business data to a governmental entity, it is really quite concerning."[67]

1. Agency Treatment of Confidential Information: Statutes

a) Dodd-Frank

The DFA does not specifically address the confidentiality of information contained in resolution plans and credit exposure reports. However, DFA § 112(d)(5) addresses the confidentiality of information submitted under Title I generally, providing as follows:

> *(5) Confidentiality*
>
> *(A) In General.—The Council, the Office of Financial Research, and the other member agencies shall maintain the confidentiality of any data, information, and reports submitted under this title.*
>
> *(B) Retention and Privilege.—The submission of any nonpublicly available data or information under this subsection and subtitle B shall not constitute a waiver*

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[66] March 29 NPR at 50.

[67] Annette Nazareth, speaking at the National Association for Business Economics Conference (Mar. 8, 2011) *quoted in* Rebecca Christie and Ian Katz, *Banks, Insurers Resist U.S. 'Funeral Plan' Crisis Breakup Rules*, BLOOMBERG, Mar. 23, 2011, http://www.bloomberg.com.

> *of, or otherwise affect, any privilege arising under Federal or State law (including the rules of any Federal or State court) to which the data or information is otherwise subject.*
>
> *(C) Freedom of Information Act.—Section 552 of title 5, United States Code, including the exceptions thereunder, shall apply to any data or information submitted under this subsection and subtitle B.*[68]

The resolution plan and credit exposure report requirements are set forth in Section 165(d) of the DFA. Section 165(d) appears in Title I of the DFA, the same title in which this confidentiality provision appears. On the statute's face, then, resolution plans and credit exposure reports (both of which would presumably qualify as "data," "information," or "reports") submitted to the Council, and to the Fed and FDIC (which are "member agencies" of the Council), would qualify for the DFA's statutory confidentiality protection contained in DFA § 112(d)(5)(A). Consequently, the DFA itself may preclude the disclosure of resolution plan and credit exposure report information as a statutory matter.

However, the interplay between the confidentiality provisions of the DFA and the FOIA is ambiguous. Paragraph 112(d)(5)(C) states that the FOIA "shall apply to any data or information submitted under this subsection and subtitle B". The resolution plan and credit exposure report requirements of DFA § 165(d) fall under subtitle C, rather than the referenced subsection or subtitle B. Consequently, it is unclear, based on the DFA language alone, whether the FOIA (and its exceptions) would apply to resolution plans and credit exposure reports.

b) The Freedom of Information Act

The Freedom of Information Act, codified at 5 U.S.C. § 552, provides, in part, that federal agencies are obligated to maintain their "records" in forms that are readily reproducible, and to "promptly" make these records available to "any person" upon receipt of a request that "reasonably describes the records" and "is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed".[69]

The FOIA provides for a number of exceptions under which an agency need not provide requested information. The most obvious exception applicable to resolution plans and credit exposure reports is the exception for "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[70] As discussed below, the March 29 NPR provides that Covered Companies would be able to designate their resolution plan and credit exposure materials as confidential. Moreover, resolution plans would almost certainly

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[68] DFA § 112(d)(5).

[69] 5 U.S.C. § 552(a)(3).

[70] 5 U.S.C. § 552(b)(4).

include information that is, in fact, "commercial or financial information." Consequently, if FOIA applies, the exception for "trade secrets and commercial or financial information" should protect submitted resolution plans from public disclosure.

Additional exceptions contained within FOIA could also potentially apply to protect information contained in resolution plans and credit exposure reports. Consider, for example, the following FOIA exception relating directly to financial institution regulators:

> *(b) This section does not apply to matters that are—…(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions….*[71]

In addition, consider the following exception relating to exemptions that are specifically authorized by statute:

> *(b) This section does not apply to matters that are—…(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—*
>
> *(A)*
>
> > *(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or*
> >
> > *(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and*
>
> *(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.*[72]

This latter exception may function in conjunction with the DFA's statutory prohibition, at DFA § 112(d)(5), discussed above, to preclude disclosure even under FOIA.

2. Agency Treatment of Confidential Information: Rules

The March 29 NPR addresses the confidentiality of resolution plans and credit exposure reports, indicating that a Covered Company must actively file a request for confidential treatment of submitted materials:

> *Any Covered Company submitting a Resolution Plan or Credit Exposure Report pursuant to this subpart that desires confidential treatment of the information*

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[71] 5 U.S.C. § 552(b)(8).

[72] 5 U.S.C. § 552(b)(3).

> *submitted pursuant to 5 U.S.C. 552(b)(4) and the Corporation's Disclosure of Information Rules, 12 CFR part 309, the Board's Rules Regarding Availability of Information, 12 CFR part 261 and the Council's Rules of Organization and related policies shall file a request for confidential treatment in accordance with those rules*.[73]

Thus, the proposed rule clearly references FOIA's 552(b)(4) exception for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Although the NPR does not establish confidentiality as a default, it does acknowledge the specific exception, and provides for the protection of this information under each particular agency's rules.

Agency protections may not necessarily be robust. For one, the Council has not yet finalized its own confidentiality rules. The agency recently issued an NPR on March 17, 2011, published in the Federal Register on March 28, 2011, proposing FOIA rules, with comments due on May 27, 2011. The proposed rule references the FOIA statutory exemption for "trade secrets and commercial or financial information." Nonetheless, the March 17, 2011 NPR states: "[e]ven though a FOIA exemption set forth in 5 U.S.C. 552(b) may apply to the records requested, the Council may, if not precluded by law and in its sole discretion, make discretionary disclosures of its records."[74]

Additionally, although the Council's March 17, 2011 FOIA NPR establishes procedures for business entities to designate business information as confidential and protected from FOIA disclosures, the proposed rule also requires the submitter of business information to actively challenge FOIA requests through agency procedures, in many cases. In some circumstances, these procedures could ultimately lead to the release of potentially confidential business information.

3. Recent Court Treatment of FOIA Challenge to Agency Confidentiality

Beyond agency policies and protections, confidentiality in the face of FOIA litigation is of particular concern given the recent *Bloomberg v. Board of Governors of the Federal Reserve System* litigation, in which the news organization sought FOIA disclosure regarding the Fed's 2008 discount window lending.[75] Although the Fed has historically succeeded in rebuffing

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[73] March 29 NPR at 55.

[74] Implementation of the Freedom of Information Act, 76 Fed. Reg. 17038, 17040 (proposed Mar. 17, 2011), *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-03-28/pdf/2011-7005.pdf.

[75] Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys., 649 F.Supp.2d 262 (S.D.N.Y. 2009), *aff'd*, 601 F.3d 143 (2d Cir. 2010), *cert. denied*.

disclosure requests, in this context the Supreme Court, denying certiorari, "left intact a court order that gives the Fed five days to release" details regarding the banks that received this discount window emergency lending.[76]

Although significant, this historic decision may not necessarily bear on the disclosure of resolution plans. For one, the *Bloomberg* case is highly distinguishable. The Second Circuit, upholding the district court, did not reach the question of the confidentiality of the requested discount window materials. The court determined instead, that the Fed's potentially confidential materials were not "obtained from a person" and therefore did not qualify for the FOIA exception relating to "trade secrets and commercial or financial information *obtained from a person* and privileged or confidential." The court pointed to the fact that the FOIA request "does not seek loan applications; it seeks documents that show what loans the Federal Reserve Banks actually made."[77] Consequently, the requested discount window loan materials were generated by the Federal Reserve itself, and not obtained from the borrowing banks. Because these were not "obtained from a person," then, the Second Circuit declined to apply the FOIA exception, and allowed the disclosure.

In the resolution plan context, submitted plans would likely be seen to have been "obtained from a person" (which includes corporations). Consequently, it is somewhat likely that the *Bloomberg* decision, which did not rule in regard to the nature of confidentiality or the definition of "commercial or financial information," would not apply. The Second Circuit's historic decision may have also been partially driven by the DFA's mandated disclosure requirements (following a two year lag) of future discount window lending, as well as the perceived lack of harm to banks who received these loans.

Nonetheless, despite the differences between *Bloomberg* and the resolution planning context, the Second Circuit's historic decision and the Supreme Court's failure to grant certiorari do change the FOIA landscape, and cast some doubts on the confidentiality of information submitted to financial sector regulators. It is as yet unclear to what extent future FOIA requests of the Fed and other financial regulatory agencies will succeed through litigation.

4. Additional Confidentiality Considerations

Additional considerations and concerns surrounding resolution plan confidentiality include:

- The lack of precedent or litigation surrounding the FDIC's confidentiality requirements;

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[76] Greg Stohr and Bob Ivry, *Fed Will Release Bank Loan Data as Top Court Rejects Appeal*, BLOOMBERG, Mar. 21, 2011, http://www.bloomberg.com/news/2011-03-21/fed-must-release-bank-loan-data-as-high-court-rejects-appeal.html.

[77] *Bloomberg*, 601 F.3d at 148.

- The FDIC's reputation among some for being casual with how it requests and handles information; and
- The degree of confidentiality to be maintained by U.S. regulators who may ultimately share resolution planning and credit exposure records with international regulators.

In light of these various considerations and recent events, the confidentiality of resolution plans and credit exposure reports is certain to be a significant issue in the coming months.

II. History and Genesis of Resolution Plans

A. Overview

Recovery and resolution plans are part of the response to the unanticipated failures and taxpayer-funded rescues of global financial firms during the 2008 financial meltdown, chief among them the rescue of Bear Stearns and the bankruptcy of Lehman Brothers in the United States and the government-funded rescues of Royal Bank of Scotland and HBOS in the United Kingdom. At a minimum, resolution plans will require detailed, workable plans for executing orderly restructurings, including a granular capital structure analysis and a showing that material affiliates can function on a stand-alone basis. At the most, they may serve as a means for regulators to force streamlining, divestitures, and even the break up of the largest financial institutions.

Many of the large banks and financial institutions that are or will become subject to resolution plan requirements operate across national boundaries, and as a result, a global view is important. During 2010, both the United States and the United Kingdom enacted broad legislation mandating that the largest, most systemically important financial institutions create and maintain such plans, legislation that ultimately led to the U.S. rulemaking discussed in this alert. In addition, months prior to the DFA and the most recent resolution plan rulemaking, the U.S. FDIC independently proposed a detailed rule that would require that the largest insured depository institutions prepare resolution plans. In the U.K., the Financial Services Authority ("FSA") initiated a year-long pilot program in which six leading banks were to submit recovery and resolution plans by the end of October 2010, after a lengthy iterative process with regulators. Finally, the Basel Committee on Banking Supervision has proposed its own version of a resolution plan requirement, and this is anticipated to inform the European approach, possibly after being refined following a review of the FSA's pilot program.

Across all jurisdictions, the objectives of recovery plans (plans detailing actions company management would take to stave off failure) and resolution plans (plans detailing actions regulators would take to wind-down a company facing imminent insolvency or severe liquidity crises) are to increase financial stability, reduce moral hazard, and provide firms and regulators a process by which they can better manage and monitor risk. Indeed, regulators have articulated that they view resolution plans as part of a comprehensive policy intended to mitigate the risk that systemic firms pose to the financial system. The plans require that institutions prepare for the worst case stress scenario and for their own failure and resolution. By facilitating the wind-

down of such firms without the need for government intercession with taxpayer funds, they are designed to address the moral hazard dilemma.

The following discussion covers each of the U.S., U.K., and International approaches to living wills, leading up to the Dodd-Frank Act's ultimate adoption of a resolution plan regime and its resulting (currently on-going) rulemaking. This section addresses the various approaches' general legislative frameworks, the more specific regulatory measures, and the remaining unanswered questions presented by each. For example, even after the most recent U.S. proposed rulemaking, it remains unknown whether regulators will treat resolution plans primarily as a means to gather advance information needed to facilitate a rapid winding down of the firm in the event of insolvency, or whether they will use the resolution plan iterative process to streamline, reduce, or even break up the largest financial institutions. Indeed, in most cases it appears that the laws adopted and proposed would give authorities the power to go beyond information gathering and require companies to make resolution plans more easily executable. The Basel Committee on Banking Supervision, for its part, has clearly proposed that resolution plans combine information gathering (and information sharing between national regulators) with restructuring of complex entities.

B. History of the "Living Wills" Concept

1. British Origins

Requiring "too big to fail" financial institutions to prepare and maintain rapid resolution plans appears to have originated with U.K. regulators. In March 2009, Financial Services Authority Chairman Lord Adair Turner published a regulatory review paper titled *The Turner Review: a regulatory response to the global banking crisis*.[78] While the paper does not specify the need for rapid resolution plans, it does generally address the need for the FSA to establish a resolution regime that facilitates the orderly winding-down of failed banks. Thereafter, on September 3, 2009, Chairman Turner openly backed plans to make systemically important banks draw up living wills in case they fail. Other early U.K. champions of living wills included Thomas Huertas, director of the banking sector for the FSA and vice chairman of the Committee of European Banking Supervisors (CEBS).[79]

An FSA paper published in October 2009 titled *A regulatory response to the global banking crisis: systemically important banks and assessing the cumulative impact* (hereinafter "*A Regulatory Response*") first articulated the objective of having systemically important banks

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[78] FINANCIAL SERVICES AUTHORITY, THE TURNER REVIEW: A REGULATORY RESPONSE TO THE GLOBAL BANKING CRISIS (2009), *available at* http://www.fsa.gov.uk/pubs/other/turner_review.pdf.

[79] *UK FSA's Living Wills Deadline Creeps Closer, Data Challenges Incoming*, A-TEAM GROUP (Sept. 6, 2010), http://www.a-teamgroup.com/article/uk-fsas-living-wills-deadline-creeps-closer-data-challenges-incoming/.

produce recovery and resolution plans setting out how operations would be resolved in an orderly fashion.[80] The plans would be reviewed by regulators and "serious obstacles to resolution" could require restructuring, including "clear separation between retail deposit taking businesses and businesses involved in proprietary trading activities."[81] On November 27, 2009, the FSA published *FSA Research Paper 09/84*, listing the desirable features of both "recovery" and "resolution" plans, and distinguishing these two types of living wills.[82]

Paralleling the release of *A Regulatory Response* and *FSA Research Paper 09/84*, in November 2009 the FSA launched a pilot program under which four systemically important banks would draw up living wills (the number would expand to six banks during the course of the program). The pilot program was designed as a trial run before formal rules were established, with an objective of putting final rules in place by the end of 2010. While reportedly the FSA originally planned to analyze the results of the pilot program during the first quarter of 2010, the pilot evolved into an iterative process between participating banks and regulators, with the banks scheduled to submit final plans by the end of October 2010.

Legislation proposed in November 2009 requiring the FSA to write rules mandating that the largest financial institutions prepare recovery and resolution plans (which legislation was known to the FSA when it began its pilot program) was enacted on April 8, 2010, as Section 7 of the Financial Services Act of 2010 ("FSA 2010").[83] Under the law, the FSA must require that financial companies—initially only very large financial services companies—prepare and "keep up-to-date" both recovery and resolution plans.

2. American Approach

U.S. regulators have been focused on resolution plans since shortly after U.K. regulators first introduced the concept, and have been more open in providing details about how such plans might look (in contrast, for example, to the FSA's pilot program, which has remained largely cloaked). The U.S. Department of the Treasury's original proposal for financial regulatory reform was published on July 22, 2009, and titled the Bank Holding Company Modernization

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[80] FINANCIAL SERVICES AUTHORITY, TURNER REVIEW CONFERENCE DISCUSSION PAPER 09/04: A REGULATORY RESPONSE TO THE GLOBAL BANKING CRISIS: SYSTEMICALLY IMPORTANT BANKS AND ASSESSING THE CUMULATIVE IMPACT (2009), *available at* http://www.fsa.gov.uk/pubs/discussion/dp09_04.pdf.

[81] *Id.* at 27-28.

[82] FINANCIAL SERVICES BILL: RESEARCH PAPER 09/84, H.C., 2009-10 (U.K.), *available at* http://www.parliament.uk/documents/commons/lib/research/rp2009/rp09-084.pdf.

[83] Financial Services Act, 2010, c. 28, §§ 1-27, sch. 1-2, *available at* http://www.legislation.gov.uk/ukpga/2010/28/pdfs/ukpga_20100028_en.pdf.

Act of 2009.[84] This proposal set out provisions in its Title II: Consolidated Supervision and Regulation of Large, Interconnected Financial Firms that would have required resolution plans. Specifically, under this early U.S. proposal the Fed would have required each U.S. "Tier 1" financial holding company to report periodically to the Fed on "its plan for rapid and orderly resolution in the event of severe financial distress."[85] The proposal would require such Tier 1 financial holding companies to prepare, and continuously update for Fed review, a credible plan for the rapid resolution of the firm in the event of severe financial distress. While the Treasury proposal was not adopted into law, it is similar to the final language adopted on July 21, 2010, with the enactment of Dodd-Frank.

Beginning in late September 2009, senior U.S. Treasury officials initiated a series of public statements promoting the idea of requiring resolution plans. For example, Treasury Secretary Timothy Geithner testified before the U.S. House Financial Services Committee on September 23, 2009:

> *We will require our major financial firms to prepare and regularly update a credible plan for their rapid resolution in the event of severe financial distress. We will require supervisors to carefully evaluate the plan on an ongoing basis. This requirement will create incentives for a firm to better monitor and simplify its organizational structure and would better prepare the government—as well as the firm's investors, creditors, and counterparties—in the event the firm collapsed.*[86]

In 2010, U.S. officials including Secretary Geithner and Federal Reserve Board Governor Daniel Tarullo continued to comment publicly on the need for resolution plans, with Governor Tarullo providing his views on why the requirement should be broadened beyond mere information gathering. Secretary Geithner, for his part, mentioned using living wills as a proactive tool in a March 20, 2010 speech in which he argued that it is a good idea "to require firms to develop and maintain so-called living wills, which will help firms and regulators identify ways to simplify and untangle the firm before a crisis occurs."

Governor Tarullo went into greater detail. His comments on March 18, 2010, at the *Symposium on Building Financial Systems of the 21st Century* in Armonk, New York included a

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[84] Bank Holding Company Modernization Act of 2009, *available at* http://www.llsdc.org/attachments/files/269/Adm-bill-T02.pdf.

[85] *Id.* at 11.

[86] Timothy F. Geithner, Secretary, Treas. Dept., Testimony regarding Financial Regulatory Reform, before the Financial Services Committee, U.S. House of Representatives (Sept. 23, 2009), *available at* http://www.treasury.gov/press-center/press-releases/Pages/tg296.aspx.

call for using living wills as a tool for taking action "before distress appears on the horizon."[87] Governor Tarullo went on to call for a "broadened" living wills requirement that would not only require that banks develop and execute resolution plans (an approach he saw as having "limitations") but also require them to "draw up a contingency plan to rescue [themselves] short of failure."[88] Governor Tarullo advocated requiring each firm to "inventory all of its legal entities, along with the legal regimes applicable to each one, and map its business lines into legal entities" as well as "document interaffiliate guarantees, funding, hedging, and provision of information technology and other key services."[89] Tarullo also viewed favorably the prospect that living wills requirements might cause firms to simplify their corporate structures, noting that "a financial firm may have a powerful incentive to simplify its organizational structure and rationalize relationships among its corporate entities" in order to reduce the costs of complying with living wills requirements.[90]

The FDIC, under Chairman Sheila Bair, was the first U.S. authority to issue proposed rules in anticipation of passage of resolution plan requirements in the broad financial regulatory reform measure then being debated in the U.S. Congress. On May 11, 2010, the FDIC proposed a detailed resolution plan rule, discussed in more detail below, that would require approximately the 40 largest insured depository institutions to submit plans showing that they could be separated from their parents in the event of insolvency. While the rule would not have given the FDIC specific authority to require a restructuring or divestiture in the event an insured depository institution repeatedly failed to submit a workable plan, it would have empowered the FDIC to gather information about not only the depository institution but also the parent and "key" affiliates.[91]

The U.S. legislative process, which included versions of a resolution plan provision in not only the original Treasury proposal but also in competing U.S. House and Senate legislative drafts, culminated in the July 21, 2010 enactment of the Dodd-Frank Act. As discussed above, Dodd-Frank instructs the Fed to require that large financial companies periodically report to the Council, Fed, and FDIC on their plans for rapid and orderly resolution in the event of material financial distress. In the event of a repeated failure to submit a credible plan, Dodd-Frank gives the Fed and FDIC joint authority to take action, including requiring the divestiture of assets or

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[87] Daniel K. Tarullo, Governor, Bd. of Gov. of Fed. Res., Toward an Effective Resolution Regime for Large Financial Institutions, Symposium on Building the Financial System of the 21st Century (Mar. 18, 2010), *available at* http://www.ritholtz.com/blog/2010/03/toward-an-effective-resolution-regime-for-large-financial-institutions/.

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *See infra* Section II.C.3 for a discussion of the details of the FDIC's rulemaking.

operations to facilitate an orderly resolution. The law requires such companies to file reports on their credit exposure, and subjects such exposures to certain limitations.

a) Comparing the American and British Regimes

Note that there are key differences between the American and British regimes. While the U.K. and U.S. living wills requirements are conceptually similar, the two nations have employed markedly different language to describe the proposed plans. For example, the British have divided their living wills plans—one, a recovery plan, would address action to be taken by a company to avoid failure, and the other, a resolution plan, would provide a roadmap for regulators to wind-down a company in the event of failure—while the Americans have mandated a single "rapid and orderly resolution" plan coupled with a report on the "nature and extent to which the company has credit exposure." In addition, the U.S. legislation specifically envisions regulators using forced divestitures and restructurings—well in advance of an insolvency event—to streamline corporate structures, whereas the U.K. law is ambiguous as to whether bank regulators will have such authority.

3. International Coordination Efforts

Many scholars have emphasized both the need for, and the complexity of, international resolution plan coordination. Indeed, the extent to which international companies will have to coordinate with multiple regulatory jurisdictions presents one of the greatest resolution planning challenges to both companies and regulators. Such challenges stem from both the organizational complexity of such institutions and the difficulty of synthesizing multiple jurisdictional regimes. As some commentators have noted:

> *With such complexity for almost all financial conglomerates, it is very difficult to map lines of business into legal entities. Unwinding such complex financial institutions can be a nightmare because SIFIs [systemically important financial institutions] have operations in many countries, because resolution regimes differ (and often conflict) across countries in many respects, because there is no agreement on a cross-border resolution plan, and because the recent crisis demonstrated that national "ring fencing" of assets is likely to be the default plan when an international bank fails without an agreed burden-sharing formula….*[92]

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[92] Morris Goldstein and Nicolas Veron, *Too Big to Fail: The Transatlantic Debate* 19 (Bruegel Working Paper No. 03, 2011) *available at* http://aei.pitt.edu/15776/1/Nicolas_Veron_WP_Too_big_to_fail_2011_03.pdf. *See also* Richard J. Herring, *Wind-down Plans as an Alternative to Bailouts: The Cross-Border Challenges* (Wharton Financial Institutions Ctr., Working Paper No. 10-08, 2010), *available at* http://fic.wharton.upenn.edu/fic/papers/10/10-08.pdf ("international corporate complexity presents a formidable challenge to an orderly unwind, because countries differ with regard to virtually every aspect of how they resolve a failing financial institution.").

Recognizing these needs and challenges, the Basel Committee has offered details on its own living wills proposals, which include standards for international cooperation and information sharing. In March 2010, the Basel Committee's Cross-Border Bank Resolution Group developed a set of ten recommendations that relate to the resolution of financial institutions.[93] These recommendations go well beyond information sharing, however, and give national authorities tools to ensure orderly resolutions, including powers to create bridge financial institutions, transfer assets, liabilities and business operations, and resolve claims. In addition, the recommendations call for international cooperation on cross-border resolutions of financial institutions active in multiple jurisdictions. Moreover, the Cross-Border Bank Resolution Group recommended that regulators understand group corporate structures and have the power—even before any insolvency event—to use incentives, as well as more stringent capital and other prudential requirements, to encourage simplification of these structures in order to facilitate effective future resolutions.

Global regulators on both sides of the Atlantic have acknowledged the need for international coordination on living wills, but so far genuine international cooperation has been elusive. There was some progress early on. On January 10, 2010, the FDIC and the Bank of England signed a Memorandum of Understanding ("MOU") promising greater cooperation when acting as resolution authorities, including consulting and supporting the development of recovery and resolution plans.[94] Note that the MOU adopts the language used by U.K. authorities, including the bifurcation of "(going concern) recovery plans and (gone concern) resolution plans."[95] However, in more recent public discussions, U.S. regulators have acknowledged that more needs to be done with regard to working with their European colleagues on formulating a unified living wills approach.

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93 Note that this is not the first time the Basel Committee addressed the desirability of resolution plans for systemic financial companies. At the *2009 Pittsburgh Summit*, G20 leaders called for the development of "internationally-consistent firm-specific contingency and resolution plans." G20 Leaders' Statement, Pittsburgh Summit, Declaration 13, Sept. 25, 2009, *available at* http://www.pittsburghsummit.gov/mediacenter/129639.htm.

94 Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information Related to the Resolution of Insured Depository Institutions With Cross–Border Operations in the United States and the United Kingdom, U.S.-U.K., Jan. 10, 2010, *available at* http://www.fdic.gov/news/news/press/2010/pr10013a.pdf.

95 *Id.* at 5.

C. Legislative and Regulatory Approaches Leading Up to the Passage of Dodd-Frank

1. The U.K.'s Financial Services Act of 2010

On April 8, 2010, the British government enacted the FSA 2010.[96] Among other things, this Act expands the FSA's mandate to include ensuring financial stability, and requires that the FSA issue rules requiring very large financial services companies to prepare and "keep up-to-date" both "recovery" and "resolution" plans. Under this bifurcated formulation, the first recovery plan is to set out steps for recovery, such as restoring capital or liquidity as well as de-risking and restructuring to prevent failure. The second resolution plan is to set out steps required to facilitate the application of resolution tools, and is to include a blueprint and "wiring diagrams" to assist regulators in planning and executing an effective resolution, as well as supporting administration and wind-down.[97]

FSA 2010 requires that recovery and resolution plans describe, among other things, actions that would be taken:

- by the covered company in circumstances that might result in its failure, or in preparation for such circumstances occurring;
- by the covered company in the event of actual or likely failure of a covered company's business (or a part thereof) in order to secure the carrying on of the business or the affected part thereof; and
- by a third party, including U.K. Treasury or the Bank of England, in order to deal with an actual or possible failure.

In addition to the required contents of the plan, described above, FSA 2010 includes the following provisions relating to scope, regulator discretion, international coordination, and enforcement:

- *Regulator Discretion*. The FSA is required to make rules implementing the living wills requirement; the specific content of the living wills is therefore not defined in the legislation itself. FSA 2010 does provide for recovery and resolution plans to include the preparation and maintenance of key information, and the FSA is required to consult with the Bank of England and the U.K. Treasury before preparing detailed rules, and only after conducting a full cost-benefit analysis.

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[96] *See supra* note 83.

[97] HM TREASURY, FINANCIAL SERVICES BILL: IMPACT ASSESSMENT 53 (2009) *available at* http://www.hm-treasury.gov.uk/d/fin_bill_ias.pdf.

- *Covered Financial Companies*. FSA 2010 is potentially applicable to all financial companies subject to FSA regulation, although initially the law will apply only to the largest financial institutions.[98] FSA 2010 requires that the FSA make living wills rules for all "authorised firms" subject to Part 1 of the U.K.'s Banking Act 2009. However, the law gives the U.K. Treasury power to stipulate to the FSA the dates by which living wills rules must be in place for categories of firms other than those financial companies that are initially covered. In an impact assessment conducted in November 2009, the U.K. Treasury found that living wills "can be useful tools not only for those firms that are large, complex or systemically significant."[99] The Treasury added that although the FSA would initially introduce living wills rules for the largest banks in order to allow for introduction of the rules gradually "and in a proportionate and risk-based manner," other firms are likely to be covered following a consultative process.[100]

- *International Coordination*. The FSA is required to consider any relevant international standards before drafting rules on recovery and resolution plans, as well as to consider any detrimental effect on the U.K.'s competitiveness.

- *Determining Inadequacies and Enforcement.* The FSA is given authority to require that a recovery or resolution plan be revised. However, the FSA must consult the Bank of England and the Treasury before finding that submitted plans are inadequate, and the Bank of England and Treasury can suggest remedial actions for the FSA to pursue. While the FSA can independently apply the full range of its current disciplinary responses to a firm that fails to file satisfactory plans and can "use these tools to achieve significant changes in an authorised firm, including restructuring," the legislation does not grant the FSA additional powers to force firms to restructure their operations.[101] The U.K. Treasury has commented that:

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[98] The Financial Services Act 2010 gives the FSA authority to make rules requiring the preparation of recovery and resolution plan requirements for a broad range of financial "authorized persons" under Section 31 of the U.K.'s Financial Services and Markets Act of 2000. (For the definition of "authorized persons," see http://www.legislation.gov.uk/ukpga/2000/8/section/31.) According to commentators, the FSA will initially limit the resolution plan requirement to only companies with at least 1,000 employees that have aggregate assets of over £100 billion. *See* Allan Murray-Jones, et. al., *The Financial Services Act 2010: Enhanced Powers For The Financial Services Authority*, Skadden, Arps, Slate, Meagher & Flom LLP, May 27, 2010.

[99] HM TREASURY, FINANCIAL SERVICES BILL: IMPACT ASSESSMENT, *supra* note 97, at 53.

[100] *Id*.

[101] *Id*. at 54.

> *Whether such powers will be necessary or desirable will be considered upon completion of the FSA's pilot work, and progress on the international template being developed by the FSB [Financial Stability Board]. Proceeding with the latter ahead of a clear evidence base and international agreement could have significant competitiveness implications for the UK.*[102]

2. The U.K.'s FSA Pilot Program

The FSA's pilot program, which also involved the Bank of England and the U.K. Treasury, was launched in late 2009, approximately the same time that FSA 2010 was being considered by Parliament. While the FSA did not officially name the banks involved in the study, it appears that the pilot program originally collected financial and organizational data from four of the U.K.'s most systemically important banks: Barclays, HSBC Holdings, Royal Bank of Scotland Group, and Standard Chartered.[103] However, during the course of the pilot program, the number of participants apparently expanded to six. The six banks reported to have participated include—in addition to the original four—Lloyds Banking Group and Santander.[104] There is some indication that the pilot program brought problems to light that will need to be addressed by regulators globally.[105] FSA officials are also said to have expressed the hope that the FSA's pilot program will serve as a "blueprint" for other governments.[106]

a) FSA Plan Details

As part of the pilot program, detailed guidance was provided by the British FSA, which suggested living wills would need to include:

- all of the information that might be required by authorities to manage a crisis (such as lists of counterparties and the location of inventory assets);
- details on client assets;

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[102] *Id.*

[103] *See* David Enrich, *U.K. Eyes 'Living Wills' for Distressed Banks*, WALL ST. J., May 20, 2010.

[104] *See* Mark Leftly, *British Banks' Survival Plans Set for G20*, THE INDEPENDENT, Sept. 5, 2010, *available at* http://www.independent.co.uk/news/business/news/british-banks-survival-plans-set-for-g20-2070604.html.

[105] *See* Enrich, *supra* note 103.

[106] *See id.*

- the location of custodians and arrangements for client asset protection;
- relevant legal restrictions;
- information necessary for the settlement, delivery and netting of financial market contracts;
- details of information storage and IT systems (e.g., the place and form in which data are retained, back-up plans);
- group-wide contingency funding plans, including which business lines could be sold to raise emergency funds; and
- plans to reduce risks or stabilize funding and liquidity.[107]

b) FSA Bifurcation of Plans

The FSA proposal tracks the approach in FSA 2010 by requiring two types of living wills plans.[108] The FSA sets out the following distinctions between recovery and resolution plans:

- Recovery Plans:
  - Must set out the firm's plans for how it would respond to severe stress, including:
    - a capital recovery plan; and
    - a liquidity recovery plan.
  - Should demonstrate the extent to which the firm's recovery could be supported by management actions to reduce the risks to which the business is exposed ("de-risking").
  - Should demonstrate that, for each management action identified by the firm, the firm has in place plans to take such steps. This would include setting out the process for deciding upon and executing the action, the circumstances in which it would be appropriate, the key dependencies, the information that would be required by the firm or third parties (and the

[107] These guidelines are set out in the FSA's TURNER REVIEW CONFERENCE DISCUSSION PAPER 09/04, *supra* note 80.

[108] Because the Memorandum of Understanding between the FDIC and the Bank of England mirrors this language, it is worth considering what a two-plan requirement might entail if employed in the United States.

ability to provide that information in the time available), and the legal, financial and operational constraints on taking the proposed action.

  - Should consider how the firm would deal with the failure of its largest counterparties (a "contagion control plan"). This would include operational impacts, such as the ability to continue to access the settlement system or to close out under netting contracts.

  - Should address facilitating the timely distribution of client assets from a failed or failing firm.

- Resolution Plans:

  - In contrast to recovery plans, resolution plans would not focus on the steps management of the firm would take. Rather, if a firm moves into resolution, it will be for the authorities to determine the appropriate course of action, within a legislative framework. To ensure the authorities are able to use the resolution tools described below, the firm's resolution plan should assume the authorities may use any of the options available.

  - Authorities would need to be assured that firms are able to provide—quickly, if necessary—the data necessary both to assess the resolution options and to execute the authorities' chosen strategy. This must include the information that would be required by an insolvency practitioner, and could include the establishment of a virtual "data room" to provide secure access to information.

  - Firms must be able to explain the relationships between the different entities within a group, in each case explaining the basis of the relationship (for example, legal status, financial, staffing, premises) and contingency arrangements in case of interruption to that relationship. Firms should have undertaken a detailed assessment of the potential obstacles or impediments (financial, legal, operational) to the authorities being able to use the following illustrative list of resolution tools:

    - the bank insolvency procedure;

    - a partial transfer of assets and liabilities (either to a bridge bank or private sector purchaser);

    - a whole bank transfer of the assets and liabilities;

    - the taking into temporary public ownership of the deposit-taker; and

    - the taking into temporary public ownership of any holding companies that sit above the deposit-taker.

- Firms would be required to identify the market and payment infrastructures to which they are connected, and plan for the firm to disconnect from those systems in an orderly manner.[109]

c) Problems Uncovered in the FSA Pilot Program

The *Wall Street Journal* has reported a number of concerns arising out of the FSA pilot program. For example, the *Journal* reports that some banks had difficulty determining the legal entities in which specific assets or employees resided.[110] They also reportedly identified instances where banks lacked adequate legal documentation for the financing relationships between internal subsidiaries and between the firm and outside parties.[111] Another potentially problematic situation exists when multiple subsidiaries operate under a single shared contract with an outside party, such as contracts for information-technology services or call centers. These kinds of arrangements would make it difficult to sell a unit or disband part of the company.[112]

Some of the same industry concerns raised during the FSA pilot program will undoubtedly arise during the U.S. regulatory process. For example, some U.K. bank executives involved with the FSA pilot program are reportedly concerned that the FSA could use the living wills program to force them to make major changes, such as selling subsidiaries and overhauling entire corporate structures.[113] Of particular concern are measures that would eliminate structures designed to minimize bank-tax burdens. [114]

3. The U.S. FDIC's Proposal

On May 11, 2010, the FDIC issued for comment a proposed resolution plan rule that would require approximately the 40 largest insured depository institution subsidiaries of financial holding companies to submit plans showing they could be separated from their parent

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[109] FINANCIAL SERVICES AUTHORITY, TURNER REVIEW CONFERENCE DISCUSSION PAPER 09/04, *supra* note 80, at 50-51.

[110] *See* Enrich, *supra* note 103.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

structures and resolved in an orderly fashion.[115] The rule would apply only to depository institutions with more than $10 billion in total assets controlled by parents with more than $100 billion in total assets, which the release reports would include 40 institutions as of 4Q 2009. The FDIC stated at the time that the proposal would dovetail with resolution plan requirements in what would become the Dodd-Frank legislation then pending before Congress. In contrast to the requirements that will eventually be enacted as part of Dodd-Frank, discussed above, the early FDIC proposal required only that insured depository institutions (and not their holding companies) submit resolution plans. The FDIC proposal has not been adopted as regulation, but it is technically still pending.

The FDIC proposal was primarily focused on information gathering. The rule requires detailed disclosure about non-financial parents and "key" affiliates as well as the depositories themselves. The rule demands disclosure of the financial relationships among the parent, affiliates and the depositories, analysis of the ability of each affiliate to function on a stand-alone basis, and plans for resolving the insolvency of the parent and key affiliates. The proposal would let the FDIC reject plans not meeting the requirements. Although the proposed rules do not specifically address whether the FDIC could take additional action in the event a company repeatedly fails to submit a workable plan, the FDIC may have assumed that such a failure would constitute a violation sufficient to trigger the entire scope of its enforcement authority.

The FDIC proposed that resolution plans (i) provide information needed to develop an effective resolution, (ii) identify material impediments to orderly resolution and describe steps to eliminate these impediments, (iii) provide the FDIC information needed to isolate the depository institution in a period of severe financial distress while preserving franchise value and maximizing creditor recoveries, (iv) provide a tailored gap analysis, (v) be approved by the institution's board, and (vi) be updated at least annually. Note that the proposal would require disclosure about not only the depository institution but also the parent. For example, it would require disclosure of the parent's legal and functional structures as well as the parent and each subsidiary's capital structure. Moreover, resolution plans would need to address not only the insolvency of the depository but also the insolvency of the parent or key affiliates.

a) FDIC Proposal Details

The FDIC proposal would have included the following requirements:

- *Summary of Analysis and Contingent Resolution Plan*: Summarize the impediments to orderly resolution. What would the company do in the event of systemic distress?

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[115] Special Reporting, Analysis and Contingent Resolution Plans at Certain Large Insured Depository Institutions, 75 Fed. Reg. 27464 (proposed May 11, 2010), *available at* http://edocket.access.gpo.gov/2010/pdf/2010-11646.pdf.

- *Organizational Structure:* Provide legal and functional structures and identify key personnel.

- *Business Activities/Relationships and Counterparty Exposures*: Describe business activities and inter-relationships among entities that provide key services. Also assess each material affiliate's ability to function on a stand-alone basis.

- *Capital Structure*: Detail capital structure for each depository and its parent, each subsidiary and key affiliates. Provide complete audited financial information for parent company and each depository. Describe corporate financing arrangements, concentration risks, and key exposures to systemic risk.

- *Intra-Group Funding, Transactions, Accounts, Exposures and Concentrations*: Describe intra-group funding relationships including, for example, a description of intra-group financial exposures, claims or liens, lending or borrowing lines and relationships. Identify extent to which parent serves as a source of funding.

- *Systemically Important Functions*: Describe systemically important functions that the depository, its subsidiaries and affiliates provide and discuss critical vulnerabilities, exposure and potential losses.

- *Material Events*: Describe events that have a material effect on the depository and its relationship with its parent or affiliates since the last analysis and plan.

- *Cross-Border Elements*: Describe the nature and extent of cross-border interrelationships and exposures, including the location and amount of foreign deposits and assets.

- *Any Other Material Factor*: Describe anything else that may impede the orderly resolution of the depository separately from its parent and affiliates.

- *Time Frame*: Identify a time frame in which "identified remediation efforts shall be achieved."

- *Approval*: The depository's board or executive committee must approve the analysis and plan and must attest that it is accurate and current.[116]

How frequently a bank would need to submit or update resolution plans remained an open question under the FDIC rulemaking proposal. While the rule would have required reports to be submitted on an annual basis, it also would have required updating as needed where there were material changes. However, the requirement appears to have been left intentionally vague under the proposal, so that it is unclear what events (either internal or external) would have

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[116] *Id.* at 27470.

triggered the need to submit a revision (perhaps what the FDIC had in mind has now been revealed in the March 29 NPR under the DFA).

b) Restructuring Authority

It is not clear whether the FDIC sought the ability to require that an insured depository institution make structural changes in order to comply with a resolution plan requirement. However, it is clear that the FDIC intended that the plans be workable. In Senate testimony on September 30, 2010, Chairman Bair commented that the May 11 proposal would "require a contingent resolution plan be submitted to the FDIC that describes how the [depository institution] could be effectively separated from the rest of the organization."[117]

c) Implications of Dodd-Frank and the March 29 NPR for the May 2010 FDIC Resolution Plan Rules Proposal

The DFA establishes a resolution planning regime at the holding company level that appears to supersede the FDIC's early effort to introduce a depository institution-level resolution planning mechanism. The DFA, and the March 29 NPR issued pursuant to it, covers the resolution of not only the holding company but also any subsidiary depository institutions. While the FDIC's May 2010 proposed rule remains active pending issuance of a final rule, given the unified agency action mandated by the DFA and exhibited in the March 29 NPR, it is unlikely that the FDIC will issue a final rule for subsidiary banks.

4. International Coordination

a) Basel Cross-Border Bank Resolution Group Treatment of Living Wills

As mentioned earlier, the Cross-Border Bank Resolution Group of the Basel Committee on Banking Supervision in March 2010 issued ten recommendations relating to the resolution of international financial firms. These recommendations go far beyond simple information sharing and call for international cooperation and intervention in advance of financial distress. The proposals are as follows:

- Regulators should have tools to ensure orderly resolutions that maintain financial stability; minimize systemic risk; protect consumers; limit moral hazard; and promote market efficiency, including the power to create bridge financial institutions, transfer assets, liabilities, and business operations to other institutions, and resolve claims.

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[117] Sheila C. Bair, Chairman, Fed. Deposit Ins. Corp., Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act, before the Committee on Banking, Housing, and Urban Affairs, U.S. Senate (Sept. 30, 2010), *available at* http://www.fdic.gov/news/news/speeches/archives/2010/spsep3010.html.

- Each country should establish a national framework to manage the resolution of financial entities in its jurisdiction.
- National authorities should seek convergence of national resolution tools to facilitate the coordinated resolution of financial institutions active in multiple jurisdictions.
- National authorities should develop procedures to facilitate cross-border recognition of crisis management and resolution proceedings.
- Regulators should understand how corporate group structures would be resolved in a crisis. If authorities believe that group structures are too complex to permit orderly resolution, they should impose regulatory incentives, including capital or other prudential requirements, to encourage simplification of the structures.
- All systemically important cross-border financial institutions should have plans that address how, in a period of severe financial distress, to preserve the firm as a going concern, promote the resiliency of key functions, and facilitate rapid resolution, if necessary. This planning should be a regular part of oversight and take into account cross-border dependencies.
- Authorities should agree on arrangements that ensure the timely cross-border sharing of information needed for contingency planning during normal times and for crisis management and resolution during times of stress.
- Jurisdictions should promote the use of risk mitigation techniques that reduce systemic risk and enhance the resiliency of critical financial or market functions during a crisis or a resolution of financial institutions.
- National resolution authorities should have authority to temporarily delay early termination clauses to complete a transfer of financial market contracts to sound financial institutions, a bridge financial institution or other public entity.
- To promote the efficient operation of financial markets, national authorities should incorporate in their planning clear options for the termination of public intervention.[118]

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[118] BASEL COMMITTEE ON BANKING SUPERVISION, REPORT AND RECOMMENDATIONS OF THE CROSS-BORDER BANK RESOLUTION GROUP at 22-43 (2010), *available at* http://www.bis.org/publ/bcbs169.pdf.

b) The Current Status of International Coordination Efforts

Since the March 2010 Basel proposals, additional steps have been taken in the international arena. The G20 Seoul Summit Declaration stated broadly that:

> *[w]e agreed that G-SIFI [global systemically important financial institutions] should be subject to a sustained process of mandatory international recovery and resolution planning. We agreed to conduct rigorous risk assessment on these firms through international supervisory colleges and negotiate institution-specific crisis cooperation agreements within crisis management groups. Regular peer reviews will be conducted by the FSB on the effectiveness and consistency of national policy measures for these firms.*[119]

Moreover, the Financial Stability Board ("FSB") has taken some proactive steps toward studying and systematizing cross-border coordination. In a February 15, 2011 *Report of the Financial Stability Board to G20 Finance Ministers and Central Bank Governors*, the Board reported that:

- A comprehensive work programme is underway to … identify the essential resolution tools and powers [of national resolution regimes], including … *critical framework conditions for effective cross-border cooperation and information sharing in managing and resolving a distressed financial institution; essential elements of institution-specific cross-border cooperation agreements*…. A FSB Steering Group on Resolution is coordinating this work and will prepare a draft of the Key Attributes by mid-2011 which should be finalised by the end of the year.

- The FSB Cross-border Crisis Management Group (CBCM) is assessing progress in the work of the institution-specific Crisis Management Groups, and will formulate criteria for authorities to assess the resolvability of SIFIs and identify the essential elements for RRPs [Recovery and Resolution Plans]. It will present a report on its work to the FSB Plenary by mid-2011 and report on progress in the development of RRPs for G-SIFIs in Q4 2011.[120]

Additionally, on April 6, 2011 Stefan Walter, secretary general of the Basel Committee, announced in prepared comments that the Committee has developed a methodology for

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[119] G20 Leaders' Declaration, Seoul Summit, Declaration 31, Nov. 11, 2010, *available at* http://www.g20.org/Documents2010/11/seoulsummit_declaration.pdf.

[120] FINANCIAL STABILITY BOARD, PROGRESS IN THE IMPLEMENTATION OF THE G20 RECOMMENDATIONS FOR STRENGTHENING FINANCIAL STABILITY 3-4 (2011), *available at* http://www.financialstabilityboard.org/publications/r_110219.pdf.

identifying banks that represent a systemic risk.[121] The Basel Committee intends to use this methodology for the "differentiated treatment" of systemically significant banks, including requiring that such banks hold higher capital reserves than other banks (i.e., requiring capital surcharges). Thus, these recent efforts appear to be primarily focused on reducing the probability of bank failure, rather than on planning for the eventuality of failure. Notably, however, according to the statement, the Basel Committee's parameters for determining systemic significance focus on size, interconnectedness, substitutability, global activity, and complexity. These criteria, particularly size, interconnectedness and substitutability, mirror factors the U.S. FSOC is considering in connection with designating NBFCs as systemically important and subject to Fed supervision, with its associated resolution planning requirements.

Despite all of these statements and on-going studies, however, it remains unclear what the future holds. A February 2011 news article discussing a meeting of the G20's finance ministers referenced IMF Managing Director Dominique Strauss-Kahn as having said that "little had been done to beef up cross-border supervision and resolution of banks."[122]

c) Implications for the U.S. Resolution Planning Regime

As yet, it is unclear exactly how U.S. resolution planning regulations will mesh with, and be informed by, foreign and international regimes. For its part, the U.S. has publicly supported the international coordination efforts put forth by the Basel Committee, the G20, and the FSB, and with good reason.[123] Of the 25 largest international bank conglomerates by assets, only four are headquartered in the United States.

At the *Reuters Future Face of Finance Summit*, held on February 28, 2011, Chairman Bair indicated that multinational financial institutions figure prominently in her thinking

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[121] *See* Jim Brunsden, *Basel Committee Develops Method of Identifying Banks Posing Systemic Risk*, BLOOMBERG, Apr. 6, 2011, http://www.bloomberg.com/news/2011-04-06/basel-develops-method-to-identify-banks-posing-systemic-risk.html.

[122] Fiona Shaikh and Huw Jones, *G20 Vows to Agree Big Bank Safeguards in November*, REUTERS, Feb. 19, 2011, http://www.reuters.com/article/2011/02/19/us-g20-regulation-idUSTRE71I35Z20110219?pageNumber=1.

[123] *See, e.g.* Lael Brainard, Undersecretary for International Affairs, Treasury Dept., Comments at the Institute of International Bankers' Breakfast Regulatory Dialogue with Government Officials (Oct. 11, 2010), *available at* http://www.treasury.gov/press-center/press-releases/Pages/tg903.aspx ("Addressing Too Big to Fail is at the heart of our efforts domestically in The Dodd-Frank Act and internationally through the G-20, FSB, and Basel Committee. … And there is an important FSB work agenda to ensure that national resolution frameworks mesh to provide a strong foundation for cross-border resolution, ring-fencing and burden-sharing are effectively addressed, and cooperative frameworks are developed among supervisors consistent with firm specific resolution and recovery plans.").

regarding systemic risk and resolution planning.[124] Chairman Bair focused, in particular, on the inability of overly complex institutions to map their business lines to their legal entities, an inability that is magnified in the international context, and that may force some multinationals to change their business models:

> *I anticipate that we are going to have troubles and this is going to be one of the areas where we are going to need to give [sic] some structural changes to align the business lines with the legal entity so that they can be broken up and marketed and sold if they get themselves into trouble. In terms of international operations, we made [sic] need to have additional subsidiarization so that there are separate legal entities that can be dealt with separately in the event of a large multinational getting into trouble.*[125]

The March 29 NPR remains focused primarily on how U.S. regulators will evaluate resolution plans filed by U.S.-based financial companies and by international financial firms respecting their U.S.-based operations. But the proposal does little to address the international complexity of resolution planning for the largest financial conglomerates. It also does little to address the need for international coordination among global regulators, or the desirability of avoiding subjecting international firms to multiple resolution plan regimes (other than repeating the DFA requirement that the Fed "take into account the extent to which the foreign financial company is subject on a consolidated basis to home country standards that are comparable"[126]). Thus, while the March 29 NPR states the broad objective that resolution plans "will also enhance the regulators' understanding of foreign operations in an effort to develop a comprehensive and coordinated resolution strategy for a cross-border firm,"[127] it remains to be seen whether international coordination will become a priority.

III. Practical Considerations for Implementation

For companies subject to the resolution planning and credit exposure report requirements of the DFA, a great deal is at stake. Likely the March 29 NPR, coupled with recent public comments by leading bank regulators regarding the consequences of failure to present a convincing plan, has driven that point home for those fortunate financial industry professionals tasked with understanding the new requirements and communicating these to the business unit leaders in their organizations. With the timeline for compliance revealing itself to be short and the task ahead emerging immense, the time for considering practical approaches to resolution planning is at hand.

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[124] Interview with Sheila Bair, *supra* note 4.

[125] *Id.*

[126] DFA § 165(b)(2)(B).

[127] March 29 NPR at 4.

A. Sources of Learning

There are three sources of learning that may benefit both regulators and respondents with regard to resolution planning. First, study of the real world resolutions of large global financial firms – principally Lehman Brothers – provides insight into what actually happens when a global financial company liquidates. Taking the exercise out of the classroom and into the street may be the best way to significantly increase the chance of producing plans that would actually work in practice. Second, the experience of the U.K.'s FSA through their recent pilot program may provide insight into how the iterative process with regulators works in the context of resolution planning. The U.K. experience may also open a window into how the approach of U.K regulators may differ from that of their American counterparts. Finally, the experience of five of the largest U.S. banks in preparing recovery plans at the request of the Fed over the last year may instruct as well.

There has been little public disclosure of this third source. While the program has largely remained under wraps, it appears that most financial industry professionals are aware that five of the largest U.S.-domiciled bank holding companies were required to deliver recovery (not resolution) plan reports to the Federal Reserve during 2010. We understand that in February of 2010 these holding companies were invited to meetings with their regulators in which they were asked to prepare recovery plans for submission to the Fed, with the firms receiving Fed feedback in early 2011.[128] The experience of these BHCs in preparing, discussing with regulators, and submitting final recovery plans with the Fed, serves as another important reference point to going about the practical work of creating a living will. The firms' recovery planning process may provide insight into how best to identify critical operations and core business lines. It may also allow for an understanding of Fed expectations with regard to a range of issues including stress testing.

B. Practical Considerations Moving Forward

Having assessed the March 29 NPR, the evolution of the resolution planning concept, and the above-described sources of learning, we believe that the following practical considerations should be considered by financial industry professionals and their institutions:

- *Team Building*: It is important to think strategically about the composition of the team, both from an internal and external perspective. It may be critical, for example, to develop a core internal team comprised of finance, risk, and legal professionals and to include professionals focused on liquidity and capital, accounting, and M&A. It may be important to include business leaders with sufficient seniority that calls to business unit heads get returned promptly. Plan for this initially being up to a year-long process, with a core team remaining in place in perpetuity after the initial plan is filed, to execute periodic and event-

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[128] For a listing of the largest U.S. bank holding companies by asset, *see* Goldstein and Veron, *supra* note 92, at 15.

driven updates. External advisers may be critical to the outcome of the project. Ideally, outside professionals will be multidisciplinary, spanning legal, restructuring, banking, and valuation, and also have real world experience executing complex financial institution restructurings.

- *Common Language*: A critical early task is for the resolution planning team leaders to communicate the task at hand to business unit heads and make sure everyone understands the terminology, objectives, and timeline. The group could debate key terms, including what is a significant legal entity, at length without making real progress. For example, consider whether there is a difference between de-risking and a recovery action. Go to the business units and ask how they would de-risk versus recover.

- *Resolution Planning versus Recovery Planning*: Understand that there are differences in the approach to "recovery" planning versus "resolution" planning. For one thing, corporations execute recovery plans, while in most cases a government agency (likely the FDIC) would execute a resolution plan. Legal entities are relevant in recovery but are even more critical in resolution planning. In a recovery process, the conversation might be more about the businesses and how to continue operating the critical businesses through a transition. Recovery plans may not require as much of a focus on the operating entities. Consider that there may be a stress point at which a recovery is possible, and that under certain levels of stress, this may deteriorate to a "resolution" scenario.

- *Stress Testing*: While the March 29 NPR does not discuss the role of conducting stress testing in the resolution planning process, the recent experience of the five BHCs in preparing recovery plans for the Fed suggests stress testing will serve as a critical starting point for the analysis. Questions may include how to model the stress tests and whether to focus on liquidity or capital constraints. In addition, recognize that, based on what we understand was the experience of the big five bank holding companies in recovery planning, institutions may have a difficult time identifying idiosyncratic stresses, those stresses that are specific to the institution, that are sufficient to cause them to fail. If a stress were of the magnitude that would cause the company to fail, then in most cases the system as a whole would fail. Stress testing presents the opportunity to consider what actions to take at each level as the stress scenario builds. Also consider the duration of the stresses being tested. In the U.S., the mindset has been that there will be an instantaneous stress, whereas in some other countries the assumption has been that a stress event will not be instantaneous and will instead last for a period of 9-12 months. U.S. recovery plans that assume instantaneous stress do not allow for certain options that take time to execute. It may be important to consider how this resonates through governance processes.

- *Execution Velocity*: Consider what is the duration of the stresses being tested, if the stress is not instantaneous. Take, for example, a potential run-off of the business. In a gradual deterioration of the business, it may be important to ask

what would be the triggering event that would cause regulators to initiate the resolution plan.

- *Significant Legal Entities*: There are multiple approaches to identifying significant legal entities. A top-down approach may be preferable. Under a top-down approach, a small number of readily identifiable entities are determined to be the most significant. In contrast, under a bottom-up approach, one understands each legal entity at the lowest level and then works upwards, generally resulting in a larger number of "significant" entities.

- *International Operations*: A threshold question may be: what is the percentage of the company's business that is outside the United States? This, in turn, will inform whether the firm is likely to be subject to multiple resolution planning regimes as well as whether it may be subject to idiosyncratic stresses related to the deterioration of specific international markets or regions.

- *Communicate with Regulators*: It will be important to think strategically about how to work with regulators, and how to think about the exercise in terms of the company's broader relationship with regulators. Ask: "what will regulators expect?" In resolution planning keep in mind that the company will not have to resolve itself. Ultimately a resolution plan – whether created by institutions or by the regulators – will be executed by the regulators. The resolution plan may need to be more granular because it may serve as a roadmap for regulators.