



Credible Living Wills Under the U.S. Regulatory Framework

September 19, 2011

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Contents

- I. Introduction 1
- II. Discussion 1
 - A. Scope 2
 - B. Timing 3
 - C. Credibility Review 5
 - D. Confidentiality 6
 - E. Plan Contents 6
 - F. Other Resolution Plan Initiatives 10
- Annex A FDIC Resolution Plan Work Streams Slide 11
- Annex B Comparison of Key Informational Requirements of FDIC Section 165(d) and
IDI Resolution Plan Rules 12

I. Introduction

The release of two rules on resolution planning by the FDIC last week means that the basic contours of the U.S. regulatory framework for resolution plans are now known. Four general themes appear in both the joint final rule on resolution plans under Section 165(d) of the Dodd-Frank Act (the “**165(d) Rule**”) and the FDIC interim final rule for large insured depository institutions (the “**IDI Rule**”).

First, resolution plans will be built on an iterative, tailored approach, recognizing that plans will develop over time and in successive submissions, and that plans will differ depending on the size and complexity of the covered company. But the flexibility runs both ways, with the regulators retaining significant discretion in the application of the requirements under the rules.

Second, the FDIC and the Federal Reserve have generally agreed on an integrated single plan approach to the resolution plans to be submitted by the firms. So, for example, the FDIC intends for the 165(d) Rule and the IDI Rule to work in tandem, both from a process perspective, and in the contents of the two plans. As laid out in the chart from the FDIC, attached as [Annex A](#), institutions should, however, keep in mind that there is a separate resolution plan under the Orderly Liquidation Authority also being developed on its own by the FDIC which can be expected to draw upon the strategy and information elements in the firm-developed resolution plans.

Third, U.S. regulators have consciously aligned the timing of resolution plan submissions with the timing of resolution plan submissions as suggested by the Financial Stability Board, thus putting in place a structure that will permit most, but not all, foreign-headquartered financial institutions operating in the U.S. to work first with their home country regulators for an entire yearly cycle and then, after one cycle with their home country regulators, to submit resolution plans to the U.S. regulators.

Fourth, U.S. regulators have created significant discretion and flexibility in terms of timing for both themselves and the industry. In multiple instances in the preamble, the regulators urge that the process of submission and review of the initial and resolution plan iterations will include an ongoing dialogue with firms. As a result, many of the deadlines can be made earlier or later at the regulators’ discretion.

In a very helpful development, the final 165(d) Rule does not include rulemaking on credit exposure reporting, which has been deferred to a later date, to allow for greater harmonization with other soon-to-be-published Federal Reserve proposals on credit exposures.

II. Discussion

The discussion below assumes familiarity with the proposed 165(d) and IDI rules. For a summary of the proposed 165(d) rule, see the Davis Polk client memorandum *[FDIC Releases Joint Notice of Proposed Rulemaking on Resolution Plans and Credit Exposure Reports](#)*. This memorandum focuses on the key differences between the proposed and recently adopted rules.

As a technical matter, what happened last week was that on September 13, 2011, the FDIC approved a [final rule](#) on resolution plans under Section 165(d) of the Dodd-Frank Act. While the Federal Reserve has not yet released its version of the 165(d) Rule, which must be approved jointly by both the FDIC and the Federal Reserve, the FDIC would not have voted in the absence of an agreement between the two agencies. As a result, with the exception of changes related to technical clean up, it can be assumed that the FDIC version of the 165(d) Rule represents the views of both regulators.

The FDIC also approved an [interim final rule](#) requiring insured depository institutions with \$50 billion or more in total assets to submit IDI-specific resolution plans. The IDI Rule was issued by the FDIC acting alone pursuant to its authority under the Federal Deposit Insurance Act (the “**FDIA**”). The FDIC originally proposed the IDI Rule on May 17, 2010,¹ but deferred finalizing the rule to allow for harmonization with the 165(d) Rule. The IDI Rule is subject to a 60-day comment period, beginning on the date it is published in the *Federal Register*.

A. Scope

Applicability of the 165(d) Rule. The 165(d) Rule will apply to the same 124 “covered companies” as the proposed rule, but the submission of resolution plans will be staggered, and the content tailored, as described below.

- “Covered companies” include:
 - any nonbank financial company designated for heightened supervision under Title I of the Dodd-Frank Act, including companies incorporated or organized outside the United States;
 - any U.S. or foreign company that controls a U.S. bank and has total consolidated assets of \$50 billion or more; and
 - any foreign bank with a U.S. branch, agency or commercial lending company subsidiary or that controls an Edge Act corporation acquired after March 5, 1987, and any company of which the foreign bank is a subsidiary, if the foreign bank or parent company has total consolidated assets of \$50 billion or more.
- The calculation of total consolidated assets for large U.S. bank holding companies and large foreign bank holding companies and banks with a U.S. commercial banking presence is unchanged from the proposed 165(d) rule.
 - Consolidated assets for large foreign bank holding companies and banks with a U.S. commercial banking presence are still calculated based on **worldwide assets**. Foreign headquartered banks should assume that this interpretation of the \$50 billion mark will have echoes in other soon-to-be-released rules under the Dodd-Frank Act.
- The final 165(d) Rule also adds that a covered company remains subject to the rule’s requirements until it has less than \$45 billion in total consolidated assets, as determined based on its most recent annual report, or as applicable, the average of the four most recent quarterly reports, filed with the Federal Reserve.
 - At the FDIC Board meeting approving the final 165(d) Rule, Acting Comptroller of the Currency John Walsh called this \$45 billion test “anomalous” and “not really . . . consistent with the law.”

Applicability of the IDI Rule. The IDI Rule applies to IDIs with \$50 billion or more in total consolidated assets (“**covered IDIs**”).

- The release accompanying the IDI Rule specifies that 37 IDIs are currently covered by the interim final rule.

¹ FDIC, Notice of Proposed Rulemaking, *Special Reporting, Analysis and Contingent Resolution Plans at Certain Large Insured Depository Institutions*, 75 Fed. Reg. 27464 (May 17, 2010).

- At the FDIC Board meeting approving the IDI Rule, the Director of the Office of Complex Financial Institutions at the FDIC, Jim Wigand, stated that of those 37 IDIs, 34 are also subject to the 165(d) Rule. The remaining three IDIs are thrifts, the holding companies of which are not subject to the 165(d) Rule.

B. Timing

Timing Is Aligned Under Both Rules. The timing of initial, annual and interim resolution plans are aligned under the 165(d) and IDI Rules so that a covered company and any of its covered IDIs will be subject to the same submission date for their 165(d) and IDI resolution plans.

- **Staggered Initial Submissions.** There are three initial submission dates based on a covered company's (or a covered IDI's parent company's) **total nonbank asset size as of the effective date of each rule.**²
 - The term "nonbank assets" is not defined, though foreign firms benefit from only U.S. nonbank assets being counted for this purpose. We believe that the term "nonbank assets" was generally intended to mean assets held outside of the IDI consolidation perimeter and that the regulators are likely to interpret the assets of uninsured foreign branches to be banking assets. The deliberate decision not to define the term means that for those institutions, whether U.S. or foreign, that find themselves close to the line or that have interpretive questions, discussions with the regulators will be possible.
 - The choice to measure nonbanking assets as of the "effective date" of each rule seems to be a markup glitch in the rules, which are not yet in official format. The effective date of the interim final IDI Rule is stated to be January 1, 2012. The effective date of the 165(d) Rule is not yet stated as the rule is not in official *Federal Register* format, but the preamble states that it would be 30 days after publication in the *Federal Register*. Assuming a Federal Reserve vote sometime in the next month, which seems likely, that means the effective date of the 165(d) Rule would be sometime in mid-November 2011. Given the attempts to align the dates, it hardly seems possible that the regulators would have created two different measurement dates for nonbanking assets. We expect that the dates will be aligned between the unofficial web-released version and the official *Federal Register* version.³
- The initial submission dates are:
 - No later than **July 1, 2012** for:
 - **U.S. Covered Companies with the Largest Nonbank Operations.** 165(d) resolution plans for U.S. covered companies with \$250 billion or more in total nonbank assets;
 - **Foreign-Based Covered Companies with the Largest U.S. Nonbank Presence.** 165(d) resolution plans for foreign-based covered companies with \$250 billion or more in total U.S. nonbank assets; and

² The principle of staggered timing had been suggested by many commenters on the proposed 165(d) rule. See, e.g., Joint Trade Association Comment Letter to the FDIC and the Federal Reserve, available at <http://www.fdic.gov/regulations/laws/federal/2011/11c08AD77.PDF>; The PNC Financial Services Group, Inc., et al. Comment Letter to the FDIC and the Federal Reserve, available at <http://www.fdic.gov/regulations/laws/federal/2011/11c06AD77.PDF>.

³ It also seems odd to tie the measurement of nonbanking assets to a date that is not a quarter end.

- **Related Large IDIs.** IDI resolution plans for covered IDIs with parent companies in the two categories above.
- No later than **July 1, 2013** for:
 - **U.S. Covered Companies with Middle-Tier U.S. Nonbank Operations.** 165(d) resolution plans for U.S. covered companies with \$100 billion or more, but less than \$250 billion, in total nonbank assets;
 - **Foreign-Based Covered Companies with Middle-Tier U.S. Nonbank Presence.** 165(d) resolution plans for foreign-based covered companies with \$100 billion or more, but less than \$250 billion, in total U.S. nonbank assets; and
 - **Related Large IDIs.** IDI resolution plans for covered IDIs with parent companies in the prior two categories.
- No later than **December 31, 2013** for:
 - **All Other U.S. Covered Companies.** 165(d) resolution plans for U.S. covered companies with less than \$100 billion in total nonbank assets;
 - **All Other Foreign-Based Covered Companies.** 165(d) resolution plans for foreign-based covered companies with less than \$100 billion in total U.S. nonbank assets; and
 - **Related Large IDIs and All Other Large IDIs.** IDI resolution plans for all other covered IDIs not otherwise included in the two earlier submission groups.
- **Discretion.** The release accompanying the final 165(d) Rule states that the FDIC and the Federal Reserve may determine that a covered company must submit its initial resolution plan **earlier or later** than provided for in the final rule.
- **New Covered Companies, Including Systemically Important Nonbank Financial Companies.** A nonbank financial company that becomes a covered company after the effective date of the final 165(d) Rule because it is designated as systemically important by the Financial Stability Oversight Council or a bank holding company that grows to have over \$50 billion in assets must submit its resolution plan by the next July 1 following the date the company becomes a covered company, provided such date is at least 270 days after the date the company becomes a covered company.

Annual Submission Dates Thereafter. Annual updates are due on or before the anniversary of a covered company's or a covered IDI's initial plan submission.

Interim Updates Not Required upon All Material Events. Interim updates are not automatically required, as they were in the 165(d) proposed rule.

- A covered company is required to file with the FDIC and the Federal Reserve a notice within a time period specified by the FDIC and Federal Reserve, but no later than 45 days after, any event, occurrence, change in conditions or circumstances or other change that results in, or could reasonably be foreseen to have, a material effect on the resolution plan of the covered company. The IDI Rule provides for a parallel interim update process for covered IDIs.
 - A material effect on the resolution plan is one that is of such significance as to render the resolution plan ineffective, in whole or in part, until revisions are made to the plan.
- The covered company or covered IDI must then revise its next annual resolution plan to take account of that event.

- **Discretion.** The FDIC and the Federal Reserve retain discretion to jointly waive a notice requirement, to require an update for any other reason, to require more frequent submissions or updates and to extend the time period for submission of a resolution plan or notice following a material event.

C. Credibility Review

Review of 165(d) Plans. The process and standards governing the joint review of 165(d) resolution plans are essentially unchanged from the proposed rule, except that the final 165(d) Rule gives the FDIC and the Federal Reserve increased flexibility by not requiring them to affirmatively acknowledge that a plan meets the rule's minimum informational requirements. The 165(d) Rule also allows the FDIC and the Federal Reserve to extend the 60-day initial review period following plan submission within which they may jointly request additional information short of determining a plan to be "deficient."

"Credible" IDI Plans

- **Credibility Defined by the FDIC.** The IDI Rule, unlike the 165(d) Rule,⁴ defines the credibility standard by which IDI resolution plans will be judged. Credibility means that a plan's strategies for resolving the covered IDI, and the detailed information required by the IDI Rule, are "well-founded and based on information and data related to the [covered IDI] that are observable or otherwise verifiable and employ reasonable projections from current and historical conditions within the broader financial markets."
- **IDI Plan Review Process.** The process for plan review under the IDI Rule is similar to that of the 165(d) Rule. For an IDI resolution plan, however, although the FDIC will review the plan in consultation with the IDI's primary federal regulator, the FDIC acting alone may determine a plan to be deficient.

Sanctions for Failure to Cure Deficiencies

- **Restrictions, Requirements and Divestitures Under Section 165(d).** As under the proposed rule, the final 165(d) Rule permits the FDIC and the Federal Reserve, as an **initial consequence** of failure to cure deficiencies, to jointly impose on a covered company, or any subsidiary of a covered company, more stringent capital, leverage or liquidity requirements or restrictions on growth, activities or operations. A covered company upon which the foregoing types of requirements or restrictions are imposed faces the further threat of mandated divestitures if it fails, within the first two years following the imposition of such requirements and restrictions, to submit a revised resolution plan that adequately remedies the deficiencies.
 - **But Deficiency Findings Not Expected for First-Generation Plans.** The release accompanying the 165(d) Rule explains, "There is no expectation by [the FDIC and the Federal Reserve] that . . . initial resolution plan iterations . . . will be found to be deficient, but rather the initial resolution plans will provide the foundation for developing more robust annual resolution plans over the next few years following that initial period."⁵

⁴ Under the 165(d) Rule, the FDIC and the Federal Reserve may jointly determine a plan to be deficient if it "is not credible or would not facilitate an orderly resolution of the covered company under the Bankruptcy Code," but the term "credible" is not defined. 165(d) Rule, at page 66.

⁵ In this respect, the regulators have adopted the approach outlined in the April 2011 Davis Polk and McKinsey & Company paper *Credible Living Wills: The First Generation*, which suggested the concept of a "first generation" resolution plan.

- **Cure Period.** Upon receiving a deficiency notice, a covered company or covered IDI would have 90 days to submit a revised resolution plan addressing the deficiencies and discussing in detail the plan revisions made to address the deficiencies. The 165(d) Rule also provides, though the IDI Rule does not, that in responding to a deficiency notice a covered company should discuss any changes to business operations and corporate structure that the covered company proposes to undertake to facilitate implementation of the revised resolution plan and why the covered company believes that the revised plan is credible and would result in an orderly resolution of the covered company under the Bankruptcy Code. The FDIC and the Federal Reserve, acting jointly with respect to a 165(d) plan, and the FDIC, acting alone with respect to an IDI plan, have discretion to shorten or extend the 90-day cure period.
- **Sanctions for Deficient IDI Plans.** In contrast to the 165(d) Rule, the IDI Rule does not explicitly identify specific potential consequences for a failure to cure deficiencies in a resolution plan. Presumably, the FDIC would rely on any of its general enforcement powers under the Federal Deposit Insurance Act to impose remedial action.

D. Confidentiality

Plans Divided Into Public and Confidential Sections. One key difference from the proposed 165(d) and IDI rules is a requirement that a portion of the resolution plans be made public. The final 165(d) and IDI Rules both provide that a resolution plan must be divided into public and confidential sections.

- **Contents of Public Section.** The rules require each 165(d) and IDI resolution plan to have a public section that consists of an “executive summary”⁶ of the resolution plan that describes the business of the covered company or covered IDI and includes certain specified information, “to the extent material to an understanding of the [covered company or covered IDI].”
 - Many of the informational elements required to be included in the public section are likely already publicly available in securities disclosure documents, call reports or other filings. A plan’s public section must, however, describe “at a high level” the covered company’s or covered IDI’s resolution strategy, including items such as the range of potential purchasers of the covered company or covered IDI and its material entities and core business lines. These data points would not have been previously public.
 - See [Annex B](#) for a full list of public section informational requirements.
- **Confidential Section.** Both rules state that the confidential section of a resolution plan will be treated as confidential to the extent permitted by law, and confidential portions of the resolution plans will be protected from Freedom of Information Act (“FOIA”) requests pursuant to applicable FOIA exceptions. The most likely FOIA exemptions would be the trade secrets exemption and the confidential supervisory information exemption.

E. Plan Contents

- **Required Economic Conditions Assumption.** The 165(d) Rule requires a resolution plan to take into account that material financial distress or failure may occur under the baseline, adverse and severely adverse economic conditions to be provided to the covered company by the Federal

⁶ Although both rules describe the public section of a resolution plan as consisting of an “executive summary,” we believe the information required to be included in the public section of a plan should be distinguished from the information required by Section __.4(b) of the 165(d) Rule and Section 360.10(c)(2)(i) of the IDI Rule. Information provided in response to the latter requirements should remain confidential.

Reserve pursuant to the stress testing requirement of Section 165(i) of the Dodd-Frank Act. This is a change from the proposed 165(d) rule's formulation of the required economic assumptions.

- An **initial resolution plan**, however, is only required to consider baseline conditions.
- IDI plans must assume the same baseline, adverse and severely adverse economic conditions as 165(d) plans, and, similarly, initial IDI plans are only required to consider baseline conditions.
- **Scope of Information Requirements.**
 - **U.S. Covered Companies.** A covered company that is domiciled in the U.S. is required to provide information with regard to both its U.S. and foreign operations.
 - **Foreign-Based Covered Companies.** A foreign-based covered company is 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. operations and its foreign-based operations.
- **Federal Reserve Stress Testing.** The Federal Reserve is expected to propose rules related to the Federal Reserve-conducted stress tests required by Section 165(i) of the Dodd-Frank Act as early as this month or next. The 165(d) Rule and the IDI Rule both provide that if a baseline scenario pursuant to such stress tests is not available in time for submission of an initial resolution plan, the covered company or covered IDI may develop a reasonable substitute.
- **Extraordinary Support.** The 165(d) Rule retains the prohibition that a plan may not rely on the provision of extraordinary governmental support to the covered company or its subsidiaries. The text of the rule was not modified in response to public comments requesting clarification of the scope of the term "governmental support." The release accompanying the 165(d) Rule, however, explains that "[t]he provision is intended to prohibit the covered company from assuming in its resolution plan that the United States or any other government will provide the covered company funding or capital *other than in the ordinary course of business*" (emphasis added).
- **Scope of 165(d) Resolution Plan.** Like the proposed rule, the final rule requires a 165(d) resolution plan to provide a strategy not just in the event of a failure of the covered company, but also in the event of a failure of the covered company's material entities, core business lines or critical operations. The final rule adds, however, that if a material entity is subject to an insolvency regime other than the Bankruptcy Code, the 165(d) plan may exclude it from the strategic analysis unless the entity either has \$50 billion or more in total assets or conducts a critical operation.
 - The definition of "critical operations" is revised in the final 165(d) Rule to mean "those operations of the covered company, including associated services, functions and support, the failure or discontinuance of which, in the view of the covered company or as jointly directed by [the FDIC and the Federal Reserve], would pose a threat to the financial stability of the United States."
 - **Interaction with IDI Plan.** The strategic analysis in a 165(d) resolution plan must assume both (1) that an IDI with \$50 billion or more in total consolidated assets would fail, and (2) that the covered company's IDIs are not the cause of the failure and provide a strategy for ensuring that the IDIs are protected from the risks arising from the nonbank subsidiaries.
 - **Foreign-Based Covered Companies.** The 165(d) Rule release states that the resolution plan of a foreign-based company that has "limited assets or operations in the United States would be *significantly limited* in its scope and complexity. . . . [O]f utmost importance for the resolution plan of a foreign-based company with limited U.S.-based assets and no critical

operations will be a close analysis of *how the resolution plan fits within the firm’s overall resolution or contingency planning process*. The nature and extent of the home country’s related crisis management and resolution planning requirements for the foreign-based company also will be considered as part of [the FDIC and Federal Reserve’s] resolution plan review process” (emphasis added).

- Tailored 165(d) Resolution Plans.** The 165(d) Rule introduces the concept of a tailored resolution plan, which was not contemplated by the proposed rule. For U.S. covered companies with smaller nonbank operations and foreign-based covered companies with a smaller U.S. nonbank presence, the list of information content requirements is similar to that imposed on other covered companies, but most of the information requirements are limited to nonbanking operations and business lines, and the interconnections between the nonbanking operations and the IDI operations.⁷

- For certain plan elements, shaded blue in the graphic to the right, covered companies eligible to submit tailored 165(d) resolution plans are only required to provide information with respect to the covered company and its nonbanking material entities.
 - For the other elements of the plan, informational requirements are the same for a tailored plan as they are for all covered companies’ plans, and information must be provided with respect to the covered company and all of its IDIs and nonbank material entities and operations. In addition, any interconnections and interdependencies identified pursuant to the rule requirements must be discussed in a tailored plan’s strategic analysis.
- Eligibility for Tailored Plan.** A covered company may elect to submit a tailored plan if, as of December 31 of the calendar year prior to the date its resolution plan is required to be submitted, it had less than \$100 billion in total nonbank assets and its total IDI assets were 85% or more of its total consolidated assets.

- Foreign-Based Covered Companies.** For purposes of determining a foreign-based covered company’s eligibility to file a tailored plan, total nonbank assets means total U.S. nonbank assets, total insured depository institution assets means assets of the covered company’s U.S. IDI operations, branches and agencies and total consolidated assets means total U.S. consolidated assets.
 - Notice.** A covered company electing to submit a tailored plan must give written notice to the FDIC and the Federal Reserve no later than 270 days prior to the date on which its resolution plan is required to be submitted.

Tailored Resolution Plan Elements
Executive summary
Strategic analysis
Corporate governance relating to resolution planning
Organizational structure and related information
Management information systems
Interconnections and interdependencies
Supervisory and regulatory information
Contact information

For a more detailed breakdown of plan elements, see [Annex B](#).

⁷ The concept of tailoring was suggested in a comment letter on the proposed 165(d) rule by an ad hoc group of major regional bank holding companies. The PNC Financial Services Group, Inc., *et al.* Comment Letter to the FDIC and the Federal Reserve, available at <http://www.fdic.gov/regulations/laws/federal/2011/11c06AD77.PDF>.

- **Discretion.** Within 90 days of such notice, the FDIC and the Federal Reserve may require that a firm eligible to submit a tailored plan must nonetheless submit a full resolution plan.
- **Differential Impact of Tailored Plan on Different Types of Institutions.** It is our expectation that different types of financial institutions will benefit differently from the tailored plan option. Foreign banks with no insured depository institution in the U.S. will likely reap the greatest benefits as they will not be subject to the IDI Rule, and the tailored plan, as applied to them, may have fewer informational requirements. It is unclear, however, whether the largest regional bank holding companies will, in practice, gain much from their ability to use the tailored plan option under the 165(d) Rule since they will also be subject to the companion IDI Rule with its nearly identical requirements applied to the IDI. As a result, some regional bank holding companies may find that their overall planning is not reduced. That said, it is still helpful that the tailoring concept is in the 165(d) Rule because, combined with the significant flexibility and discretion that the regulators have maintained for themselves, it seems likely that even those with large IDIs will be able to work with the regulators to customize resolution plans for their business model, size and complexity. For the barely systemic covered companies, the tailored plan is likely to be even more helpful and, for both large regional bank holding companies and the barely systemic covered companies, we expect that the later initial submission dates means that those institutions will benefit from the experience gained by the regulators in assessing the resolution plans of the largest institutions.
- **Coordination of 165(d) and IDI Plan Informational Requirements.** We believe that the informational requirements of the 165(d) and IDI Rules are substantially similar, although it is apparent from the text of the rules that there are differences in wording, scope and focus. Annex B contains a chart comparing, at a high level, the rules' key informational requirements. Helpfully, the IDI Rule provides that an IDI resolution plan may incorporate data and other information from a 165(d) resolution plan. Since our expectation is that most financial institutions will submit one integrated plan with separate chapters, we also expect that any minor differences in the regulators' interpretation of the informational requirements means that the agency which asks for more information will prevail since both agencies will want to receive everything that the other agency receives.
 - At the FDIC Board meeting approving the resolution plan rules, FDIC General Counsel Michael Krimminger pointed out that the focus of the IDI Rule is a resolution under the FDIA, not the Bankruptcy Code, and thus some IDI plan requirements are focused on ensuring access to insured deposits within one business day of the institution's failure, on maximizing net present value and on how the IDI can be resolved in the least costly manner to the Deposit Insurance Fund. As is apparent from the chart in Annex B, these are the key differences in the information requirements of the two rules.
- **Data Production Requirements and Management Information Systems ("MIS")**
 - **165(d) Data Production Requirement Eliminated.** The proposed 165(d) rule would have required each covered company, at an unspecified "reasonable" period of time after the rule's effective date, to demonstrate its ability to promptly produce the data underlying key aspects of its resolution plan. The final 165(d) Rule eliminates this requirement and instead requires that a plan provide a detailed description about MIS capabilities, including analysis of the capabilities of a covered company's MIS to collect, maintain and report the information underlying the resolution plan and any deficiencies, gaps or weaknesses in such capabilities.

- **Supervisory Review by Federal Reserve.** In addition, the 165(d) Rule provides that the Federal Reserve will use its examination authority to review covered companies' MIS capabilities and will share such information with the FDIC.
- **Data Production Requirement Included in IDI Rule.** Though the parallel requirement was removed from the 165(d) Rule, the IDI Rule provides that within a reasonable period of time following a covered IDI's initial plan submission, the covered IDI must demonstrate its capability to promptly produce the information and data underlying its resolution plan, in a format acceptable to the FDIC.

F. Other Resolution Plan Initiatives

The FDIC has identified 165(d) and IDI resolution plans as two of three resolution planning processes currently underway. The third is the FDIC's own planning for the resolution of a systemically important financial company under the Orderly Liquidation Authority in Title II of the Dodd-Frank Act, under which the FDIC would act as receiver. The chart attached to this memorandum as Annex A was released by the FDIC on September 13, 2011 and illustrates how the FDIC views these three workstreams.

Not coincidentally, the timing and process of submitting resolution plans in the United States aligns with developments internationally as well. The requirement that the first group of 165(d) and IDI resolution plans be submitted by July 2012 roughly corresponds with suggested timelines in the Financial Stability Board's July 2011 *Consultative Document on Effective Resolution of Systemically Important Financial Institutions*, which suggests that first drafts of resolution plans should be due by June 2012. Under the UK Financial Services Authority's August 2011 *Consultation Paper on Recovery and Resolution Plans*, the FSA has proposed that initial recovery and resolution plans for firms within its scope be due by June 2012 as well.



If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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FDIC Resolution Plan Work Streams Slide

Resolution Plan Work Streams FDIC

	Resolution Plans under Title I §165(d) aka "Living Wills"	Resolution Plans for Insured Depositories	Resolution Plans under Title II for the FDIC as Receiver
Who prepares the resolution plan?	Systemically important financial companies subject to enhanced supervision and prudential standards by the Federal Reserve Board	Insured depository institutions with \$50 billion or more in total assets	Federal Deposit Insurance Corporation
What is the legal framework for resolution?	United State Bankruptcy Code or applicable insolvency regime (e.g., state insurance liquidation statute)	Federal Deposit Insurance Act	Title II – Orderly Liquidation Authority – of the Dodd-Frank Wall Street Reform and Consumer Protection Act
For which entities does the resolution plan have to provide a resolution strategy?	The holding company and any subsidiary that conducts core business lines or critical operations*	Insured depositories	Any systemically important financial company to which the FDIC could be appointed receiver, including holding companies and nonbank subsidiaries
When are resolution plans due?	The dates are staggered, based on total nonbank assets. The first set of plans are due July 1, 2012	Dates are same as for Title I resolution plans	Ongoing. The FDIC has been developing Title II resolution plans since enactment of Dodd-Frank

*For subsidiaries not resolved through the bankruptcy code, \$50 billion or more in total assets or conducts critical operations.

Comparison of Key Informational Requirements of FDIC Section 165(d) and IDI Resolution Plan Rules

Informational Requirement	Section 165(d) Plan	IDI Plan
Public Section		
▪ Summary of the resolution plan that describes the business of the covered company or covered IDI	✓	✓
▪ Description, “at a high level,” of the resolution strategy, covering items such as the range of potential purchasers	✓	✓
▪ Names of material entities	✓	✓
▪ Description of core business lines	✓	✓
▪ Financial information regarding assets, liabilities, capital and major funding sources	✓	✓
▪ Description of derivatives activities and hedging activities	✓	✓
▪ List of memberships in material payment, clearing and settlement systems	✓	✓
▪ Description of foreign operations	✓	✓
▪ Identities of material supervisory authorities	✓	✓
▪ Identities of principal officers	✓	✓
▪ Description of corporate governance structure and processes related to resolution planning	✓	✓
▪ Description of material management information systems	✓	✓
Executive Summary¹		
▪ Key elements of strategic plan for resolution	✓	✓
▪ Material events since most recent plan submission that may have a material effect on the plan		✓
▪ Material changes to plan since most recent plan submission	✓	✓
▪ Actions taken to improve plan or remediate or mitigate weaknesses or impediments since most recent plan submission	✓	✓

Informational requirements that may be “tailored” by eligible covered companies to focus on nonbank operations are shaded blue.

¹ Although both rules describe the public portion of a resolution plan as consisting of an “executive summary,” we believe the information required to be included in the public portion of a plan should be distinguished from the information required by Section __.4(b) of the 165(d) Rule and Section 360.10(c)(2)(i) of the IDI Rule. Information provided in response to the latter requirements, listed in this chart under the heading “Executive Summary,” should remain confidential.

Informational Requirement	Section 165(d) Plan	IDI Plan
Strategic Analysis		
<ul style="list-style-type: none"> ▪ Key assumptions and supporting analysis underlying resolution plan 	✓	
<ul style="list-style-type: none"> ▪ Range of specific actions to facilitate resolution of covered company, material entities, core business lines and critical operations 	✓	
<ul style="list-style-type: none"> ▪ Strategy for maintaining operations of covered company and material entities 	✓	
<ul style="list-style-type: none"> ▪ Strategy in event of failure of a material entity, core business line or critical operation 	✓	
<ul style="list-style-type: none"> ▪ Strategy for ensuring adequate protection of insured depository institution subsidiaries 	✓	
<ul style="list-style-type: none"> ▪ Identification of critical services, mapped to material entities and core business lines, and strategy for maintaining continuity of critical services 		✓
<ul style="list-style-type: none"> ▪ Identification of aspects of parent company organizational structure, interconnectedness, structure of legal or contractual arrangements or overall business operations that would impact IDI in the event of receivership 		✓
<ul style="list-style-type: none"> ▪ Strategy to unwind or separate IDI and its subsidiaries from organizational structure of parent company, including demonstration that strategy is the least costly resolution method 		✓
<ul style="list-style-type: none"> ▪ Strategy for sale or disposition of deposit franchise in a manner that ensures prompt depositor access to insured deposits, maximum net present value return and minimum amount of loss in the resolution of cases, including demonstration that strategy is the least costly resolution method 		✓
<ul style="list-style-type: none"> ▪ Funding, liquidity and capital needs, and resources available, mapped to core business lines and critical operations/services 	✓	✓
<ul style="list-style-type: none"> ▪ Processes for: <ul style="list-style-type: none"> ▪ Determining market value and marketability of core business lines and material asset holdings (and, for 165(d) plans, critical operations); ▪ Assessing feasibility of actions contemplated in resolution plan; and ▪ Assessing impact of actions contemplated in resolution plan on value, funding and operations 	✓	✓

Informational requirements that may be “tailored” by eligible covered companies to focus on nonbank operations are shaded blue.

Informational Requirement	Section 165(d) Plan	IDI Plan
Organizational Structure and Related Information		
▪ Legal and functional structure analysis, including mapping of core business lines (and, for 165(d) plans, critical operations) to material entities	✓	✓
▪ Analysis of inter-affiliate funding relationships, accounts, exposures and other interconnections and interdependencies	✓	✓
▪ Discussion of overall deposit activities, including unique aspects of deposit base or underlying systems that may create operational complexity or result in extraordinary resolution expenses in the event of failure		✓
▪ Description of systemically important functions and critical vulnerabilities ²		✓
▪ Description of material components of liabilities, separately identifying short-term and long-term, secured and unsecured and subordinated liabilities	✓	✓
▪ Description of processes to identify pledgees and holders of collateral, including jurisdiction where collateral held and, if different, the jurisdiction where the security interest in the collateral is enforceable	✓	✓
▪ Description of material off-balance sheet exposures	✓	✓
▪ Description of practices related to booking of trading and derivatives activities	✓	✓
▪ Identification of material hedges and hedging strategies	✓	✓
▪ Description of process undertaken to establish exposure limits	✓	
▪ Identification of major counterparties and analysis of interconnections, interdependencies and relationships, including impact of failure of major counterparties	✓	✓
▪ Identification of material participations in trading, payment, clearing and settlement systems, including mapping of memberships to legal entities and core business lines (and, for 165(d) plans, critical operations)	✓	✓
▪ Unconsolidated balance sheet and consolidating schedule for material entities	✓	✓
▪ Description of components of organizational structure based or located outside the U.S. and of foreign deposits and assets ³		✓

Informational requirements that may be “tailored” by eligible covered companies to focus on nonbank operations are shaded blue.

² The IDI Rule requires description of systemically important functions as one element of an IDI plan. Though the 165(d) Rule does not have a parallel requirement as such, it requires analysis of systemically important functions throughout a plan by requiring analysis with respect to “critical operations.”

³ The 165(d) Rule does not contain a requirement parallel to Section 360.10(c)(2)(xviii) of the IDI Rule, but the accompanying release says that the 165(d) plan of a U.S.-based covered company with foreign operations should identify risks and strategies relating to its foreign operations, including the complications created by differing national laws, regulations and policies.

Informational Requirement	Section 165(d) Plan	IDI Plan
Corporate Governance		
▪ Description of integration of resolution planning into corporate governance structure and processes; policies, procedures and internal controls governing preparation and approval of resolution plan; identification of senior management official(s) primarily responsible for resolution plan ⁴	✓	✓
▪ Nature, extent and results of contingency planning or similar exercises to assess viability of or improve resolution plan	✓	✓
▪ Description of relevant risk measures used for internal and external reporting	✓	
Management Information Systems (MIS)		
▪ Inventory and description of key MIS, including descriptions of legal owner or licensor, service level agreements, software and system licenses and associated intellectual property	✓	✓
▪ Analysis of capabilities of MIS to collect, maintain and report information underlying the resolution plan, including deficiencies, gaps and weaknesses in such capabilities	✓	✓
▪ Mapping of key MIS to material entities, core business lines and critical operations	✓	
▪ Identification of scope, content and frequency of key internal reports for monitoring financial health, risks and operations	✓	
▪ Description of process for supervisory or regulatory authorities to access key MIS	✓	
▪ Discussion of disaster recovery or other backup plans		✓
Supervisory and Regulatory Information		
▪ Identification of relevant U.S. and foreign supervisory and resolution authorities	✓	
Contact Information		
▪ Identification of a senior management point of contact regarding the covered company's resolution plan and contact information for a senior management official of each material entity	✓	

Informational requirements that may be “tailored” by eligible covered companies to focus on nonbank operations are shaded blue.

⁴ The release accompanying the 165(d) Rule says that the size of a covered company's resolution planning corporate governance structure “is expected to vary based upon the size and complexity of the covered company. For the largest and most complex companies, it may be necessary to establish a central planning function that is headed by a senior management official. Such official would report to the Chief Risk Officer or Chief Executive Officer and periodic reports on resolution planning would be made to the covered company's board of directors.”