

# Client Alert.

September 16, 2011

## Living Wills: FDIC Approves Final Rules

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On Tuesday morning, the Federal Deposit Insurance Corporation (“FDIC”) Board unanimously approved two rules regarding resolution planning: one rule for large bank holding companies and nonbank financial companies supervised by the Federal Reserve Board of Governors (“FRB”),<sup>1</sup> and the other rule for large banks.<sup>2</sup>

The first rule (the “165(d) Rule”) is a final rule required by section 165(d) of the Dodd-Frank Act. The plan required under section 165(d) is a detailed contingency plan that describes how large bank holding companies and nonbank financial companies supervised by the FRB (collectively, “Covered Companies”) that are at risk of default can be sold, broken up, or wound down quickly and effectively in a way that mitigates serious adverse effects to U.S. financial stability. Covered Companies include (i) all bank holding companies (including foreign banking organizations that are or are treated as bank holding companies) with consolidated assets of \$50 billion or more and (ii) all nonbank financial companies that the Financial Stability Oversight Council designates for supervision by the FRB.<sup>3</sup> A total of 124 Covered Companies are currently subject to the 165(d) Rule, the same number noted in the proposed rule. As with the proposed 165(d) Rule, the vast majority of Covered Companies appear to be foreign banking organizations.<sup>4</sup>

**AS WITH THE PROPOSED 165(D) RULE, THE VAST MAJORITY OF COVERED COMPANIES APPEAR TO BE FOREIGN BANKING ORGANIZATIONS.**

The 165(d) Rule will ultimately be issued jointly by the FDIC and the FRB (collectively, the “Agencies”) and published in the Federal Register. The timing for FRB approval is uncertain.

The second rule (the “IDI Rule”) is an interim final rule that covers banks and other insured depository institutions with \$50 billion or more in assets (collectively, the “CIDIs”).<sup>5</sup> The FDIC has identified 37 CIDIs. Unlike the 165(d) Rule, the FDIC is the sole agency responsible for the IDI Rule.

Comments on the IDI Rule are due within 60 days of publication in the Federal Register.<sup>6</sup> The IDI Rule has an effective date of January 1, 2012.

<sup>1</sup> The full text of this final rule is available at <http://fdic.gov/news/board/Sept13no4.pdf>.

<sup>2</sup> The full text of this interim final rule is available at <http://fdic.gov/news/board/Sept13no6.pdf>.

<sup>3</sup> The Financial Stability Oversight Council (“FSOC”) will determine which nonbank financial institutions are systemically important under § 113 of the Dodd-Frank Act. We expect an initial determination by the FSOC before the end of the year.

<sup>4</sup> See Cady North, *Bloomberg Government Study: How Foreign Banks Are Regulated Under Dodd-Frank*, July 4, 2011, at 19 (noting that of the 124 Covered Companies, an estimated 100 foreign banks will need to comply with section 165(d)).

<sup>5</sup> The \$50 billion threshold reflects two modifications to the proposed IDI Rule. Under the proposal, a bank would have been covered if it had more than \$10 billion in assets and if it was owned or controlled by a company with more than \$100 billion in assets.

<sup>6</sup> The FDIC published the IDI Rule as an interim final rule because the proposed rule was published, and the comment period ended, before the enactment of Dodd-Frank. See 75 Fed. Reg. 27464 (May 17, 2010).

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## RELATIONSHIP BETWEEN THE 165(D) RULE AND THE IDI RULE

The parents of CIDs are a subset of the Covered Companies. According to the FDIC, 34 Covered Companies are bank holding companies with subsidiary IDIs with \$50 billion or more in total assets, thus triggering the IDI Rule requirements. Accordingly, these companies will be required to file both resolution plans.<sup>7</sup>

Broadly speaking, the 165(d) Rule and the IDI Rule (collectively, the “Rules”) serve a similar purpose: the comprehensive resolution<sup>8</sup> of a Covered Company or CID in the most efficient and least costly way possible. The plan required under the section 165(d) Rule (the “DFA Plan”) should address the Covered Company and key nonbank subsidiaries, to varying degrees, and the plan required under the IDI Rule (the “IDI Plan”) should address large banking subsidiaries.

The Rules reflect different public policies, however. The DFA Plan is intended to provide a roadmap for a “rapid and orderly resolution” of the Covered Company in the event of material distress or failure. “Rapid and orderly resolution” means a reorganization or liquidation of the Covered Company under the Bankruptcy Code that can be accomplished within a reasonable period of time and in a manner that substantially mitigates the risk that the failure of the Covered Company would have serious adverse effects on financial stability in the U.S. In short, a DFA Plan is part of the “macro-prudential” regulation embedded in Dodd-Frank. By contrast, an IDI Plan focuses more narrowly on the protection of insured depositors and the FDIC’s Deposit Insurance Fund if the IDI were to fail. An IDI Plan is part of the historic “micro-prudential” approach to bank regulation.

Given the common purpose of the Rules, requirements for a DFA Plan and an IDI Plan (collectively, the “Plans”) are substantially the same in many areas. We address these similarities before reviewing a few items specific to the 165(d) Rule.

## SIMILARITIES OF THE PLANS

### Deadlines

Covered Companies and CIDs must meet one of three deadlines, depending on the entities’ asset size. For companies required to file both Plans, the submission deadlines are currently the same. The tiering of deadlines evidently reflects the Agencies’ desire to focus on the institutions that presumably would have the greatest impact on U.S. financial stability in the event of material distress or failure. With this in mind, however, the Agencies have retained flexibility to move Covered Companies from one tier to another, depending on the Agencies’ assessment of systemic risk. The tiering also provides a slight measure of relief to the smaller (relatively speaking) Covered Companies and CIDs.

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<sup>7</sup> The FDIC has identified three CIDs that must file IDI Plans but whose organizations are not required to file a DFA Plan.

<sup>8</sup> A truly comprehensive resolution is global, a result beyond the power of any one country’s regulators. Nevertheless, the 165(d) Rule addresses the cross-border aspect of a Covered Company’s resolution plan, which we summarize below.

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Covered Company	Size of Nonbank Assets	Reporting Obligation	Plan Deadline <sup>9</sup>
Nonbank financial institution supervised by the Federal Reserve Board ("SIFI")	SIFI with ≥ \$250 billion in nonbank assets	Standard Resolution Plan <sup>10</sup>	July 1, 2012
	SIFI with ≥ \$100 billion in nonbank assets	Standard Resolution Plan	July 1, 2013
	SIFI with < \$100 billion in nonbank assets	Standard or Tailored Resolution Plan <sup>11</sup>	December 31, 2013
Bank Holding Company ("BHC") with ≥ \$50 billion in total assets	BHC with ≥ \$250 billion in nonbank assets	Standard Resolution Plan	July 1, 2012
	BHC with ≥ \$100 billion in nonbank assets	Standard Resolution Plan	July 1, 2013
	BHC with < \$100 billion in nonbank assets	Standard or Tailored Resolution Plan	December 31, 2013
Foreign Bank or Company that is a BHC or is treated as a BHC under Section 8(a) of the IBA ("FBO") with ≥ \$50 billion in total assets	FBO with ≥ \$250 billion in U.S. nonbank assets	Standard Resolution Plan <sup>12</sup>	July 1, 2012
	FBO with ≥ \$100 billion in U.S. nonbank assets	Standard Resolution Plan	July 1, 2013
	FBO with < \$100 billion in U.S. nonbank assets	Standard or Tailored Resolution Plan	December 31, 2013

<sup>9</sup> These deadlines also currently apply to CIDs, subject to FDIC regulation 12 C.F.R. § 360.10.

<sup>10</sup> The Complete Resolution Plan must contain elements specified in §\_\_.4(b)-(i).

<sup>11</sup> As discussed further below, under the 165(d) Rule, Covered Companies with less than \$100 billion in total nonbank assets (or, total U.S. nonbank assets for foreign Covered Companies) that predominantly operate through one or more IDIs may file a tailored resolution plan. The tailored resolution plan must contain elements in §\_\_.4(b); §\_\_.4(c)-(f) and (h), but only with respect to the Covered Company and its nonbank material entities and operations, and in §\_\_.4(g) and (i), with respect to the Covered Company, all of its IDIs, and any nonbank material entities and operations.

<sup>12</sup> Note that, for FBOs, the information required in the Standard and Tailored Resolution Plans is with respect to the subsidiaries, branches and agencies, and critical operations and core business lines, as applicable, that are domiciled in the United States or conducted in whole or material part in the United States. With respect to §\_\_.4(g), the plan must also identify, describe in detail, and map to the legal entity the interconnections and interdependencies among the U.S. subsidiaries, branches and agencies, and critical operations and core business lines of the FBO and any foreign-based affiliate.

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## Credibility

Section 165(d) of Dodd-Frank provides that a DFA Plan must be “credible”—a term the FDIC has also employed in the IDI Rule. “Credible” is not defined in the Dodd-Frank Act or expressly in either Rule, but the IDI Rule offers some insight. The FDIC explains:

A resolution plan is credible if its strategies for resolving the CIDI, and detailed information required by this section, are well-founded and based on information and data related to the CIDI that are observable or otherwise verifiable and employ reasonable projections from current and historical conditions within the broader financial markets.<sup>13</sup>

Notably (and unfortunately), the 165(d) Rule does not include a comparable provision. In any event, the assessment of credibility for a DFA Plan *should* differ from that for an IDI Plan. The DFA Plan is macro-prudential in nature and is intended to facilitate an “orderly and rapid resolution,” or to prevent or mitigate harm to counterparties and financial stability, while the IDI Plan is micro-prudential and focuses on the institution itself and how the FDIC can resolve it at least cost to the insurance fund.

In any event, the credibility of any plan is determined by the likelihood that the plan would achieve its intended result. For example, for the DFA Plan, the execution of a credible plan would in fact mitigate risk to counterparties and other financial market participants in the event that the Covered Company cannot continue to conduct its business, either because the failed Covered Company provided a critical service that is not easily replaced or because counterparties choose not to do business with the Covered Company (*e.g.*, by terminating short-term funding contracts), out of concern that the Covered Company will be unable to perform. Thus a credible plan would be one where the FDIC and the FRB believe that the resolution strategies will find a substitute for any critical services provided by the Covered Company or remove the uncertainty that could cause counterparties to halt or reduce their own financial activities. How the Agencies would arrive at this belief is unclear and, ultimately, a true judgment call. Part of the decision depends on what the specific risks are—how many counterparties are involved, what lines of business might be most affected, etc.—and for this determination, the credit exposure reports and stress test results will be important. Additionally, a Covered Company should be prepared to explain in detail how, via a bankruptcy proceeding, the right economic results will be achieved.<sup>14</sup> This demonstration would require specialized economic advice and counsel on how a reorganization or liquidation would work.

## Confidentiality

Both Rules require the Plans to include a public section as well as a confidential section. Their preambles are clear: the Agencies recognize that the Plans will include highly detailed, internal proprietary information, which will be protected both as trade and commercial secrets and as supervisory information under the Freedom of Information Act.

Nevertheless, preparation of the public section is required and could be problematic. These public sections include the executive summaries of the Plans, which describe the Covered Company or CIDI’s business and include other information “to the extent material to an understanding” of the Covered Company or CIDI. The Rules enumerate eight categories of

<sup>13</sup> To be codified at 12 C.F.R. § 360.10(b)(4). The IDI Rule specifically requests comment on this definition.

<sup>14</sup> Federal Reserve Governor Tarullo recently suggested that a DFA Plan should include an economic efficiency analysis. See Gov. Tarullo, *Industrial Organization and Systemic Risk: An Agenda for Further Research* (Sept. 15, 2011), <http://www.federalreserve.gov/newsevents/speech/tarullo20110915a1.pdf>.

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information that may or are likely to be material. These categories involve facts that in all likelihood would have been disclosed in call reports and reports required by the FRB, or in public materials required by the securities laws. In addition to these disclosures, the public sections of the Plans should include descriptions of the corporate governance structure and the processes related to resolution planning (*i.e.*, who is in charge of planning and reporting relationships) and of material management information systems.

The most troubling part of the public executive summary would be a “description, at a high level, of the . . . resolution strategy, covering such items as the range of potential purchasers of the [Covered Company or CIDI], its material entities and core business lines.” In order for this description to be meaningful, it would have to identify which entities and material lines might be sold off—a highly sensitive subject even within the Covered Company or the CIDI. In the preamble to the IDI Rule, the FDIC explains that all details in the public section “are or should be publicly available”; however, it is not evident what part of a resolution strategy already is, or outside of the confidential resolution plan process should be, publicly available.

It may be cold comfort to Covered Companies and CIDs that such strategy description need only be at a high level.

## Synch'ing up the IDI Plan

The FDIC has made several modest but substantive changes to the requirements for the contents of an IDI Plan. As a result, these plans will match the DFA Plans more closely in terms of level of detail.

For example, an IDI Plan now must map core business lines and critical services to legal entities, and the same is required in the DFA Plan. The proposal for the IDI Rule had asked for such information, but at a more general level. In addition, the strategic analysis part of the IDI Plan has been expanded, more closely resembling the requirements for a DFA Plan. The IDI Rule now calls for the same specific information about asset valuation and sales processes, trading and derivative activities, management information systems, and corporate governance policies as the 165(d) Rule.

## DFA PLAN MATTERS

### Tailored plans

The 165(d) Rule provides a “tailored” resolution plan option for qualifying Covered Companies. A tailored plan focuses more on the nonbanking operations of a Covered Company; a Covered Company is not required to include banking operations in most of the reporting plan elements. The tailored plan, therefore, will be less burdensome than a standard DFA Plan.

The tailored plan option is available only to Covered Companies that are bank holding companies that have less than \$100 billion in total nonbank assets, and whose IDI subsidiaries comprise at least 85 percent of the total consolidated assets of the Covered Company. For foreign-based Covered Companies, the tailored plan prerequisites are U.S.-based: for the purpose of the 85 percent test (if it applies), it is the assets of any U.S. IDI operations, branches and agencies that are compared to the foreign-based Covered Company's U.S. total consolidated assets.

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The effect of the tailored plan option in reducing the regulatory burden for any qualifying U.S.-based Covered Company may be modest. The IDIs of these Covered Companies will still be required to file IDI Plans, which will likely involve the same level of detail and information as the DFA Plan otherwise demands for Covered Companies of similar size and complexity in the discussion of banking operations. FBOs that are or are treated as bank holding companies, but that do not control an IDI chartered in the U.S., may realize some benefit from the tailored plan because they would not have to propose an IDI Plan.<sup>15</sup>

**THE EFFECT OF THE TAILORED PLAN OPTION IN REDUCING THE REGULATORY BURDEN FOR ANY QUALIFYING U.S.-BASED COVERED COMPANY MAY BE MODEST.**

In practice, greater regulatory relief should be available regardless of whether a Covered Company is filing a standard or tailored DFA Plan. The Agencies recognize that all DFA Plans necessarily will vary depending on the size and complexity of each Covered Company.

## Foreign Bank Organizations

The scope of the 165(d) Rule is the same as that of the proposed rule and encompasses any FBO that is or is treated as a bank holding company in the U.S. and with consolidated assets of more than \$50 billion—regardless of where those assets may be located.<sup>16</sup> The 165(d) Rule reduces the burden of the requirements in two respects. First, as discussed above, many FBOs will qualify for a tailored plan.

Second, even if an FBO is ineligible to file a tailored plan, its DFA Plan will be limited to the resolution of entities based in the U.S. The preamble to the 165(d) Rule 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.” It is “of utmost importance” to the Agencies how the DFA Plan for such a FBO fits within its global resolution or contingency planning process. Indeed, the Agencies’ review of a FBO’s DFA Plan will include consideration of “[t]he nature and extent of the home country’s related crisis management and resolution planning requirements.”

**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.**

## Credit exposure reports

The proposed 165(d) Rule describes the format and content of credit exposure reports that also are required by section 165(d). Notably, the 165(d) Rule omits credit exposure report requirements pending the FRB’s separate rulemaking on credit concentrations. In all likelihood, a rule on credit exposure reports will be finalized before the first DFA Plans are due. Even in the absence of a specific reporting requirement, a Covered Company preparing a DFA Plan will have to collect much of the same information that would otherwise have appeared in a credit exposure report. With respect to IDI Plans, the FDIC requires that, shortly after the initial submission of a plan, a CIDI demonstrate its capability to produce

<sup>15</sup> Even this benefit may be evanescent for some. For foreign-based Covered Companies with branches or agencies licensed in New York, the New York banking statute provides essentially for the ring-fencing of the branch or agency office if the foreign bank fails. Thus, even if such a Covered Company were required to provide a resolution strategy for its New York branches or agency offices, the plan simply would refer to applicable New York banking law.

<sup>16</sup> The DFA Rule applies to any foreign bank or company that is a bank holding company or is treated as a bank holding company under section 8(a) of the International Banking Act of 1978, and that has \$50 billion or more in total consolidated assets.

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promptly information underlying the plan—a data set likely to encompass information that would be contained in a credit exposure report.

## “Critical operations”

The threshold for a “critical operation” appears to have been raised from the proposed 165(d) Rule. The proposed rule deemed an operation critical if its failure or discontinuance “would likely result in a disruption to the U.S. economy or financial markets.” In an effort to align the definition more closely to the stated purpose of section 165(d), the 165(d) Rule “clarifies” that the threshold of significance of an operation “must be severe enough to pose a threat to the financial stability of the United States.” For example, a Covered Company’s critical operation would include a clearing, payment, or settlement system that the Covered Company operates for which there is no ready substitute.

## “Material entity” and role of non-Bankruptcy Code insolvency regimes

The 165(d) Rule requires that each DFA Plan include a strategic analysis describing a resolution strategy not only for the Covered Company as a whole, but also in the event of a failure or discontinuation of a material entity, core business line, or critical operation.

The preamble to the 165(d) Rule defines a “material entity” to include a subsidiary that conducts core business lines or critical operations of the Covered Company. To the extent a material entity could be a debtor under the Bankruptcy Code, the applicable strategic analysis in a DFA Plan is driven by the Bankruptcy Code. For an indication of what the Agencies might expect in this regard, the IDI Rule cites to the FSB consultative document, and recommends use of factsheets that could easily be used by insolvency practitioners.<sup>17</sup>

If, however, a material entity is subject to an insolvency regime other than the Bankruptcy Code, the 165(d) Rule provides that a Covered Company may limit its strategic analysis of other applicable insolvency regimes. Specifically, if any such material entity is subject to an insolvency regime other than the Bankruptcy Code, a Covered Company may exclude that entity from its strategic analysis unless that entity either has \$50 billion or more in total assets or conducts a critical operation. If either element is met, the relevant strategic analysis should be in reference to the corresponding alternative insolvency regime (e.g., foreign insolvency regime, state insolvency regimes for insurance companies, or the Securities Investor Protection Act applicable to broker-dealers).

As a practical matter then, the 165(d) Rule will require Covered Companies to identify all their material entities, calculate their respective combined assets, and determine whether such entity conducts a “critical operation.” Depending on the results, Covered Companies may have to employ special experts to devise those portions of the DFA Plan that deal specifically with non-Bankruptcy Code resolution strategies.

## Material events

A Covered Company must submit a DFA Plan annually. A Covered Company must also submit a notice identifying any material event significant enough to merit modification of its resolution plan, within 45 days of the event. Then, the

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<sup>17</sup> See IDI Rule at 6.

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Covered Company must update the next annual submission. The Agencies require notice only when an event results in, or could reasonably be foreseen to have, a material effect on the resolution plan of the covered company such that the resolution plan would be ineffective or require material amendment to be effective. This represents a reprieve from the proposed rule, under which a Covered Company would have had to provide an updated DFA Plan with each material change.

## CONCLUSION

This alert is an overview of the Rules' most notable features, along with our preliminary observations regarding the interrelationships between the Rules, and broader considerations in light of the Dodd-Frank Act and relevant cross-border initiatives.

The next step for Covered Companies and CIDs involves effective early-stage planning. To this end, our discussion here is a preview of our forthcoming Living Wills User Guide, which will provide both a high-level summary of key issues, a granular description of the Rules, tips for early-stage planning, and a continued discussion of additional practical implications.

In connection with our User Guide, we will soon be hosting a seminar on the topics raised herein. Please contact [cadams@mofo.com](mailto:cadams@mofo.com) for additional details.

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