

**Davis Polk**

# **Proposed guidance to Section 165(d) rule for triennial full filers**

September 5, 2023 | Client Update

# Table of Contents

<b>Section</b>		<b>Slide</b>
<b>01</b>	Background	2
<b>02</b>	Key takeaways	4
<b>03</b>	Scope of proposed guidance	5
<b>04</b>	Capital	6
<b>05</b>	Liquidity	8
<b>06</b>	Governance mechanisms	10
<b>07</b>	Operational capabilities	12
<b>08</b>	Legal entity rationalization and separability	14
<b>09</b>	Derivatives and trading activities	16
<b>10</b>	IDI resolution guidance	17
<b>11</b>	Branches	18
<b>12</b>	Group resolution plan	19
<b>13</b>	Format and structure of plan	20
<b>14</b>	Regulator statements on proposed guidance	22
<b>15</b>	Glossary	24

# Background

- The Federal Reserve Board and the Federal Deposit Insurance Corporation (together, the **Agencies**) published for public comment two notices of proposed guidance regarding resolution plans under Section 165(d) of the Dodd-Frank Act and its implementing regulations (together, the **Section 165(d) Rule Guidance Proposals**).
  - [Guidance for Resolution Plan Submissions of Domestic Triennial Full Filers](#) (**Proposed Domestic Guidance**)
  - [Guidance for Resolution Plan Submissions of Foreign Triennial Full Filers](#) (**Proposed FBO Guidance**)
- The Agencies have previously issued guidance to GSIBs who are biennial filers ([2019 GSIB Guidance](#)), and a subset of large FBOs ([2020 FBO Guidance](#)). The Agencies have not previously issued guidance to domestic triennial full filers or other FBOs that are triennial full filers.
  - The Proposed Domestic Guidance would be new guidance applicable to large regional U.S. banking organizations that were not covered by the 2019 GSIB Guidance.
  - The Proposed FBO Guidance would supersede and replace the 2020 FBO Guidance and apply to all foreign triennial full filers, including those subject to the 2020 FBO Guidance.
- The Section 165(d) Rule Guidance Proposals are open for public comment until November 30, 2023, the same date that comments on the [IDI Resolution Planning Rule Proposal](#), [LTD Proposal](#), and [Basel III Proposal](#) are due.
  - Our client update analyzing the IDI Resolution Planning Rule Proposal can be found [here](#) and our client update on the LTD Proposal can be found [here](#).
  - Our client update on the Basel III Proposal is forthcoming.
- The following slides (1) summarize key aspects of the Section 165(d) Rule Guidance Proposals; (2) highlight the relevant differences between the Proposed Domestic Guidance and Proposed FBO Guidance; and (3) analyze how each guidance document differs from previous guidance, including the 2019 GSIB Guidance and 2020 FBO Guidance.

# Key takeaways

- **Timing.** The Agencies state that firms should incorporate the final guidance into their resolution plans “as soon as practicable.” In light of the fact that the next batch of resolution plans are due July 1, 2024, the Agencies are considering “a short extension of the next resolution plan submission date” to a new due date “sooner than one year after the proposed guidance is published in final form.”
  - FDIC Vice Chair Travis Hill expressed concern that the guidance will be finalized sooner than one year before the next resolution plans are due.
  - FRB Governor Michelle Bowman recommended that the final guidance should be delayed until other regulatory reform proposals issued by the Agencies are finalized.
  - Firms subject to the guidance that are preparing resolution plans for the 2024 cycle will need to evaluate how to proceed given the questions about timing and what standards will ultimately apply.
- **SPOE vs. MPOE.** Both guidance documents are segmented to provide different expectations for firms that choose an SPOE or MPOE resolution strategy.
  - All domestic GSIBs contemplate SPOE resolution strategies, while all domestic triennial full filers that will be subject to the Proposed Domestic Guidance contemplate MPOE resolution strategies.
  - The Agencies have stated that they do not have a preference for SPOE resolution strategies over MPOE resolution strategies, but it is unclear whether that will, over the long term, continue to be the case with respect to all regional and FBO filers.
  - FDIC Vice Chair Travis Hill, FDIC Director Jonathan McKernan, and FRB Governor Michelle Bowman each expressed concerns about how the proposed guidance may lead to a preference for SPOE resolution strategies.

# Key takeaways

- **Proposed 2020 FBO Guidance vs. final 2020 FBO Guidance.** Several aspects of the Proposed FBO Guidance borrow provisions that were in the **proposed** 2020 FBO Guidance, but ultimately dropped in the **final** 2020 FBO Guidance. The Agencies explain that circumstances since 2020 (i.e., spring 2023 banking turmoil) have persuaded the Agencies that these provisions are now appropriate for covered FBOs. Key provisions that will now apply to covered FBOs, discussed further in later slides, include:
  - RCAP
  - RLAP
  - Separability expectations
  - Interaction between group resolution plan and U.S. resolution plan
- **Regulatory reform proposals.** Simultaneously with the publication of the proposed guidance, the FDIC published for public comment the IDI Resolution Planning Rule Proposal and the FRB, FDIC, and OCC jointly published for public comment the LTD Proposal. In July 2023, the FRB, FDIC, and OCC published for public comment the Basel III Proposal.
  - The Section 165(d) Rule Guidance Proposals reference new requirements that may result from these regulatory reform proposals, such as new long-term debt requirements included in the LTD Proposal.
  - FRB Governor Michelle Bowman warned that implementation of the Section 165(d) Rule Guidance Proposals will be complicated by the parallel implementation of the other regulatory reform proposals, which will impact the resolution strategies of firms.

# Scope of proposed guidance

## Proposed Domestic Guidance and Proposed FBO Guidance\*

- **Category II.** Firms that are not U.S. GSIBs and that have:
  - **≥ \$700B** in total consolidated assets, or
  - **≥ \$100B** in total consolidated assets and **≥ \$75B** in cross jurisdictional activity
  
- **Category III.** Firms that are not in Category I or II and that have:
  - **≥ \$250B** in total consolidated assets, or
  - **≥ \$100B** in total consolidated assets and **≥ \$75B** in any of the three following specific risk indicators:
    - Weighted short-term wholesale funding,
    - Nonbank assets, or
    - Off-balance sheet exposure

\* For FBOs, the thresholds are calculated at the consolidated U.S. operations level, rather than at the global or intermediate holding company level.

# Capital

## SPOE

### Proposed Domestic Guidance

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- **RCAP.** Like the 2019 GSIB Guidance, includes expectations concerning the appropriate positioning of capital and other loss-absorbing instruments (e.g., debt that a parent or intermediate holding company may forgive or convert to equity) among the material entities within the firm.
- **Long-term debt requirements.** In the discussion of RCAP, includes expectations that positioning of capital resources should be consistent with rules requiring pre-positioned resources in the form of long-term debt, including new requirements resulting from the LTD Proposal.
- **RCEN.** Like the 2019 GSIB Guidance, includes expectations regarding firms having a methodology for periodically estimating the amount of capital that may be needed to support each material entity after the bankruptcy filing.

### Proposed FBO Guidance

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- **RCAP.** In contrast to the 2020 FBO Guidance, includes expectations concerning RCAP. For context, RCAP was included in the proposed 2020 FBO Guidance, but not in the final 2020 FBO Guidance. According to the Agencies, in light of recent experience during the spring 2023 banking turmoil, RCAP is now appropriate to increase the likelihood that the capital needs of an FBO within the United States will be sufficient to support the SPOE resolution of its U.S. entities and operations.
- **Long-term debt.** In the discussion of RCAP, includes the same language on long-term debt requirements as the Proposed Domestic Guidance.
- **RCEN.** Like the 2020 FBO Guidance, includes expectations regarding RCEN.

# Capital

## MPOE

- Neither proposed guidance document includes expectations concerning capital for firms that contemplate an MPOE strategy.
- According to the Agencies, these firms' material entities are not expected to remain open and operating in resolution and would not need to meet regulatory capital minimums.
- We note that a bridge bank is a new entity and is exempt by statute from any capital requirements.



# Liquidity

## SPOE

### Proposed Domestic Guidance

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- **RLAP.** Like the 2019 GSIB Guidance, includes expectations on RLAP, as in measuring a firm’s available liquidity resources.
- **RLEN.** Like the 2019 GSIB Guidance, includes expectations on RLEN, as in estimating the amounts of liquidity material entities will need to remain open and operating in resolution in accordance with the firm’s strategy.

### Proposed FBO Guidance

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- **RLAP.** In contrast to the 2020 FBO Guidance, includes expectations concerning RLAP. For context, RLAP was included in the proposed 2020 FBO Guidance, but not in the final 2020 FBO Guidance. According to the Agencies, expectations concerning RLAP are now appropriate for these FBOs because the ability to raise funding within or transfer resources to the United States when the firm is under stress may present challenges that are difficult or impossible to overcome. According to the Agencies, this risk can be appropriately mitigated through pre-positioning resources in the United States.
  - **RLEN.** Like the 2020 FBO Guidance, includes expectations on RLEN.
  - **Liquidity capabilities.** In contrast to the Proposed Domestic Guidance and the 2020 FBO Guidance, the guidance includes a new liquidity capabilities section providing that firms are expected to have a comprehensive understanding of funding sources, uses, and risks at material entities and critical operations, including how funding sources may be affected under stress.
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# Liquidity

## MPOE

- For any filer that adopts an MPOE strategy, both of the guidance documents propose that the firm should have the liquidity capabilities necessary to execute its resolution strategy, and its plan should include analysis and projections of a range of liquidity needs during resolution.
- The Agencies believe that these expectations would provide important information about liquidity-related challenges and the feasibility of the proposed strategy.
- This implies an intense liquidity analysis for the bridge bank.

# Governance mechanisms

## SPOE

### Proposed Domestic Guidance

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- **Key expectations.** The guidance includes expectations that firms:
  - Develop a playbook that details board and senior management actions necessary to execute the strategy.
  - Identify triggers to ensure the timely escalation of information to senior management and the board so that key actions can be taken when needed.
  - Analyze key legal issues associated with pre-bankruptcy provision of capital and liquidity to subsidiaries.
- **Secured support agreement.** The guidance includes an expectation that firms consider a secured support agreement by the parent to provide support to material legal entity subsidiaries during resolution.

### Proposed FBO Guidance

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- **Key expectations.** Includes similar key expectations as described in the Proposed Domestic Guidance and in the 2020 FBO Guidance, with the addition that the plan should cover any contemplated foreign parent secured support.
- **Global strategy.** The guidance includes an expectation that if the preferred global resolution strategy for the firm is a home country-led resolution in which its U.S. entities and operations remain open, the governance mechanisms should not interfere with the execution of a global resolution strategy. This expectation reflects the Agencies' recent experience during the spring 2023 banking turmoil, in which the systems and criteria used to evaluate the U.S. operations and global operations were inconsistent.
- **Secured support agreement.** In more flexible language than the Proposed Domestic Guidance, the guidance expects firms to consider pre-positioning liquidity or creating a mechanism for foreign parent secured support and describe how that would not interfere with the global resolution strategy.

# Governance mechanisms

## MPOE

- The Proposed Domestic Guidance does not contain guidance on governance mechanisms for an MPOE strategy.
- By contrast, the Proposed FBO Guidance proposes adopting limited governance mechanism expectations concerning coordination between the governing body of the firm's U.S. operations and the foreign parent, with the goal of ensuring that any implementation of the U.S. resolution strategy occurs even if the foreign parent is unwilling or unable to support the U.S. operations.

# Operational capabilities

## SPOE

### Proposed Domestic Guidance

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- **Key updates from 2019 GSIB Guidance.** Includes guidance similar to the 2019 GSIB Guidance, but with enhancements to management information systems, shared and outsourced services, and QFCs that would apply GSIB-like operational capabilities standards to large regional banking organizations.
- **Management information systems.** Includes new expectations on management information systems that firms should be able to produce various data from material entities in a timely manner, including financial statements, credit exposures, risk positions, guarantees, legal records, and personnel information.
- **Shared and outsourced services.** Includes enhanced expectations that firms support continuity of shared and outsourced services, including retaining key personnel, identifying all shared services supporting critical operations, mitigating continuity risks, and preventing automatic termination of shared services in resolution.
- **QFCs.** Includes expectations on analyzing how early termination of QFCs could be triggered by resolution and any associated legal obstacles, although removes expectations included in the 2019 GSIB Guidance to specifically analyze legal obstacles associated with emergency motions under the QFC stay rules.
- **SR Letter 14-1.** Adopts portions of the operational expectations of SR Letter 14-1

### Proposed FBO Guidance

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- **Key updates from 2020 FBO Guidance.** Includes guidance similar to the 2020 FBO Guidance, but with new sections on management information systems and QFCs as well as enhanced shared and outsourced services expectations.
- **Collateral management.** Includes guidance similar to the Proposed Domestic Guidance, but with the additional requirement that firms are able to track certain collateral information at the end of each business day and quarterly.
- **Shared and outsourced services.** Includes guidance similar to the Proposed Domestic Guidance, but with an additional expectation of analysis of how continuity of shared services relies on cooperation of foreign regulators.
- **QFCs.** Includes enhanced expectations on QFCs compared to the Proposed Domestic Guidance, including discussions of adherence to the QFC stay rules and ISDA protocols.
- **SR Letter 14-1.** Adopts portions of the operational expectations of SR Letter 14-1.

# Operational capabilities

## MPOE

- **SPOE vs. MPOE operational capabilities.** Both guidance documents include expectations for firms that use an MPOE resolution strategy, but the expectations are much lighter than the comparable expectations under the SPOE sections.
- **Payment, clearing and settlement (PCS).** Both guidance documents include expectations on PCS under the MPOE sections that are significantly less rigorous than the SPOE sections. For example, the MPOE sections do not include expectations on maintaining a PCS activities framework, playbooks for continued access to PCS services, or the content related to users and providers of PCS services.
- **Collateral management.** Both guidance documents include reduced requirements for collateral management in the MPOE sections compared to the SPOE sections, including specific expectations to aggregate statistics of QFCs, track collateral sources, and identify asset level information on collateral.
- **QFC.** The MPOE sections of the guidance documents do not include expectations on QFCs that are included in the SPOE sections, reflecting the fact that an MPOE strategy will result in the resolution of the firm's IDI subsidiary by the FDIC, at which point the FDIC's temporary stay-and-transfer powers under the FDIA would resolve potential QFC default issues.

# Legal entity rationalization and separability

## SPOE

### Proposed Domestic Guidance

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- **Legal entity rationalization.** Includes the same expectations as the 2019 GSIB Guidance, which provide that a firm should develop criteria supporting its resolution strategy and integrate into day-to-day decision-making processes. The criteria would be expected to consider the best alignment of legal entities and business lines and facilitate resolvability as a firm's activities, technology, business models, or geographic footprint change over time.
- **Separability.** Includes the same expectations as the 2019 GSIB Guidance, which provide that the firm should identify discrete and actionable operations that could be sold in resolution to provide meaningful optionality for the resolution strategy under a range of potential failure scenarios.

### Proposed FBO Guidance

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- **Legal entity rationalization.** Includes the same expectations as the 2020 FBO Guidance with respect to legal entity rationalization. The guidance is similar to the Proposed Domestic Guidance, with modifications to refer to the FBO's U.S. operations.
- **Separability.** Includes the same expectations as the 2020 FBO Guidance with respect to separability. Includes similar, but slightly less onerous, guidance as the Proposed Domestic Guidance, with modifications to refer to the FBO's U.S. operations.

# Legal entity rationalization and separability

## MPOE

- Provides that firms using an MPOE strategy should have legal entity structures that support the preferred resolution strategy.
- Clarifies that to the extent a material entity IDI relies upon other affiliates during resolution, the plan should discuss the rationale for the legal entity structure, associated risks, and potential mitigants.
- Includes expectations that resolution plans include options for the disposal of significant assets, portfolios, legal entities, or business lines.



# Derivatives and trading activities

## SPOE

### Proposed Domestic Guidance

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- **Request comment.** The document requests comment on whether guidance should be provided on derivatives and trading activities. Clarifies the importance of stabilization and de-risking of derivatives during resolution, but notes that the covered banking organizations have limited derivatives and trading operations compared to the GSIBs.

### Proposed FBO Guidance

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- **Request comment.** Similarly requests comment on whether guidance should be provided on derivatives and trading activities. Adds that in the context of FBOs, resolution challenges may be posed by transactions that originate from the U.S., but are booked outside the U.S.

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## MPOE

- The Agencies do not anticipate providing guidance on derivatives and trading activities to firms that have MPOE resolution strategies, as none of these firms' operations would be expected to continue in resolution or to be separately wound down outside of resolution and so would not need advance continuity planning.

# IDI resolution guidance

## MPOE

- The Agencies provide a separate section on IDI resolution guidance solely for firms that have an MPOE resolution strategy.
- Includes expectations that the firm will demonstrate that the IDI can be resolved while mitigating the risk of serious adverse effects on U.S. financial stability and adhere to the requirements of the FDIA regarding failed bank resolutions.
  - For firms that choose a payout liquidation for resolving a material entity IDI, the plan should demonstrate how to mitigate the risk of serious adverse effects on U.S. financial stability.
  - For firms that choose a bridge bank for resolving a material entity IDI, the plan should include an analysis that the IDI could be resolved without the use of the systemic risk exception to the least-cost requirement.
- Requiring analyses of U.S. financial stability risks and the least-cost test under the FDIA could be burdensome for firms that use an MPOE resolution strategy. Firms that use an SPOE resolution strategy would not be subject to these expectations.

# Branches (FBOs only)

## SPOE

### Proposed FBO Guidance

- **FBO-specific.** The Proposed FBO Guidance has a separate section providing guidance on how to treat U.S. branches of FBOs in the resolution plan, which is substantially similar to the 2020 FBO Guidance.
- **Material entity.** For any U.S. branch that is a material entity, if the plan does not contemplate the applicable U.S. regulator taking possession of the branch, the plan should show how the branch would continue to facilitate access to financial market utilities for identified critical operations. Regardless of the strategy for the branch, the plan must analyze the effects of the cessation of operations of the branch on financial market utility access and any critical operations.

## MPOE

- The above guidance applies to covered FBOs that use both SPOE and MPOE resolution strategies.

# Group resolution plan (FBOs only)

## SPOE

### Proposed FBO Guidance

- **FBO-specific.** The Proposed FBO Guidance provides a new section, not included in the 2020 FBO Guidance, on how a firm's U.S. resolution plan should be consistent with its home country resolution plan.
- **Impact of global resolution plan.** Includes expectations that the resolution plan describes the impacts of the global resolution plan on U.S. operations and the extent to which the U.S. resolution plan relies on different assumptions, strategies, or capabilities.
- **Shared objectives.** The firm's broader resolvability framework should consider the objectives of both the global resolution strategy and the U.S. resolution strategy, noting any complementary efforts to enhance resolvability.

## MPOE

- The above guidance applies to covered FBOs that use both SPOE and MPOE resolution strategies.

# Format and structure of plans

## SPOE

### Proposed Domestic Guidance and Proposed FBO Guidance

- **2019 GSIB Guidance and 2020 FBO Guidance.** The Proposed Domestic Guidance largely conforms to the 2019 GSIB Guidance and the Proposed FBO Guidance largely conforms to the 2020 FBO Guidance, but each contains a few key modifications described below.
- **FRB Discount Window.** Clarifies that the plan should support any assumptions that the firm will have access to the FRB's Discount Window or other borrowings immediately prior to entering bankruptcy, including a discussion of the operational testing conducted to facilitate access in a stress environment, placement of collateral, and the amount of funding accessible to the firm. As included in previous guidance, firms may assume access to the FRB Discount Window only for a few days after the point of failure to facilitate orderly resolution.
- **Systemic risk exemption.** Clarifies that firms should not assume the use of the systemic risk exception to the least-cost test in the event of a failure of an IDI.

# Format and structure of plans

## MPOE

- Includes the expectation that a plan should demonstrate and describe how the failure event results in material financial distress, including consideration of the likelihood of the diminution of liquidity and capital prior to bankruptcy.
- According to the Agencies, “[t]his clarification is intended to address staff’s observation that some of the 2021 resolution plans submitted by triennial full filers did not reflect the condition of a failed firm.”

# Regulator statements on proposed guidance

## — FDIC Chairman Martin Gruenberg

- Noted that the proposed guidance “focuses on a set of large regional banking organizations that are just below the U.S. global systemically important banking organizations in terms of their size, complexity and the potential impact of their failure on U.S. financial stability.”
- Clarified that the proposed guidance reflects previous guidance to U.S. GSIBs, observations from the most recent cycle of resolution plans by this group of firms, the Agencies’ observations during the spring 2023 banking turmoil, and capabilities that are essential for orderly resolution, including “capital and liquidity needed to carry out their plan; operational capabilities related to payment, clearing and settlement activities; collateral; management information systems; and shared and outsourced services.”

## — FDIC Vice Chairman Travis Hill

- Warned that the emphasis on SPOE resolution strategies, when all of the large domestic banking organizations that will be subject to this new guidance currently have MPOE strategies, could demonstrate an implicit preference by the Agencies of an SPOE strategy. Urged the Agencies to clearly and transparently determine whether and when firms should adopt an SPOE strategy.
- Expressed frustration that the guidance will be finalized less than one year before the next wave of resolution plans are due, when the FDIC had previously stated that future guidance would be finalized more than a year before resolution plans are due.

## — FDIC Director Jonathan McKernan

- Stated concern about the Agencies’ ambiguity on SPOE strategies versus MPOE strategies and the timing of the guidance, but ultimately supported the guidance in light of the urgency caused by the spring 2023 banking turmoil.



# Regulator statements on proposed guidance

## — Federal Reserve Governor Michelle Bowman

- Noted that the guidance contemplates least-cost resolution analysis in resolution plans, but expressed doubt that there is information sufficiently available to firms about the test and how the test is applied by the FDIC for firms to effectively evaluate whether a proposed resolution plan would satisfy that test.
- Warned that implementation of the guidance by firms will be complicated by the parallel consideration of the LTD Proposal and Basel III Proposal and recommends that the publication of the guidance should be delayed until the pending proposals are finalized.
- Expressed concern that, while the Agencies express no preference on whether firms should have SPOE or MPOE resolution strategies, the **“ongoing regulatory reform efforts could effectively eliminate this optionality.”**





# Glossary

Term	Definition
<b>Section 165(d) Rule Guidance Proposals</b>	FRB and FDIC, Publication for Proposed Guidance for Dodd-Frank Act Resolution Plan Submissions of Triennial Fuller Filers (August 29, 2023). Consists of two proposals: (1) Guidance for Resolution Plan Submissions of Domestic Triennial Full Filers and (2) Guidance for Resolution Plan Submissions of Foreign Triennial Full Filers.
<b>IDI Resolution Planning Rule Proposal</b>	FDIC, Resolution Plans Required for Insured Depository Institutions with \$100 Billion or More in Total Assets; Informational Filings Required for Insured Depository Institutions with At Least \$50 Billion, but Less Than \$100 Billion in Total Assets (Aug. 29, 2023).
<b>LTD Proposal</b>	FRB, FDIC, and OCC, Notice of Proposed Rulemaking on Long-term Debt Requirements for Large Bank Holding Companies, Certain Intermediate Holding Companies of Foreign Banking Organizations, and Large Insured Depository Institutions (Aug. 29, 2023).
<b>Basel III Proposal</b>	FRB, FDIC, and OCC, Regulatory Capital Rule: Amendments Applicable to Large Banking Organizations and to Banking Organizations with Significant Trading Activity (July 27, 2023).
<b>FBO</b>	Foreign banking organization.
<b>FDIA</b>	Federal Deposit Insurance Act.
<b>GSIB</b>	Global systemically important bank.
<b>MPOE</b>	Multiple point of entry: resolution strategy in which multiple resolution proceedings are initiated by multiple authorities at the level of the parent company and at the level of the operating subsidiaries.
<b>SPOE</b>	Single point of entry: resolution strategy in which only parent company is placed into receivership and its assets, principally investments in its subsidiaries, are passed into a newly created bridge holding company.
<b>RCAP</b>	Resolution capital adequacy and positioning.
<b>RCEN</b>	Resolution capital execution need.
<b>RLAP</b>	Resolution liquidity adequacy and positioning.
<b>RLEN</b>	Resolution liquidity execution need.
<b>QFC</b>	Qualified financial contract.

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If you have any questions about the topics covered in this deck, please contact any of the lawyers listed above or your regular Davis Polk contact.

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