June 10, 2011

By electronic submission to www.federalreserve.gov and www.fdic.gov

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Robert E. Feldman
Executive Secretary
Attention: Comments/Legal ESS
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Re: Notice of Proposed Rulemaking Implementing Resolution Plan and Credit Exposure Report Requirements of Section 165(d) of the Dodd-Frank Act

Board Docket No. 1414 & RIN 7100–AD73 / FDIC RIN 3064–AD77

Ladies and Gentlemen:

The Securities Industry and Financial Markets Association,[1] The Clearing House Association L.L.C,[2] the American Bankers Association,[3] the Association

[1] SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. For more information, visit www.sifma.org.

for Financial Markets in Europe,[4] The Financial Services Roundtable[5] and the Institute of International Bankers[6] are pleased to submit comments on the Notice of Proposed Rulemaking published jointly by the Board of Governors of the Federal Reserve System and the Federal Deposit Insurance Corporation[7] to implement the requirements of Section 165(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act[8] regarding resolution plans and credit-exposure reports.

Our comments are attached to this letter. If you have any questions, please do not hesitate to email or call Kenneth E. Bentsen, Jr., for SIFMA, (kbentsen@sifma.org / (202) 962-7400); Mark Zingale for The Clearing House Association (Mark.Zingale@TheClearingHouse.org / (212) 613-9812); Wayne

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(continued…)

[2] Established in 1853, The Clearing House is the nation's oldest banking association and payments company. It is owned by the world's largest commercial banks, which collectively employ 1.4 million people in the United States and hold more than half of all U.S. deposits. The Clearing House Association L.L.C. is a nonpartisan advocacy organization representing—through regulatory comment letters, amicus briefs and white papers—the interests of its owner banks on a variety of systemically important banking issues. Its affiliate, The Clearing House Payments Company L.L.C., provides payment, clearing and settlement services to its member banks and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the automated-clearing-house, funds-transfer and check-image payments made in the U.S. See The Clearing House's web page at www.theclearinghouse.org for additional information.

[3] The American Bankers Association represents banks for all sizes and charters and is the voice for the nation's $13 trillion banking industry and its 2 million employees. The majority of ABA's members are banks with less than $165 million in assets. Learn more at www.aba.com.

[4] AFME (Association for Financial Markets in Europe) advocates stable, competitive and sustainable European financial markets that support economic growth and benefit society. AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. AFME participates in a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association through the GFMA (Global Financial Markets Association). For more information please visit the AFME website, www.afme.eu.

[5] The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for $92.7 trillion in managed assets, $1.1 trillion in revenue, and 2.3 million jobs.

[6] The Institute represents internationally headquartered financial institutions from 39 countries around the world; its members include international banks that operate branches and agencies, bank subsidiaries, and broker-dealer subsidiaries in the United States.

[7] Federal Reserve & FDIC, Resolution Plans and Credit Exposure Reports Required, 76 Fed. Reg. 22648 (proposed Apr. 22, 2011) (to be codified at 12 C.F.R. pts. 252 & 381).

[8] Pub. L. No. 111-203, § 165(d), 124 Stat. 1376 (2010).

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Sincerely,

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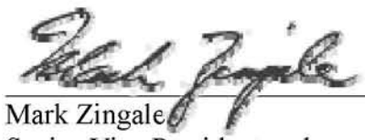

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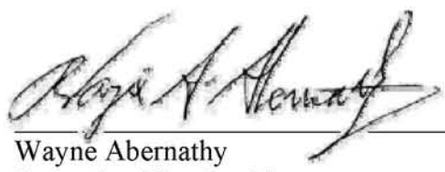

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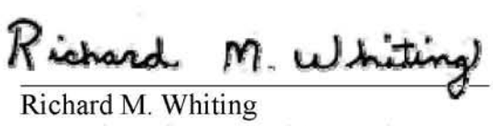

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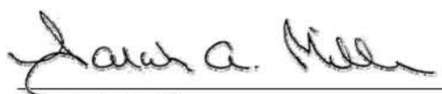

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The Clearing House Association Bank Regulatory Committee

The Clearing House Association Government and Legislative Affairs Committee

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Comments on the Joint Notice of Proposed Rulemaking
by the Federal Reserve and FDIC
Regarding Resolution Plans and Credit Exposure Reports

from

TABLE OF CONTENTS

The Clearing House Association L.L.C., the Securities Industry and Financial Markets Association, the American Bankers Association, the Association for Financial Markets in Europe, The Financial Services Roundtable and the Institute of International Bankers are pleased to submit comments on the Federal Reserve and FDIC's joint notice of proposed rulemaking[1] to implement the requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "**Dodd-Frank Act**")[2] regarding resolution plans and credit-exposure reports. The six combined trade associations appreciate the opportunity to comment on the proposed rule. Our members welcome the opportunity to work with the supervisors on developing an effective resolution-planning process for systemically important firms.

I. EXECUTIVE SUMMARY

The combined trade associations and their members are strong supporters of recovery and resolution planning as a key building block in the emerging system of enhanced prudential regulation for systemically important firms. We, like the supervisors and the taxpayers, believe that, in a future financial panic, supervisors must have alternatives to the dilemma of either a fire-sale liquidation or a bailout by taxpayers.[3] Mindful of the importance of creating an integrated and effective recovery- and resolution-planning process and of how new such a process is for both firms and supervisors, we respectfully offer in this joint comment a number of suggested modifications to the proposed rule aimed at more effective resolution planning. We share the supervisors' goal that resolution planning should be viewed as a cooperative and iterative process between firms and supervisors that should evolve over time.[4] Accordingly, we would propose

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[1] Federal Reserve and FDIC, Resolution Plans and Credit Exposure Reports Required, 76 Fed. Reg. 22648 (proposed Apr. 22, 2011) (to be codified at 12 C.F.R. pts. 252 & 381).

[2] Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[3] *See* Randall D. Guynn, *Are Bailouts Inevitable?*, YALE JOURNAL ON REGULATION (forthcoming Fall 2011).

[4] *See generally* Davis Polk & McKinsey & Company, *Credible Living Wills: The First Generation* (Apr. 2011), *available at* http://www.davispolk.com/files/Publication/37a3a804-6a6c-4e10-a628-7a1dbbaece7c/Presentation/PublicationAttachment/c621815c-9413-436b-91ea-3451b2b4cf32/042611_DavisPolkMcKinsey_LivingWills_Whitepaper.pdf.

certain modifications to the proposed rule so that resolution plans submitted pursuant to Section 165(d)[5] would:

- **Begin with an initial pilot program limited to the largest and most complex U.S.-headquartered bank holding companies**, which would foster early learning and development of best practices. A pilot would also reduce the risk that supervisory time and resources will be misspent reviewing, as necessitated by the current proposed rule, a significant number of plans developed simultaneously, independently and with limited common understanding of supervisory expectations regarding the form and content of the resolution plans. A similar pilot model has successfully been used for recovery and resolution planning in the UK;[6]

- **Maintain flexibility regarding the timing of initial submissions and the staggering of regular submissions**, which would enable better allocation of supervisory resources and encourage companies to link resolution planning to other strategic- and contingency-planning processes;

- **Foster the evolution of resolution planning's scope, quality and information granularity,** which will necessarily result from the development and clarification of supervisory expectations and best practices over the next several years. The required content and scope of the first-generation plans will be different from later generations; the standards for review of those plans must likewise be different. Allowing for this evolution ensures an iterative process that properly accounts for the cost, systems changes, necessary transition period and timing for creating meaningful and practical resolution plans;

- **Allow sufficient time to create and develop an initial plan and provide opportunity for appropriate review of that plan by a**

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[5] Title, section and subsection numbers refer to corresponding portions of the Dodd-Frank Act in the form in which it was enacted or to the proposed rule, as appropriate, unless the context otherwise requires.

[6] *See, e.g.*, Financial Services Authority, *Turner Review Conference: Discussion Paper* (Oct. 2009) ("By the end of 2009 a small number of major UK banking groups will have begun work to produce their recovery and resolution plans as part of a pilot exercise intended to help the FSA develop policy in this area . . . .").

firm's board of directors (or, in the case of foreign-headquartered firms, an expressly authorized board delegee);

- **Address the targeted Bankruptcy Code analysis required by Section 165(d), and acknowledge that a more holistic recovery and resolution plan may be required by supervisors**, as a prudential matter, to supplement the Section 165(d) analysis;

- **Acknowledge that affiliated insured depository institutions will be resolved under the Federal Deposit Insurance Act** ("**FDIA**"), whether pursuant to a sale to a third party in a traditional purchase-and-assumption agreement, with or without loss-sharing, a recapitalization of that business by transferring it to a bridge bank and exchanging the claims against the failed bank for equity in the bridge[7] or any other resolution method;

- **Provide additional flexibility for nonbank financial companies to take into account their unique situation** and the regulatory uncertainties they face;

- **Impose less onerous requirements on regional bank holding companies and foreign-headquartered firms** that do not have an impact on the stability of the U.S. financial system. This would avoid misallocating scarce supervisory resources on firms that are not systemically important to U.S. financial stability and reduce the risk of an adverse reaction by supervisors in other countries that could lead to a competitive disadvantage to U.S. firms or undermine efficient global finance; and

- **Provide adequate opportunity for further consideration of resolution-planning requirements.** For example, we suggest that the rule not be effective before January 2012 at the earliest, which is the statutory deadline for publication of a final rule implementing Section 165(d). In the interim, supervisors and firms could work together to create certainty around the requirements and expectations for resolution planning.

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[7] *See* Comment Letter from SIFMA and TCH to the FDIC on the FDIC's Second Notice of Proposed Rulemaking under Title II of the Dodd-Frank Act: Recapitalizations as an Effective Way to Resolve Systemically Important Banks and Non-Bank Financial Companies on a Closed Basis Without Taxpayer-Funded Bailouts (May 23, 2011), *available at* https://www.sifma.org/issues/item.aspx?id=25639.

We present these, and a number of other suggestions, in the body of this combined comment. A visual representation of our modified approach is attached as Appendix A, and modified regulatory language is attached as Appendix B.

II. RESOLUTION PLANS

A. The Targeted Analysis Required by Section 165(d) Should Be Considered in the Context of Holistic Prudential Planning

A core challenge to the design of an integrated planning process is that Section 165(d) limits the scope—and therefore the practical utility—of a Section 165(d) resolution plan, but U.S. and non-U.S. supervisors face the need, at least for the largest, most complex firms, to create practical and useful resolution plans that are much broader in scope than those contemplated under Section 165(d). The limits of what may be required in a Section 165(d) resolution plan arise because Section 165(d):

- Focuses on an analysis under the Bankruptcy Code, though many of the affiliates and subsidiaries of any Covered Company[8] will be resolved under other specialized insolvency regimes such as the FDIA, state liquidation regimes for state-licensed uninsured branches and agencies of foreign banks, the International Banking Act of 1978 for federally licensed branches and agencies, foreign insolvency regimes, state insolvency regimes for insurance or the Securities Investor Protection Act ("**SIPA**");[9]

- Ignores the existence of Title II, implying that the factual predicate of Title II should not be part of a Section 165(d) resolution plan;[10]

- Does not, for purposes of the review of a Section 165(d) resolution plan, look to whether a resolution is "rapid";[11] and

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[8] Uppercase terms not defined in this letter have the meaning given to them in the proposed rule.

[9] Footnote 7 of the release explicitly acknowledges this paradox.

[10] Senator Dodd's initial discussion draft legislation circulated in November 2009 linked the resolution-plan review to a determination that a plan is not credible or would not facilitate an orderly resolution under the Bankruptcy Code *or under Title II*. Chris Dodd, Chairman Senate Comm. on Banking, Housing, and Urban Affairs, *Discussion Draft: Restoring American Financial Stability*, §109(b)(3), at 48 (Nov. 10, 2009). There is no public record of why the change occurred.

- Does not require that the review of whether a plan is "not credible" or "deficient" take into account the stability of the U.S. financial system.[12]

These statutory constraints mean that, as a matter of statutory textual interpretation and regulatory authority thereunder, the statutory resolution plan under Section 165(d) should be built on the basis that:

- The resolution plan will analyze how the continuing operations of a Covered Company's insured depository institutions can be "adequately protected" in connection with the resolution of such Covered Company under the Bankruptcy Code;[13]

- Affiliated insured depository institutions will be resolved under the FDIA, whether pursuant to a sale to a third party in a traditional purchase-and-assumption agreement, with or without loss-sharing, a recapitalization of that business by transferring it to a bridge bank and exchanging the claims against the failed bank for equity in the bridge or any other resolution method;

- Non-U.S. assets and liabilities, including branches and subsidiaries of domestic depository institutions, will be part of the continuing operations transferred with the consent of appropriate overseas supervisory authorities and counterparties;

(continued…)

[11] Although Section 165(d)(1) refers to a resolution plan as one that provides for "rapid and orderly resolution in the event of material financial distress or failure," Section 165(d)(4) omits the word "rapid" in specifying the potential bases for a plan to be deemed deficient, saying instead that a resolution plan may be deemed deficient if it "is not credible or would not facilitate an *orderly resolution* of the company under title 11, United States Code" (emphasis added).

[12] *See* Section 165(d)(4).

[13] The adequate-protection requirement of Section 165(d)(1)(A) is the core substantive requirement in the information requirements of Section 165(d) plan since it is the only information requirement with a qualitative judgment to be made. The remaining informational elements do not contain a qualitative judgment. They are (i) full descriptions of the company's ownership structure, assets, liabilities and contractual obligations, (ii) identification of the cross-guarantees tied to different securities, identification of major counterparties and a process for determining to whom the collateral of the company is pledged and (iii) any other information that the Federal Reserve and the FDIC jointly require by rule or order.

- Prohibited "extraordinary support"[14] is limited to the injection of public money to recapitalize an insolvent firm or the invocation of Title II and does *not* include the Federal Reserve's secured lender-of-last-resort facilities,[15] Federal Home Loan Bank secured advances or the FDIC's use of the Deposit Insurance Fund to insure deposits and otherwise produce the least-cost resolution of an insured depository institution under the FDIA;[16]

- The "fall 2008" scenario is neither required by Section 165(d) nor within its statutory scope;[17] instead, it is a scenario that is relevant for Title II; and

- Actions considered in any recovery plan should be incorporated in the Section 165(d) resolution plan, as applicable.

We respectfully submit that these assumptions are more consistent with Section 165(d)'s statutory language and purpose than the broader current proposed rule, and we request that these changes form part of the final rule.

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[14] *See* Section __.4(a)(3)(ii) (prohibiting a resolution plan from relying on the provision of extraordinary support by the U.S. or any other government).

[15] These facilities have never been considered to be taxpayer-funded bailouts, when administered in accordance with the guidelines established by Walter Bagehot. *See* Walter Bagehot, LOMBARD STREET: A DESCRIPTION OF THE MONEY MARKET, Ch. VII, at 97 (1873) (R.D. Irwin ed. 1962) (to stay a financial panic, central banks should lend freely to solvent firms on a fully secured basis at penalty rates). For example, Milton Friedman—the titan of free market economics—considered them appropriate central-bank functions consistent with free market principles. Indeed, Friedman largely blamed the Great Depression on the Federal Reserve's failure to exercise its lender-of-last-resort powers early enough or aggressively enough. *See* Milton Friedman & Anna Jacobson Schwartz, A MONETARY HISTORY OF THE UNITED STATES, 1867-1960, at 407-419 (1963).

[16] The Deposit Insurance Fund is funded by requiring insured depository institutions to pay insurance premiums into the fund including special assessments if the Deposit Insurance Fund is depleted. *See* 12 U.S.C. § 1815(d). It is not funded by taxpayers or any other public source.

[17] The proposed rule would require that a resolution plan account for the fact that material financial distress or failure "may occur at a time when financial markets, or other significant companies, are also under stress and that the material financial distress of the Covered Company may be the result of a range of stresses." Section __.4(a)(3)(i). It is this requirement of a particular scenario, coupled with other aspects of the proposed rule, such as the definition of "material financial distress," that may be designed to require consideration of circumstances of extreme financial system-wide distress or panic without notice—a "fall 2008" scenario.

B. There Is a Clear Need for Supplemental Prudential Planning Beyond the Targeted Scope of Section 165(d)

As the statutory language of Section 165(d) will limit its usefulness in many instances, our recommendation is that a clear distinction should be made in the final rule between the Section 165(d) plan—which does not permit consideration of all available resolution tools or fully include all relevant subsidiaries—and the broader resolution-planning process that will be required as a prudential matter and that should contemplate the impact on the financial stability of the United States.[18] While the targeted Section 165(d) plans may be sufficient for a broad range of institutions, supervisors should also have the flexibility to require, where appropriate, supplemental information, beyond the scope of Section 165(d), that addresses how certain very large, complex financial institutions could be resolved in a manner that would avoid or mitigate systemic risk through use of the full panoply of available supervisory and other tools, including those under the Bank Holding Company Act, the FDIA, the International Banking Act, Title II and state and foreign insolvency regimes. It is only through an integrated, holistic process that effective resolution planning, taking into account and addressing systemic risk with the largest and most complex institutions, can unfold.

Under our proposal, the final rule would be reconfigured so it reflects that the resolution-plan requirements of Section 165(d) are just one part of a larger set of recovery- and resolution-planning processes that are currently being designed

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[18] Governor Tarullo of the Federal Reserve Board has described the broader approach as follows:

> The living will requirement could be broadened so as to make it into a potentially very useful supervisory tool for healthy firms, as well as a resource in the event that resolution became necessary. Under this approach, the firm would, in addition to developing a resolution plan, be required to draw up a contingency plan to rescue itself short of failure, identify obstacles to an orderly resolution, and show it can quickly produce the information needed for the supervisor to orchestrate an orderly resolution should the need arise. These plans will evolve as the organization's business and economic conditions evolve, and accordingly, the plans will need to become a regular part of normal supervisory processes.

Daniel K. Tarullo, Member, Federal Reserve Board, "Toward an Effective Resolution Regime for Large Financial Institutions: An Agenda for Europe and the United States," Remarks at the Symposium on Building the Financial System of the 21st Century (Mar. 18, 2010), *available at* http://www.federalreserve.gov/newsevents/speech/tarullo20100318a. pdf. Section 165(d) is no obstacle to such an approach.

by supervisors in the United States and other countries and by the Financial Stability Board ("**FSB**").[19]

C. The Determination of What Is "Not Credible" or "Deficient" Should Evolve over Time

There are potentially severe business-model and competitiveness consequences to any financial firm if the Federal Reserve and the FDIC were to jointly determine that the company's Section 165(d) resolution plan is "not credible," including further increases in capital and liquidity requirements, leverage limits, activities limits and even forced sales. Our members welcome the opportunity to work with the supervisors and prepare resolution plans that meet the requirements of Section 165(d), and we share the supervisors' goal that resolution planning should be viewed as a cooperative and iterative process between firms and supervisors that should evolve over time.[20] One of the challenges in the resolution-planning process is that a financial business should be managed to optimize capital formation, prudent maturity transformation and economic growth as a going concern, rather than for failure as a gone concern.[21]

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[19] We doubt, for example, that supervisors in other countries will be comfortable with the targeted scope of the Bankruptcy Code-based analysis in the Section 165(d) resolution plan.

[20] At the FDIC board meeting approving the proposed rule, Acting Comptroller of the Currency John Walsh, who is also a member of the FDIC board, commented that "[t]he rule appropriately contemplates an iterative process to develop initial plans and continuing dialogue to keep them relevant as was discussed in the presentation. And it will be important to recognize that the range of acceptable outcomes may be large and we shouldn't really be expecting or seeking plans that fit a single approach or framework." *The Federal Deposit Insurance Corporation Board of Directors Hold an Open Session*, LexisNexis at *17 (Mar. 29, 2011) (statement of John G. Walsh, Acting Comptroller of the Currency) (CQ Transcriptions database).

[21] While we do not exclude the possibility of some simplification, over time, as a result of the resolution-planning process, we are troubled by recent regulatory statements that may leave the impression that some regulatory policymakers have already decided on the outcome of the resolution plans. *See* Sheila C. Bair, Chairman, FDIC, "We Must Resolve to End Too Big to Fail," Remarks at 47th Annual Conference on Bank Structure and Competition Sponsored by the Federal Reserve Bank of Chicago (May 5, 2011) ("[T]he FDIC and the Fed must be willing to insist on organizational changes that better align business lines and legal entities well before a crisis occurs. Unless these structures are rationalized and simplified in advance, there is a real danger that their complexity could make a SIFI resolution far more costly and more difficult than it needs to be."); Daniel K. Tarullo, Member, Federal Reserve Board, "Regulating Systemically Important Financial Firms," Remarks at the Peter G. Peterson Institute for International Economics (June 3, 2011) ("Together with the FDIC, the Federal Reserve will be reviewing the resolution plans required of larger institutions by Dodd-Frank and, where necessary, seeking changes to facilitate the orderly resolution of those firms.").

As a result, supervisors should not create a system that manages for failure rather than for success.

The authority to impose more stringent capital, liquidity, leverage or other requirements under Section 165(d) is limited solely to the resolution planning that Section 165(d) contemplates. It does not apply to the broader prudential recovery and resolution planning that is envisioned for the largest, most complex firms. To the extent that, as a result of such broader planning, structural changes are envisioned, the appropriate statutory authority is Section 121, not Section 165(d). Section 121, known as the Kanjorski Amendment, would allow supervisors to impose limitations and even require asset dispositions as a last resort, but only upon a "grave threat" determination by the Federal Reserve, a two-thirds vote of the Financial Stability Oversight Council ("**FSOC**") and appropriate procedural protections.[22] It would undermine congressional intent to use the targeted focus of Section 165(d) as a means to impose structural changes when a specific standard with procedural protections, which was the focus of intense debate and discussion, has been provided for that purpose.

Neither Section 165(d) nor its legislative history defines or specifies factors to guide how a "not credible" or "deficient" joint determination would be made. The proposed rule also does not set forth any such factors. We note that there is no statutory or regulatory deadline for any such determination, and that the determination is posed in the negative. That is, the possible determination is that a plan is "*not* credible" or "would *not* facilitate an orderly resolution" under the Bankruptcy Code, not an affirmative determination of credibility. We believe this orientation appropriately reflects the targeted statutory purposes of Section 165(d).

We acknowledge the difficulty, at this stage of the iterative, multiyear process, of creating a definition for "not credible" or "deficient." Our suggestion is that, subject to the iterative supervisory process described in Section II.D below, this term for the moment, like many others in the proposed rule, be left undefined

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[22] Section 121 provides that if the Federal Reserve determines that a bank holding company with $50 billion or more in assets or a systemically important nonbank financial company poses a "grave threat" to U.S. financial stability, the Federal Reserve, upon a two-thirds vote of the FSOC, must limit the company's ability to merge with other companies; restrict the company's ability to offer financial products; require the company to terminate one or more activities; impose conditions on the activities; or, as a last resort, require the company to dispose of assets. The Federal Reserve must provide the company with written notice that such action is being considered, and the company is entitled to a hearing in advance of any such regulatory action. In addition, Section 121 provides for the adoption of regulations regarding application of its provisions to foreign-headquartered financial institutions.

with a view to working out crisper definitions over time either by a revised regulation or in supervisory letters or FAQs. Given the lack of market and regulatory experience and knowledge in this area, it is difficult to proceed otherwise. As Acting Comptroller of the Currency John Walsh, who is also a member of the FDIC board, commented at the FDIC board meeting approving the release of the proposed rule, "it will be important to recognize that the range of acceptable outcomes may be large and [supervisors] shouldn't really be expecting or seeking plans that fit a single approach or framework."[23]

We would like to suggest a few thoughts for the supervisors' consideration as they engage in their first rounds of review. We suggest that the review be tied to the scope and planning decided between the firms and the supervisors in our modified proposal. We expect that, for initial plan submissions, the focus of review will be on process, planning and governance around the resolution plan. We also suggest that the supervisory expectation for the first-generation plans be that a Covered Company focus on the most significant material entities, core business lines and critical activities.

Even assuming this approach, we note one requirement that we do not believe is appropriate for inclusion in any resolution plan. Section __.4(e)(2) would require a resolution plan to provide an unconsolidated balance sheet for the Covered Company and a consolidating schedule for all entities that are subject to consolidation. We believe that this requirement is overly inclusive and that the scope of any unconsolidated balance sheets and consolidating schedules should be limited to material entities, as elsewhere in the proposed rule.

Finally, we believe that any definition of credibility should be informed by the overall context of the entire Dodd-Frank Act.

D. Proposals for a Phased and Iterative Process of Resolution-Plan Submission and Supervisory Review

Resolution planning is a new and untested process for Covered Companies and supervisors. The final rule should provide that resolution planning will evolve through a cooperative and iterative supervisory process over several years. Other major regulatory changes—such as the increase in capital requirements under Basel III, the adoption of International Financial Reporting Standards or the creation of the regulatory system for over-the-counter derivatives—had to be or

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[23] *The Federal Deposit Insurance Corporation Board of Directors Hold an Open Session*, LexisNexis at *17 (Mar. 29, 2011) (statement of John G. Walsh, Acting Comptroller of the Currency) (CQ Transcriptions database).

are being phased in over time. It is unworkable to expect that such a fundamental new risk-management and resolution-planning system could be implemented without a transition period that phases in the new requirements. Such a phase-in period would allow supervisors and firms to explore various approaches to resolution planning in an orderly way, both with respect to what should generally be required and what is appropriate in the case of any given firm. We note, moreover, that we believe that the cost-benefit analysis outlined in the proposed rule[24] also severely underestimates the time, effort and expense required to comply with the rule.[25]

We therefore urge that the Federal Reserve and the FDIC revise the rule so that the resolution-planning requirements are phased in and include an exploratory, collaborative transition period.

In the pages that follow, we describe one possible rulemaking approach that would accomplish those goals. For convenience, much of the approach is also set forth in the form of substitute regulatory text in Appendix B (the "**Modified Proposal**"). We propose:

- **A Pilot Program for Large, Complex U.S.-Headquartered Banking Organizations.** The rule should be revised to give the supervisors the flexibility to begin with a pilot program involving the largest and most complex U.S.-headquartered banking organizations, as described in Section II.D.1. The learning from this process could later be applied to less complex institutions, foreign-headquartered banks and nonbank financial companies.

- **A Phased and Iterative Process of Resolution-Plan Submission and Supervisory Review**, as described more fully in this Section II.D.

- **Requirements for Regional and Other Less-Complex Bank Holding Companies that Are Tailored and Proportional to the Risk that They Pose to U.S. Financial Stability.** The Section 165(d) resolution plan and any broader prudential requirements placed on

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[24] Proposed Rule at 22654.

[25] In recent testimony before the U.K. Parliament's House of Commons Treasury Select Committee, Barclay's CEO Bob Diamond revealed that Barclays spent £30 million (roughly $49 million) creating its living will. Jill Treanor, *Bankers Divided Over Reform As Vince Cable Threatens To Get Tough*, THE GUARDIAN (June 9, 2011), *available at* http://www.guardian.co.uk/business/2011/jun/08/bankers-divided-over-reform.

regional bank holding companies should be tailored to their risk profile.[26]

- **Requirements for Nonbank Financial Companies that Are Also Tailored and Proportionate**, as described below in Section II.E.

- **Requirements for Foreign-Headquartered Banking Organizations that Are Tailored and Proportional to the Risk that They Pose to U.S. Financial Stability and Take into Account the Extent to Which They Are Subject to Comparable Requirements in Their Home Countries**, as described below in Sections II.F and II.G and more fully in the separate Institute of International Bankers ("**IIB**") comment letter on the proposed rule.[27]

The discussion below refers to the Modified Proposal where applicable, but the majority of our suggestions are severable and could be considered singly in addition to as parts of a more comprehensive regulatory alternative.

1. The Proposed Rule's Uniform Countdown Until an Industry-Wide Plan Submission Date Should Be Modified To Allow for Staggered Phase-In of Resolution Plan Requirements

The proposed rule would require that all 124 estimated Covered Companies submit their initial resolution plans within 180 days after the rule's effective date.[28] The plan submissions would trigger a 60-day period of agency review, and the Federal Reserve and the FDIC would be required within that time to jointly determine whether each plan satisfies the rule's extensive informational requirements.[29] We have illustrated the proposed rule's process for submission

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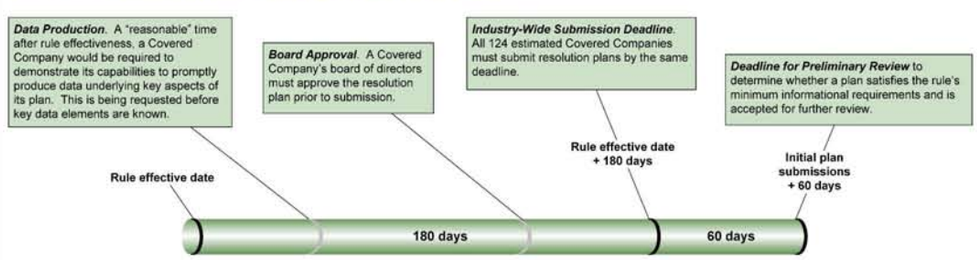
[26] Title I explicitly permits differentiation among financial firms, "on an individual basis or by category," and tailoring of regulatory requirements and timing based on differences in capital structure, complexity, financial activity, size and other risk-related characteristics. Section 165(a)(1)–(2). As Congress expressly recognized in Dodd-Frank and financial supervisors are rightly acknowledging, "one-size-fits-all" regulation should be avoided. Donna Borak, *Fed Will Differentiate Barely "Systemic" from Truly TBTF*, AMERICAN BANKER, May 6, 2011 (quoting Federal Reserve Chairman Bernanke as saying, "We're going to be very careful not to have a discrete drop, a discrete change, a discrete difference between $49 billion and $51 billion banks. . . . It will not be the case that community banks, or medium-sized regional banks, or international giants will face the same changes in regulation").

[27] Comment Letter from the IIB to the Federal Reserve and the FDIC on Joint Notice of Proposed Rulemaking Regarding Resolution Plans and Credit Exposure Reports (June 10, 2011) ("**IIB Comment Letter**").

and review in Figure 1 below. A larger version of this illustration is attached in Appendix A.

Fig. 1 Submissions Under Proposed Rule



We believe that the proposed rule's approach would lead to an inefficient use of supervisory resources. The Federal Reserve and the FDIC should instead draft a rule that permits resolution plans to be submitted on a risk-based, staggered basis, and the Modified Proposal suggests language to accomplish that objective. Section 165(d) presents no statutory obstacles to a staggered phase-in of its requirements,[30] and there are numerous benefits to such an approach.

(continued…)

[28]Section __.3(a). The Federal Reserve and the FDIC estimate that 124 firms will be subject to the rule's requirements is in the Paperwork Reduction Analysis accompanying the proposed rule. Proposed Rule at 22654.

[29] Section __.6(a)(1).

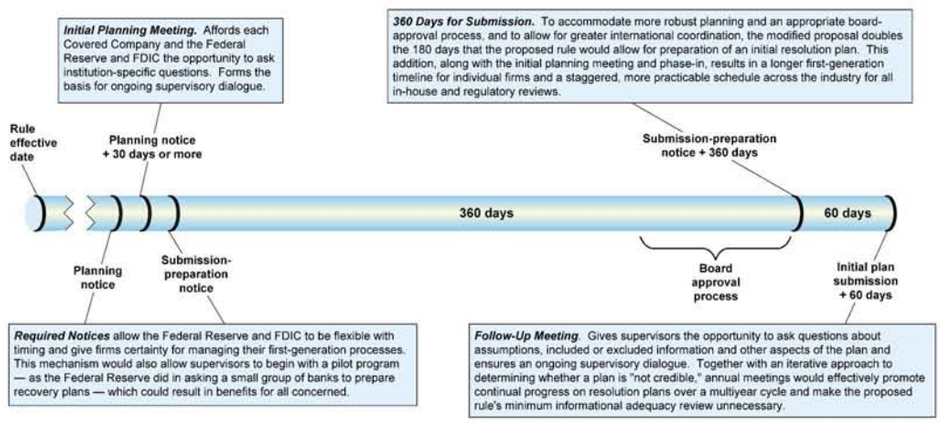
[30] Section 165(d), by its terms, would clearly permit phase-in and staggering. The only statutory deadline is for the promulgation of the rule, which must be completed by January 21, 2012. The statute is silent with respect to any timelines *within* the rule itself. In the Title VII context, that silence is being interpreted by the agencies and accepted by congressional oversight committees as permitting phased implementation. As CFTC Chairman Gensler explained in congressional testimony:

> The Dodd-Frank Act gave the CFTC flexibility as to setting implementation or effective dates of the rules to implement the Dodd-Frank Act. For example, even if we finish finalizing rules in a particular order, that doesn't mean that the rules will be required to become effective in that order. Effective dates and implementation schedules for certain rules may be conditioned upon other rules being finalized, their effective dates and the associated implementation schedules. For instance, the effective dates of some final rules may come only after the CFTC and SEC jointly finalize the entity or product definitions rules.

(…continued)

Supervisors would be able to spread their workload by requiring plan submissions only as quickly as they are able to adequately review them, and to begin their learning process by focusing on a manageable number. They could also ensure that no supervisory problems are overlooked in the deluge of complex plans. This approach would also increase efficiencies on an industry-wide basis by enabling supervisors to issue FAQs or other periodic guidance as the process expands across the full spectrum of Covered Companies. Meanwhile, the types of firms that may be less prepared to submit resolution plans could be granted additional time before commencement of their formal processes. We illustrate our Modified Proposal in Figure 2 below. A larger version of this illustration is attached in Appendix A.

Fig. 2 First-Generation Process Under Modified Proposal



Section __.3(a)(1) of the Modified Proposal would allow the Federal Reserve and the FDIC to undertake a pilot resolution-planning program with a small group of firms,[31] or to phase in the applicability of the rule's requirements

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(continued…)
Hearing Before the H. Comm. on Agriculture, 112th Cong. (2011) (statement of Gary Gensler, Chairman, U.S. Commodity Futures Trading Comm'n.).

[31] We are aware that other countries have also begun or are beginning with pilot programs. *See, e.g.*, Financial Services Authority, *Turner Review Conference: Discussion Paper* (Oct. 2009) ("By the end of 2009 a small number of major UK banking groups will have begun work to produce their recovery and resolution plans as part of a pilot exercise intended to help the FSA develop policy in this area . . . .").

across the industry in a more general way. The formal process for any particular Covered Company would not begin until the delivery of a joint notice from the Federal Reserve and FDIC scheduling an initial planning meeting among the Federal Reserve, the FDIC and the Covered Company. Thus, supervisors have discretion to spread the rule's applicability across the industry as quickly, or not, as they desire. The planning meeting would offer an invaluable opportunity for a Covered Company to ask questions and seek clarification about aspects of the rule's applicability to its specific business, structure and risk profile and preview for the Federal Reserve and the FDIC any particular difficulties that it foresees. The supervisors, of course, would be able to ask their questions as well and to begin developing an institution-specific informational foundation for their eventual review of the Covered Company's resolution plan. The concept of an initial planning meeting—which is likely to be followed by an ongoing dialogue about impediments and issues, particularly during the first generation—reflects the supervisory nature of the undertaking.

The Modified Proposal does not discuss the issue of how the Federal Reserve and the FDIC should choose which Covered Companies would submit their resolution plans when, but we have some suggestions for how supervisors might structure a staggered industry-wide process. First, firms such as nonbank financial companies, smaller bank holding companies and non-U.S.-headquartered institutions should be permitted to go later in the process. Second, the Federal Reserve and the FDIC should be guided by the principle of proportionality in considering how to allocate their limited resources. Thus, non-U.S. headquartered institutions that have only a small U.S. footprint and therefore pose less risk to the U.S. financial system could be permitted to go later in the process or be excluded.[32] That would provide the benefit of allowing more time for non-U.S. requirements to develop, and the Federal Reserve and the FDIC might ultimately be able to defer much of the responsibility for such institutions to home-country supervisors.[33] Finally, simple, objective metrics such as total U.S.-based assets might be used as a proxy for identifying which bank holding companies should start their resolution planning when.

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[32] As discussed in the IIB Comment Letter, applying the requirements of Section 165(d) to foreign banking organizations on the basis of the assets of their U.S. operations would reduce the number of Covered Companies in a manner that would be consistent with congressional intent and would promote more effective implementation of those requirements. IIB Comment Letter at 7–8.

[33] IIB Comment Letter at 15–17.

2. Timing Requirements Should Account for the Difficulties that Preparation of an Initial Plan Will Pose and for an Appropriate Board-Approval Process

The proposed rule would allow only 180 days from rule effectiveness for the preparation and submission of an initial resolution plan.[34] We believe that, for firms complying for the first time, 180 days is inadequate to allow for the immense data-identification and -collection effort, analyses that need to be undertaken of the data, strategic management discussions and an appropriate level of board-supervised review and approval by the Covered Company's board of directors, which will itself be an iterative process. We suggest that, at a minimum, 360 days would be more appropriate, and in the Modified Proposal a notice following the initial planning meeting marks the beginning of a 360-day period for a Covered Company to submit its initial resolution plan.

The proposed rule would require a Covered Company's board of directors to approve an initial or annual resolution plan before its submission and to note such approval in the Covered Company's minutes.[35] We believe that this board-approval requirement significantly improves upon the approval-and-attestation requirement proposed by the FDIC in its May 2010 rule proposal regarding contingent resolution plans at certain large insured depository institutions.[36] We suggest, however, that the proposed rule be modified to clarify the scope of the board-approval requirement consistent with the oversight role of a board of directors.

A board's role is to provide strategic direction and oversight, in contrast with the role of an institution's management, which is responsible for the actual

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[34] The FDIC intent to finalize the rule in July 2011 has created uncertainty about the intended timing for the effectiveness of the final rule. We submit that effectiveness should, at the very least, not be in advance of the statutory deadline of January 21, 2012.

[35] In the case of a foreign-based Covered Company only, the resolution plan may be approved by a delegee acting under the express authority of the board of directors of the Covered Company. Section __.3(e)(2).

[36] That proposal would have required a covered insured depository institution's "board or directors or designated executive committee [to] approve the analysis and plan and attest that the plan is accurate and that the information is current." FDIC, Special Reporting, Analysis and Contingent Resolution plans at Certain Large Insured Depository Institutions, 75 Fed. Reg. 27464, 27470 (proposed May 17, 2010) (to be codified at 12 C.F.R. pt. 360) (proposing to require insured depository institutions with greater than $10 billion in total assets that are owned and controlled by parent companies with more than $100 billion in total assets to plan their resolutions).

conduct of its operations. In the context of a resolution plan, we believe it is appropriate for supervisors to require a board:

- To confirm that the recovery- and resolution-planning process is appropriately integrated into its firm's governance structure;
- To provide strategic direction to the resolution-planning process, including actions taken over the course of multiple resolution-plan submission cycles to overcome impediments to resolution;
- To review and approve the design of the process under which resolution planning occurs;
- To authorize the design of a resolution plan by senior management and other key employees, including approving the processes established for collecting and verifying the information included in the plan and for preparing and updating it;
- To be informed of key informational content underlying the plan; and
- To become familiar with such content and to discuss it.

Much of the information contained in a resolution plan is of a detailed operational nature, however, and no board should need to approve a resolution plan in the sense of certifying or confirming all the factual information it contains.

To clarify the scope of the proposed rule's board-approval requirement, we suggest that the Federal Reserve and the FDIC substitute the text set forth in Section __.3(e) of the Modified Proposal.

3. Submission of a Plan Should Be Followed by a Meeting with the Federal Reserve and the FDIC To Discuss It

The proposed rule establishes a process whereby a preliminary joint agency review of a resolution plan to determine whether it satisfies the minimum informational requirements of Section __.4 would precede the more in-depth joint agency review following which a plan might be determined to be "not credible." Although a Covered Company will receive an affirmative indication, on the basis of a joint initial informational-adequacy-based review, that its plan either has or has not been "accepted for review," the proposed rule's 60-day deadline renders unlikely anything more than a perfunctory initial agency review.

Under the Modified Proposal, within 60 days of submission of an initial resolution plan, a meeting among the Federal Reserve, the FDIC and the Covered Company would be scheduled. At the meeting supervisors would ask any questions of the Covered Company about assumptions, included or excluded information or other aspects of the plan. This face-to-face meeting, together with an iterative approach, as described above, to the review to determine whether a plan is "not credible," eliminates the need for the minimum informational-adequacy review described in Section __.6(a)(1) of the proposed rule and, we believe, would be a more effective way to ensure ongoing and acceptable progress in a Covered Company's development of its resolution plan over a multiyear cycle.

Having yearly meetings to follow up on the submission of resolution plans is in keeping with the appropriately supervisory nature of the resolution-planning process. It also avoids the result that seems possible under the proposed rule that at least some firms could be required to begin submitting updated annual plans before ever receiving feedback on their initial plans. We believe it would be inefficient to require a Covered Company to comply with annual or other updating requirements before having had at least a discussion with its supervisors about its initial resolution plan.

4. Annual Resolution Plan Updates Should Not Be Due During the First Quarter of the Calendar Year

Following the initial round of submissions, the proposed rule would require Covered Companies to resubmit resolution plans annually no later than 90 days after the end of each calendar year, which for virtually all Covered Companies is the same period of the year when annual results and annual reports are being prepared.[37] In past years this has also been the period when stress tests, which will henceforth be annual, have been conducted. We strongly request that, under any approach adopted in the final rule, annual updates not be due during the

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[37] We assume that the timing for annual stress tests will be part of the package of systemic-risk reforms that Chairman Bernanke has indicated will be issued later this summer. *See* Dodd-Frank Implementation: Monitoring Systemic Risk and Promoting Financial Stability: Hearing Before the S. Comm. on Banking, Housing and Urban Affairs, 112th Cong. (2011) (statement of Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys.) ("To meet the January 2012 implementation deadline for these enhanced standards, we anticipate putting out a package of proposed rules for comment this summer."). We ask that the agencies take into account that there is substantial overlap within the Covered Companies among the teams that will be required to prepare resolution plans and conduct stress tests.

first quarter of the calendar year, when firms and key personnel are engaged with year-end financial reporting, annual stress tests and capital-planning reviews.[38]

In the Modified Proposal we suggest that, following the submission and review of its initial resolution plan, a Covered Company be required to submit an updated annual resolution plan no less frequently than once every 12 months, but that the Covered Company be permitted to work out its own annual submission date with its supervisors. Similar to the staggering of initial resolution-plan submissions across the industry, this type of annual updating requirement avoids the potential for the Federal Reserve and FDIC to be unnecessarily overwhelmed with resolution plans to review during a particular quarter of each year. It also avoids the potential for a yearly industry-wide cycle of fresh and stale periods for the information contained in all resolution plans on an aggregate, systemic basis.

5. Data-Production Capabilities Should Be Evaluated on a Supervisory Basis, Not Incorporated into Regulatory Requirements

The proposed rule would require, within a reasonable period of time following its effectiveness, that a Covered Company demonstrate its capacity to promptly produce the data underlying key aspects of its plan. We believe that this requirement, rather than forming a part of the rule, is better addressed as part of the Federal Reserve and the FDIC's ongoing review of the resolution-planning process of individual Covered Companies. We would propose the omission of any upfront data-production-demonstration requirement.

Formalizing this type of requirement at such an early stage is counterproductive since it is not possible to operationalize data production and make systems investments before understanding how data elements and information sorting will be assessed by supervisors. Developing this understanding is likely to require at least one annual cycle.[39] The Modified Proposal provides for regular meetings between a Covered Company and the Federal Reserve and FDIC, and these would be appropriate opportunities for supervisors to engage with the firm on its data-production and systems capabilities. The Modified Proposal incorporates the proposed rule's suggestion

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[38] For Covered Companies, such as some non-U.S. Covered Companies, whose financial reporting is made on a basis other than calendar year-end, annual plans should not be due during the quarter following their fiscal year-end.

[39] Section __.4(k) is so indeterminate as to suggest that the Federal Reserve and the FDIC themselves may not yet have fully formed their expectations in this regard.

that Federal Reserve and FDIC staff will have access to information and personnel of the Covered Company during the review of a resolution plan.[40] This access would allow for ongoing monitoring of data and systems capabilities.[41]

6. Interim Updates Should Not Be Mandatory; If They Are, the Trigger Should Be Fundamental Change

The proposed rule would require Covered Companies to file an updated resolution plan within a time period specified by the Federal Reserve and FDIC, 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.

We do not believe that there is any need for a final rule to *require* interim updating of a resolution plan given the annual-updating requirement and, more importantly, the fact that the Federal Reserve and the FDIC propose to retain the discretion to require updating as frequently as they jointly determine to be appropriate.[42] Such discretion permits appropriate tailoring of the timing and content of any update requirement to the facts and circumstances of individual institutions. For example, in many cases it would be reasonable to permit a financially sound organization with a strong resolution-planning governance process to incorporate any adjustments that a major acquisition or disposition might require into the organization's next annual plan update, without filing an interim update.

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[40] Section __.3(d).

[41] There are limits to how far this Section 165(d) information-access provision could properly be stretched. There have been some recent suggestions that Section 165(d) might authorize the Federal Reserve and the FDIC to embed staff at systemically important financial institutions on a continuous basis. *See*, *e.g.*, Sheila C. Bair, Chairman, FDIC, "We Must Resolve to End Too Big to Fail," Remarks at the 47th Annual Conference on Bank Structure and Competition Sponsored by the Federal Reserve Bank of Chicago (May 5, 2011). The authority for doing so under Section 10(b)(3) of the FDIA, as amended by Section 172 of the Dodd-Frank Act, is questionable for firms in generally sound condition. Section 165(d) does not by its terms provide authority to conduct examinations or inspections, and it would be inappropriate to interpret Section 165(d) as effectively nullifying the limitations of FDIA § 10(b)(3).

[42] *See* Section __.3(c)(1).

The Modified Proposal preserves the Federal Reserve and the FDIC's joint authority to request that a Covered Company submit its resolution plan more frequently than annually,[43] but it removes the required interim-updating provision.

If it is necessary that the rule provide for interim updating, we have several suggestions about how such a requirement should be modified. The proposed rule and the accompanying release unnecessarily establish a hair trigger for interim resolution-plan updates. The accompanying release provides a non-exhaustive list of changes that may be viewed as having a material effect on a resolution plan and thereby triggering an interim update.[44] Though some of the items listed could be important to a resolution plan, others very likely would not be. A five-percent change in market capitalization, for example, could stem from stock buybacks or even just short-term market fluctuations. The proposed rule's use of "reasonable foreseeability" is also problematic. For example, a proposed merger between two regional bank holding companies that remains subject to regulatory approval would be an event that "could reasonably be foreseen to have" a material effect on the resulting Covered Company's resolution plan, but beginning the 45-day updating period at a time of reasonable foreseeability before closing seems clearly to be premature. Moreover, if the two merging firms have resolution plans, it does not make sense to update them in advance of merger integration.

The threshold for any required interim updating should be high, and we would suggest the use of a "fundamental change" standard under which interim updates would be required only when such a fundamental change in the firm has occurred that renders the resolution plan, in its entirety, inadequate. The concept of a fundamental change is a higher standard than material change.[45] To

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[43] Modified Proposal § __.3(c)(1).

[44] Proposed Rule at 22650.

[45] This distinction between fundamental and material changes borrows from the securities laws. As the SEC has explained it:

> The use of the term "fundamental" is intended to reflect more accurately current staff practice under which post-effective amendments are filed when major and substantial changes are made to information contained in the registration statement. Material changes that can be accurately and succinctly stated in a short sticker would continue to be permitted. While many variations in matters such as operating results, properties, business, product development, backlog, management and litigation ordinarily would not be fundamental, major changes in the issuer's operations, such as significant acquisitions or dispositions, would require the filing of a post-effective amendment. Also, any change in the business or operations of the registrant that would necessitate a restatement of

(…continued)

implement these changes, we suggest that the Federal Reserve and FDIC substitute the text set forth at page 42 of Appendix B in place of Section __.3(b)(1) of the proposed rule.

The substitute text set forth in Appendix B also makes clear that an interim update to a resolution plan does not require the submission of an entire "Resolution Plan," as that term is used in the proposed rule (*i.e.*, the full document satisfying all the informational requirements of Section __.4 of the proposed rule). The proposed rule only provides for the resolution plans submitted initially and annually to be reviewed for compliance with Section __.4 and evaluated under Section __.6(b).[46] Further, the release accompanying the proposed rule states that an interim update to a resolution plan should describe the event triggering the update, any material effects that the event may have on the resolution plan and any actions that the Covered Company has taken or will take to address such material effects.[47] We view our suggested language in Appendix B in this regard not as a substantive change, but as a technical correction consistent with the proposed rule's intent.

E. The Final Rule Should Recognize the Particular Burdens that Nonbank Financial Companies Will Face

We believe that the final rule should recognize the additional difficulties and particular burdens that nonbank financial companies will face. Unlike bank holding companies and foreign banking organizations, which can determine today whether they would be subject to the proposed rule's requirements, nonbank financial companies do not know if or when they will be designated for Federal Reserve supervision by the FSOC nor whether they will be required to establish

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(continued…)

> the financial statements always would be reflected in a post-effective amendment. At the same time, pursuant to the undertaking, a registrant using a shelf registration statement for a series of debt offerings would be able to sticker the prospectus to reflect changes in interest rates, redemption prices and maturities. Although such information clearly is material to any investor in the securities, it does not represent a fundamental change in the information set forth in the registration statement when all other details remain the same.

Delayed or Continuous Offering and Sale of Securities, 46 Fed. Reg. 42001, 42007–08 (proposed Aug. 18, 1981).

[46] *See* Sections __.6(a)(1) & (b) (referring only to resolution plans submitted under Section __.3(a)).

[47] Proposed Rule at 22650.

an intermediate holding company. They are thus not yet in a position to determine whether any rule to implement Section 165(d) will apply to them. Apart from uncertainty of application, nonbank financial companies, because they have to date been largely outside the scope of substantive banking regulation, will have to significantly adjust to numerous elements of Title I's enhanced systemic regulatory framework after being designated. Certainly, none has had the experience of preparing a recovery plan, which is a predicate to the next stage of resolution planning.

Compliance with capital, reporting and other new obligations, of which resolution plans are just one, and transitioning under Federal Reserve oversight will be a monumental task. In addition, nonbank financial companies may be required to form an intermediate holding company to facilitate compliance with these new requirements, which could impact legal structure in ways relevant to resolution planning. Accordingly, the resolution-plan requirements should recognize these factors in addressing timing considerations for such firms. It is important to both Covered Companies and supervisors that nonbank financial companies make an appropriate and effective transition.

The application of resolution-plan requirements to nonbank financial companies should make clear that an intermediate holding company, if any, would be the Covered Company to which the resolution-plan requirement would apply, and the timing provisions of a final rule should be flexible enough to allow the completion of any required structuring before resolution planning must begin.[48]

The Modified Proposal offers a framework that could accommodate the particular concerns of nonbank financial companies by providing for a phasing in of the rule's requirements. As noted above, the Modified Proposal would allow the Federal Reserve and the FDIC to apply resolution-planning requirements across the industry in staggered fashion, allowing nonbank firms to begin their processes later. It also would ensure that supervisors would delay applicability of the rule's requirements to nonbank financial companies until a reasonable time after they are designated for Federal Reserve supervision and after the Federal Reserve determines whether they will be required to establish intermediate holding companies. The Federal Reserve and the FDIC could also extend the length of the first-generation process by requiring an interim submission focused

[48] Section 167 requires the Federal Reserve to adopt rules to establish the criteria by January 2012 for determining whether to impose intermediate holding company requirements on systemically important nonbank financial companies. The Federal Reserve has not yet indicated when proposed rulemaking on this topic should be expected.

on high-level strategy and legal organizational structure prior to submission of the full first-generation plan.

Regardless of the timing and other mechanisms ultimately adopted, the process of resolution planning should reflect a tailored approach so that nonbank financial companies are not required to comply with a rigid, bank-centric framework.

F. The Final Rule Should Deal More Appropriately with Foreign-Headquartered Financial Institutions

We believe that the proposed rule is overly inclusive in its application to foreign-headquartered firms, and we agree with the comments on this point made by the IIB in their comment letter on the proposed rule dated June 10, 2011.

G. The Federal Reserve and the FDIC Should Coordinate with FSB and Non-U.S. Requirements

We encourage the Federal Reserve and FDIC to coordinate and standardize the numerous cross-border requirements relating to various recovery- and resolution-planning exercises, as well as those relating to complementary domestic initiatives.[49] Ongoing regulatory coordination with the FSB and supervisors in different countries is of paramount importance to avoid overlapping and inconsistent requirements.[50]

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[49] The Federal Reserve and the FDIC should consider, for example, the potential need to align the information requirements of resolution plans with the developing system of uniform legal-entity identifiers. Dept. of the Treasury, Office of Financial Research; Statement on Legal Entity Identification for Financial Contracts, 75 Fed. Reg. 74146 (Nov. 30, 2010); *see also* Comment Letter from The Clearing House, Enterprise Data Management Council, Financial Services Roundtable, Futures Industry Association, International Swaps and Derivatives Association, Investment Company Institute, Managed Funds Association & SIFMA to the Office of Financial Research & Dept. of the Treasury on the LEI Policy Statement (Jan. 31, 2011), *available at* http://www.sifma.org/Issues/item.aspx?id=23198. The agencies should evaluate the extent and sophistication of the mapping of legal-entity-level information required by the proposed rule in light of technological realities and the need for firms to internally harmonize their implementation of overlapping regulatory processes and requirements. Any process that requires "re-mapping" of legal entities identified and coded for one purpose to those identified and separately coded for another will require a tremendous amount of time and effort and will introduce a substantial risk of errors that can be avoided with coordination and flexibility in the early stages of ongoing supervisory processes.

[50] The FSB Cross-Border Crisis Management Group is expected to consult in July 2011 on *Essential Elements of Effective Recovery and Resolution Plans* and on a framework for the assessment of resolvability of systemically important financial institutions. The FSB Steering (…continued)

When exercising their supervisory prerogatives with respect to resolution planning, host-country authorities should coordinate with, and wherever possible, give deference to, the broader plan implemented under supervision from the home country. With regard to systemically significant cross-border institutions, Crisis Management Groups that include U.S. supervisors can play a key role in facilitating resolution-planning coordination between home- and host-country supervisors. The final rule, consistent with Section 165(b)(2),[51] should explicitly acknowledge the existence of these international efforts and the need for international cooperation, and we agree with the comments made by the IIB in this regard.[52] Deference to home-country supervisors has benefits not just for foreign-based firms subject to U.S. resolution-planning requirements, but also for globally active U.S.-headquartered firms.

Given the multitude of contingency plans that are or will soon be required for the multijurisdictional, global financial-services industry, inefficiencies and overly burdensome regulation can only be avoided if informational requirements are aligned at the more granular levels for organizations that operate on a multinational basis. U.S. supervisors should coordinate with their FSB, UK, EU and other foreign counterparts. Many firms will have to change their internal-reporting structures and invest heavily in information systems and personnel to produce the information that the proposed rule and other regulations will require. Creating different types of plans here and abroad will be a major project, and resolution planning should be structured so the process is efficient, and as consistent and uniform as possible.

(continued…)

Group is expected to discuss draft proposals for *Key Attributes of Effective Resolution Regimes* in July 2011. The European Commission is reviewing comments received on its January 2011 consultation *Technical Details of a Possible EU Framework for Bank Recovery and Resolution*, and a proposal for a directive is expected in September 2011. The UK's Financial Services Act 2010 authorizes the FSA to require recovery and resolution plans, and a consultation paper is expected during the summer of 2011. The Basel Committee on Banking Supervision Cross-Border Bank Resolution Group is expected to publish findings from a survey on national resolution regimes and tools in the middle of 2011. Relevant legislation, rulemaking or pilot programs are also progressing in France, Germany, Spain, Switzerland and Belgium.

[51] Section 165(b)(2) requires that, in applying standards such as resolution-planning requirements to foreign-based firms, the Federal Reserve "give due regard to the principle of national treatment and equality of competitive opportunity" and "take into account the extent to which the foreign financial company is subject on a consolidated basis to home country standards that are comparable to those applied to financial companies in the United States."

[52] See IIB Comment Letter at 12–15, 17–20.

III. CREDIT-EXPOSURE REPORTS

A. Rulemaking on Credit-Exposure Reports Should Be Postponed in Light of Other Related Rulemakings or, at the Very Least, Reopened for Comment Later

We suggest that the Federal Reserve and the FDIC postpone rulemaking to implement the credit-exposure-reporting requirements of Section 165(d). Doing so would allow for harmonization with related initiatives, which we strongly support, and the development of key definitions, which are conspicuous in their absence from the proposed rule. The release accompanying the proposed rule states that several related initiatives are underway or contemplated[53] and that the Federal Reserve and FDIC "will ensure that data collected through these other initiatives and the Credit Exposure Report will be coordinated and harmonized to the extent possible."[54] It goes on to say that reporting requirements will be proposed for public comment in 2011 and will provide additional clarity around the definition of "credit exposure" for each asset class identified by the proposed rule.[55] In light of that expected timeline, and given that the statutory deadline for rulemaking to implement Section 165(d)'s credit-exposure-reporting requirement is not until January 2012, there does not seem to be any particular reason for proposing credit-exposure-reporting regulations at this time. Moreover, the credit-exposure-reporting and resolution-plan requirements of Section 165(d) are not procedurally interrelated, and Section __.5 of the proposed rule could be severed and reserved for reproposal at a later date without disrupting the remaining structure and content of the rule.

As an alternative to delaying the credit-exposure-reporting portion of the rule until the package of related rules is proposed, we suggest that this portion of the rule be reopened for comment before any determination of an effective date for this portion of the rule.[56] Without such an approach the proposed rule does

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[53] The proposed rule mentions single-counterparty credit exposure limits, to be implemented by the Federal Reserve under Section 165(e), and Federal Reserve stress testing under Section 165(i). We would add the concentration limits of Section 622 and the enhanced affiliate-transaction and lending-limit provisions of Title VI to the list of related initiatives.

[54] Proposed Rule at 22652.

[55] *Id.*

[56] Previously closed comment periods have been reopened in other Dodd-Frank Act rulemaking contexts. *See, e.g.*, CFTC, Reopening and Extension of Comment Periods for Rulemakings Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 Fed. Reg. 25274 (May 4, 2011) (to be codified at 17 C.F.R. pt. 1).

not provide a meaningful opportunity to comment, particularly given the absence of a definition of "credit exposure."

That said, we offer the following specific comments on the proposed rule's credit-exposure-reporting requirements.

B. Credit-Exposure-Reporting Requirements Should Be Subject to Transition or Phase-In

Though the proposed rule does not specifically mention when a Covered Company's first credit-exposure report would be due, it would appear to require reporting to begin 30 days after the end of the first calendar quarter following the rule's effective date. We believe that timing would be much too soon and that credit-exposure reporting should be subject to transition or phase-in. Many more definitions—which we expect will begin to be included in the anticipated proposed reporting requirements, and might also helpfully be refined through ongoing clarification in FAQs or supervisory guidance—are needed to clarify the meaning of key terms. Reporting firms will also need to align or build new systems to capture, quantify, aggregate and report exposures, particularly those that are not tracked today. Making these systems investments in advance of greater certainty about the nature and scope of the reporting requirements would be inefficient and wasteful. As standard reporting forms and complementary initiatives such as the Office of Financial Research's creation of a uniform system of legal-entity identifiers take shape, the quality and consistency of firms' credit-exposure-reporting capabilities will improve. All of these developments, however, will take time. There may also be unintended consequences to adjust for, such as reduction by a Covered Company of the number of counterparties to which it maintains credit exposure, consequences that would lessen the Covered Company's reporting burden but concentrate credit risk.

As to ongoing reporting requirements, we agree that requiring the data in a credit-exposure report (other than trading data and intra-day credit exposure) to be as of the end of a calendar quarter is the best approach and will ensure the highest data quality, but we suggest that quarterly credit-exposure reports be due 60 days after the end of a calendar quarter, rather than 30 days after quarter-end.

C. The Federal Reserve Should Maintain a List of Companies that Are Significant

The Federal Reserve should maintain a public list of companies that are "significant bank holding companies" or "significant nonbank financial

companies" under Regulation Y. The definitions of those terms,[57] will factor heavily into the scope of the credit-exposure-reporting requirement. Putting aside the issues surrounding how those terms are defined,[58] it would increase efficiency and effectiveness for the list of companies relevant for credit-exposure reporting to be clear to all that are subject to the reporting requirement. If it is not, reporting firms will be subject to unclear calculation requirements and will likely reach inconsistent conclusions about the scope of companies relevant for reporting purposes, rendering the reports less useful to supervisors.

D. Reporting for Each Category of Exposure Should Be of a Single Number

We believe that reporting for each of the proposed rule's categories of exposures should be of a single number representing the consolidated exposure of a Covered Company together with its relevant subsidiaries or the consolidated exposure of a significant company together with its relevant subsidiaries. The rule would benefit from clarification that this is the intended interpretation.

E. "Subsidiary" Should Not Be Interpreted as a Regulation Y Subsidiary

The proposed credit-exposure-reporting requirements would be codified as part of a new Regulation YY, which we hope implies that the term "subsidiary" as used in the proposed rule will be defined in a practical way that is calibrated for this reporting requirement and not how that term is defined in Regulation Y, which is designed for very different purposes. We think it a practical unlikelihood that Covered Companies would be able to obtain the information required for reporting from all of the entities that would be "subsidiaries" under Regulation Y.[59] We suggest that, for purposes of the credit-exposure-reporting

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[57] The Federal Reserve is in the process of developing definitions for these terms. Federal Reserve, Definitions of "Predominantly Engaged in Financial Activities" and "Significant" Nonbank Financial Company and Bank Holding Company, 76 Fed. Reg. 7731 (proposed Feb. 11, 2011) (to be codified at 12 C.F.R. pt. 225).

[58] *See* Comment Letter from the IIB to the Federal Reserve on Notice of Proposed Rulemaking Regarding Definitions of "Predominantly Engaged in Financial Activities" and "Significant" Nonbank Financial Company and Bank Holding Company 3–4 (March 30, 2011).

[59] *See* 12 C.F.R. § 225.2(o) (defining "subsidiary" to mean "a bank or other company that is controlled by another company, and refers to a direct or indirect subsidiary of a bank holding company. An indirect subsidiary is a bank or other company that is controlled by a subsidiary of the bank holding company"); *see also* 12 C.F.R. § 225.2(e) (defining "control," which is ultimately based on a difficult-to-determine "all facts and circumstances" test).

requirements, the proposed rule use the accounting term "financially consolidated subsidiaries" in place of "subsidiary" to make clear that the broad Regulation Y definition will not apply.

F. Bidirectional Credit-Exposure Reporting Should Be Tailored to Available Information

We recognize that Section 165(d) sets out the framework for bidirectional reporting that the proposed rule mirrors: *i.e.*, a Covered Company must report its credit exposures to significant companies and on significant companies' exposures to it. However, reporting the exposure of a significant company *to* the reporting Covered Company is impracticable because such exposure is often unknowable. For example, a significant company that makes a loan to a Covered Company or buys a bond from a Covered Company will often subsequently trade the loan or bond in the secondary market, obscuring from the vantage point of the Covered Company borrower the ultimate holder of any credit risk. It would also be difficult to track exposures where a significant company participates in syndicated lending to a Covered Company. Tracking and reporting would be entirely novel for some categories of exposures and would pose significant logistical obstacles. Hedges and derivatives that alter exposures contribute to the difficulties. These difficulties support the need for transition or phase-in of credit-exposure-reporting requirements.

In addition, while the information required to estimate the exposure of significant companies to a Covered Company exposure may, in the view of the reporting Covered Company, be a byproduct of exposure modeling, it is generally not utilized in the management of counterparty credit risk. As such, it may not benefit from the validation that is performed on "positive" exposures in estimating capital requirements. Generating reliable "negative" exposures is a non-trivial exercise that will not directly benefit the reporting firm.

G. Quarterly Reporting of Trading Positions Does Not Provide Useful Data, and Intra-Day Credit-Exposure Reporting Should Be of Limits

We do not believe there is value to requiring trading positions that are credit exposures to be reported on a quarterly basis. These types of exposures have high volatility, and the exposure as of one particular day per quarter is not meaningful. A better approach for this type of data would be for supervisors, in lieu of requiring regular reporting, to monitor—and require on a supervisory basis any appropriate improvements to—a Covered Company's capabilities to produce trading data quickly and on an automated basis. The solution to the Lehman-weekend problem of firms not being able to quickly assess their net exposures to

Lehman is an information-systems problem, not a quarterly-reporting problem, and should be solved as such.

A similar issue arises in connection with the proposed rule's requirement that a Covered Company report the "credit exposure associated with intra-day credit extended." We believe that such reporting—consistent with the Federal Reserve's traditional approach—should be of intra-day limits and of consequences of breaching the limits, rather than reporting of credit exposure on any one day within a quarterly reporting period.

H. Additional Cross-Border Requirements Are Not Necessary

We believe that the proposed rule adequately captures cross-border exposures and that additional reporting requirements focused specifically on cross-border exposures are unnecessary. Cross-border exposures would be a subset of each type of data that the proposed rule requests.

IV. CONFIDENTIALITY

A. The Proposed Rule Provides Inadequate Confidentiality Protection for Competitively Sensitive, Confidential Supervisory Information in Resolution Plans and for Competitively Sensitive Data in Credit-Exposure Reports

We believe that the balance of interests clearly favors the nondisclosure of the informational content of a firm's resolution plan and credit-exposure reports.[60] We realize that the Freedom of Information Act ("**FOIA**") will apply to data submitted in resolution plans and credit-exposure reports, making it critical that the information submitted be treated as an integral part of the examination process and subject to similar protections. Resolution planning is analogous to the bank-examination process, which rightly receives strong confidentiality protections.[61]

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[60] See Annette L. Nazareth & Margaret E. Tahyar, Transparency and Confidentiality in the Post-Financial Crisis World—Where to Strike the Balance?, HARVARD BUS. L. REV. (forthcoming Spring 2011).

[61] It receives such protections even though a primary purpose of the examination process relates to maintaining public confidence. *See* FDIC, DSC Risk Management Manual of Examination Policies § 1.1 ("[One purpose of bank examinations] relates to the maintenance of public confidence in the integrity of the banking system and in individual banks. Such confidence is clearly essential because the system's customers serve as the source of funding, without which banks would be unable to meet their most fundamental objective of providing financial services."), *available at* http://www.fdic.gov/regulations/safety/manual/index_pdf.html.

Resolution plans and credit-exposure reports should therefore be made subject to the strongest FOIA protection available. The final rule should expressly acknowledge that information submitted has been created for the "use of" the Federal Reserve, the FDIC and the FSOC in the examination or supervision process and will, therefore, be treated as confidential supervisory information. The final rule should also assert that, as with examination reports,[62] the plans and reports are the property of the supervisors. We suggest that the Federal Reserve and FDIC substitute the text set forth at page 42 of Appendix B to this letter in place of Section __.9(c) of the proposed rule. Doing so would clarify the applicability of the FOIA "confidential supervisory information" exemption,[63] and give firms the assurance of confidentiality needed to facilitate a candid dialogue with supervisors.

Resolution plans and credit-exposure reports will be submitted to the Federal Reserve and, in the case of resolution plans, to the FDIC, and they will also be available to the FSOC and, presumably, to some host-country supervisors. Some sharing of this data among multiple supervisory agencies and their staff is thus inevitable. The Federal Reserve and the FDIC should ensure that any such sharing does not affect confidentiality under FOIA. Furthermore, this sharing increases the risk of leaks or unauthorized access and makes the inclusion of strong confidentiality protections in the proposed rule all the more important. Along these lines, we suggest that, as a supervisory practice, the Federal Reserve and the FDIC put in place practical procedures, either in the rule itself or as part of supervisory guidance, to minimize the risk of leaks or inadvertent disclosure.[64] These safeguards should include the creation of "insider" lists of persons with permitted access to the plans or reports,[65] electronic control of access to data and a trail of who has accessed the plan or the credit-exposure reports. To the extent that information is shared with the FSOC, the OFR, other national or international agencies or outside consultants to the FDIC,[66] adequate systems and procedures to

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[62] *See, e.g.*, 12 C.F.R. § 261.20(g) ("All confidential supervisory information or other information made available under this section shall remain the property of the Board."); *see also* 12 C.F.R. §§ 261.22(e), 309.5(g) & 3.09.6(a).

[63] 5 U.S.C. § 552(b)(8).

[64] *See* Nazareth & Tahyar, *Transparency and Confidentiality in the Post-Financial Crisis World—Where to Strike the Balance?*, HARVARD BUS. L. REV.

[65] This precaution is analogous to the insider-list requirement under EU law for material nonpublic information. *See* OJ L 162, 30.4.2004, 70.

[66] *See* Mark Leftly, *US Watchdog Call in Experts to Draft 'Living Wills' for Banks*, THE INDEPENDENT, Apr. 24, 2011 ("[The FDIC] is taking no chances that the banks will provide
(…continued)

ensure protection of the data, including protection against computer hacking and other leaks, should be implemented and continuously monitored for effectiveness.

B. Resolution Plans

A resolution plan will contain business-plan data, granular data on critical operations, trading books and counterparty exposures, all of which will be competitively sensitive.[67] It will also contain end-of-life contingency planning in the highly unlikely event of the failure of a Covered Company. We strongly disagree with recent suggestions that a portion or summary of a resolution plan should be made public,[68] as doing so could lead to significant misunderstandings in the market, potential disclosure of sensitive information or other results that exacerbate systemic risk and thus run counter to Congress's intent with regard to resolution plans. Disclosing information in a way that is harmful not just because it increases systemic risk, but also because the disclosure could disrupt the internal operations of the company or harm its competitive position (especially vis-à-vis unregulated competitors)[69]—and is also misleading—is different from disclosing information because it is material to investors. Selective disclosure of plans or portions of plans can also be more destabilizing in a financial crisis, rather than contributing to financial stability, by providing an incomplete picture of the recovery- and resolution-planning actions of the Covered Company.

Firms should be permitted to decide whether and to what extent they are required by applicable securities laws to inform their investors about the outlines

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(continued…)

sufficiently detailed wills. It has invited corporate advisory firms to pitch to join a panel that will draw up early versions of the wills, to give the regulator a benchmark with which to measure the detail of the banks' plans.").

[67] *See, e.g.*, Sections __.4(c)(1)(iii), __.4(e)(8) & __.4(e)(10).

[68] *See, e.g.*, Pew Financial Reform Project, *Standards for Rapid Resolution Plans* 11 (2011), *available at* http://pewfr.articulatedman.com/admin/document/files/Standards-for-Rapid-Resolution-Plans.pdf.

[69] For example, consider the public disclosure of intercompany funding information. The information would be useless to most employees and customers, highly sensitive and likely to change from time to time. However, in the hands of a competitor, it could be unfairly exploited. If the potential competitor were not itself a Covered Company subject to the same reporting requirements, it would achieve a material competitive advantage. We do not believe that Section 165(d) should be implemented in a manner that promotes such negative competitive effects.

of their resolution plan. [70] Materiality of the relevant information and the appropriate level of disclosure will be worked out over time and will be heavily fact- and context-dependent. We expect, for example, that increased disclosure could be required in times of financial stress or panic. Disclosing a resolution plan to the public and competitors routinely and without regard to the background context would clearly harm a company. The proposed rule appropriately does not, and the final rule should not, address these issues that are governed by the securities laws, but they are obviously a key consideration that firms will bear in mind.

Finally, to the extent that other countries' supervisors are unlikely to follow suit and impose a routine disclosure requirement on their own firms, such a requirement would place U.S.-headquartered firms and foreign firms subject to U.S. resolution-planning requirements at a severe competitive disadvantage and could thus adversely impact international supervisory cooperation in contingency planning. [71] Moreover, blocking statutes and privacy laws in other countries will make interagency sharing of data more difficult if there is public disclosure.

C. Credit-Exposure Reports

Public dissemination of credit-exposure reports would also be problematic and thus should not be required. For example, the proposed rule would require the reports to contain a description of the systems and processes that the Covered Company uses to collect and aggregate the underlying data and to produce and file the report. Much of that description would contain highly proprietary information about systems and processes. Moreover, credit-exposure reports will contain proprietary client and customer data that should be protected under various bank examination, supervisory and reporting principles.

V. CONCLUSION

In light of all the concerns and questions raised in this submission, the intent to finalize rulemaking to implement Section 165(d) in July 2011 is

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[70] That firms may make particular disclosures about their resolution plans as *required* under applicable securities laws is not inconsistent with the treatment of resolution plans as confidential supervisory information.

[71] In the absence of substantial international regulatory harmony on this point, competitive arbitrage opportunities will ensue.

troubling.[72] We are concerned that the Federal Reserve and the FDIC will not have sufficient time to adequately review and revise the proposed rule in response to comments. We are not aware of any previous circumstance, outside of an emergency scenario, where a 30-day period between the end of comments and a vote was contemplated. Ample time remains before the January 2012 statutory deadline to finalize this rule.

The six combined trade associations appreciate the opportunity to comment on the proposed rule and strongly believe that the iterative supervisory approach to resolution plans under Section 165(d) described here will, within the given statutory framework, enhance financial stability by decreasing the systemic risk associated with the failure of a systemically important firm. Consistent with this overarching consideration are our suggestions for a phasing-in of the proposed rule, a pilot program, international coordination and appropriate confidentiality standards. Our members welcome the opportunity to work with the supervisors on developing an effective resolution planning process for systemically important firms. If you have any questions regarding our comments, please do not hesitate to contact any of the individuals listed in the accompanying cover letter.

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[72] The FDIC's website states that the FDIC intends for the rule to be final in the summer of 2011, even though the statutory deadline is not until January 21, 2012. The press has reported that the FDIC will vote on the final rule at an FDIC board meeting the first week of July. Meera Louis and Craig Torres, *FDIC's Bair Will Leave July 8 After Finishing 'Living Will' Rule*, BLOOMBERG (May 9, 2011).

Appendix A— Visual Timelines of Proposed Rule and Modified Proposal

Fig. 1 Submissions Under Proposed Rule

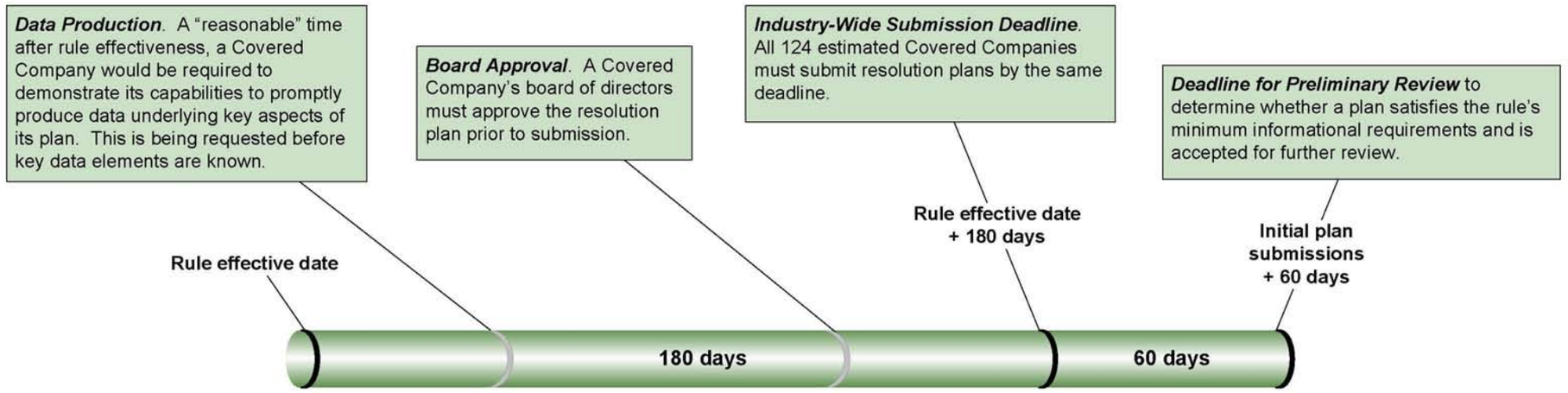
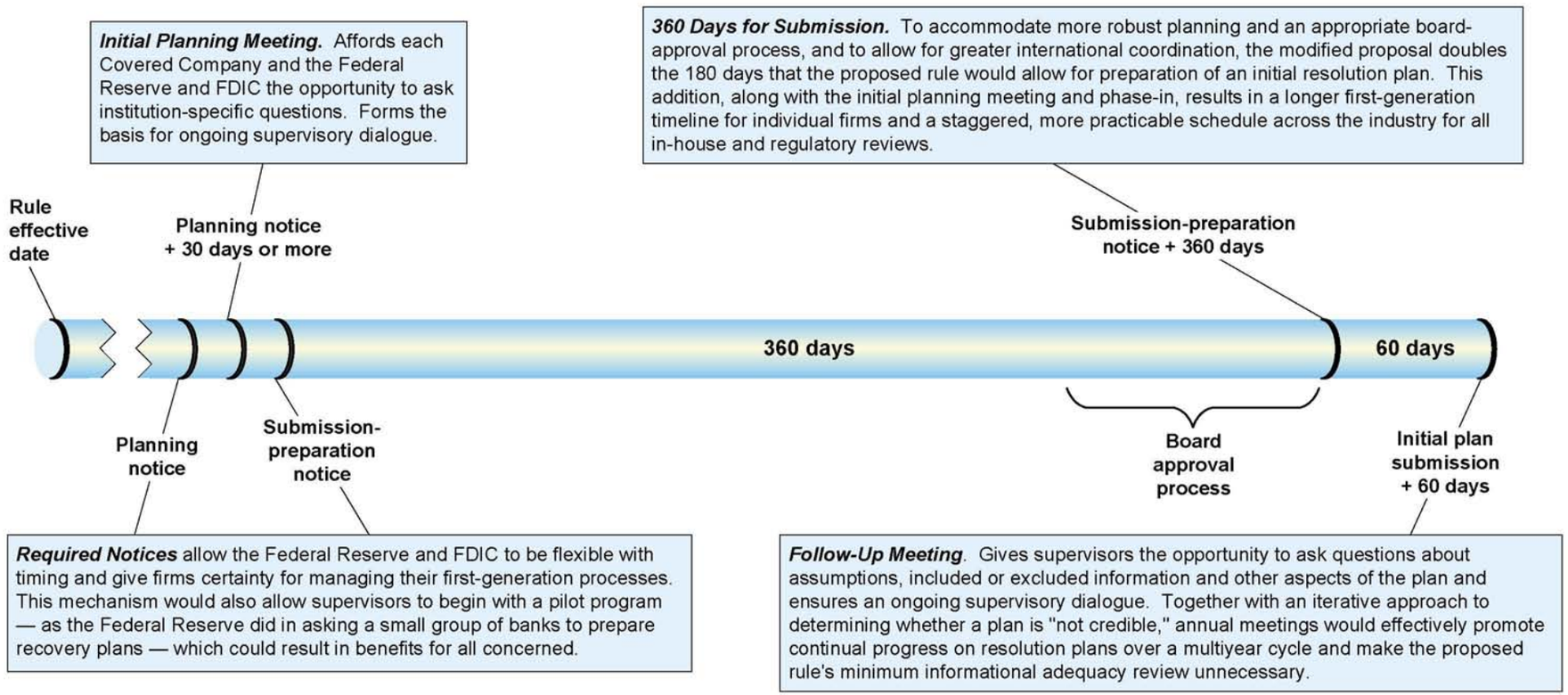


Fig. 2 First-Generation Process Under Modified Proposal



Appendix B—Modified Regulatory Text

Modified Proposal

The Modified Proposal referred to in the body of our comment suggests substitute regulatory text that could be used in place of Sections __.3 and __.6 of the proposed rule. Additional substitute regulatory text is suggested at page 42 below.

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§ ____.3 Resolution Plan required.

(a) *Initial Resolution Plans required—*

(1) Following the effective date of this part, or such later date as a company becomes a Covered Company, the Board and the Corporation shall jointly notify each Covered Company in writing of the date of an initial planning meeting among the Board, the Corporation, and the Covered Company. The date of such planning meeting shall be 30 calendar days after the date of the joint notice issued pursuant to this paragraph, or such longer period as the Board and the Corporation may jointly determine.

(2) Within 60 calendar days of the meeting required by paragraph (a)(1) of this section, or such shorter or longer period as the Board and Corporation may jointly determine, the Board and the Corporation shall jointly notify the Covered Company in writing of the date for submission of the Covered Company's initial Resolution Plan. The date for submission of the Covered Company's initial Resolution Plan shall be 360 calendar days after the date of the joint notice issued pursuant to this paragraph, or such longer period as the Board and the Corporation may jointly determine.

(b) *Annual Resolution Plans required.*—The Covered Company shall submit a Resolution Plan to the Board and the Corporation at least once every 12 months based on a date and schedule to be determined by the Board and the Corporation after consultation with the Covered Company.

(c) *Authority to require more frequent submissions or extend time period.* Notwithstanding paragraphs (a) and (b) of this section, the Board and Corporation may jointly:

(1) Require that a Covered Company submit a Resolution Plan more frequently than required pursuant to paragraph (b) of this section;

(2) Extend the time period that a Covered Company has to submit a Resolution Plan under paragraphs (a) and (b) of this section; and

(3) Waive the requirement that a Covered Company submit an update to a Resolution Plan.

(d) *Access to information.* In order to allow evaluation of the Resolution Plan, each Covered Company must provide the Board and the Corporation such information and access to personnel of the Covered Company as the Board and the Corporation jointly determine during the period for reviewing the Resolution Plan is necessary to assess the credibility of the Resolution Plan and the ability of the Covered Company to implement the Plan. The Agencies will rely to the fullest extent possible on examinations conducted by or on behalf of the appropriate Federal banking agency for the relevant company.

(e) *Board of directors approval of Resolution Plan.* Prior to submission of a Resolution Plan under paragraph (a) or (b) of this section:

(1) The board of directors of the Covered Company shall review the Resolution Plan and, consistent with traditional corporate-governance principles, approve of its submission, noting such approval in the minutes; or

(2) In the case of a foreign-based Covered Company only, a delegee acting under the express authority of the board of directors of the Covered Company shall review the Resolution Plan and, consistent with traditional corporate-governance principles, approve of its submission.

(f) *Resolution Plans provided to the Council.* The Board shall make the Resolution Plans and updates submitted by the Covered Company pursuant to this section available to the Council upon request.

* * * * *

§ ____.6 Post-Submission Meeting and Review of Resolution Plans; Resubmission of Deficient Resolution Plans

(a) *Post-submission meeting.* Within 60 calendar days of receiving a Resolution Plan under § ____.3, the Board and the Corporation shall jointly notify each Covered Company in writing of the date of a post-submission meeting among the Board, the Corporation, and the Covered Company to discuss the Covered Company's Resolution Plan.

(b) *Joint determination regarding deficient Resolution Plans.* If the Board and Corporation jointly determine that the Resolution Plan of a Covered Company submitted under § ____.3(a) is not credible or would not facilitate an orderly resolution of the Covered Company under the Bankruptcy Code, the Board and Corporation shall jointly notify the Covered Company in writing of such determination. Any joint notice provided under this paragraph shall identify the aspects of the Resolution Plan that the Board and Corporation jointly determined to be deficient.

(c) *Resubmission of a Resolution Plan.* Within 90 days of receiving a notice of deficiencies issued pursuant to paragraph (b) of this section, or such shorter or longer period as the Board and Corporation may jointly determine, a Covered Company shall submit a revised Resolution Plan to the Board and Corporation that addresses the deficiencies jointly identified by the Board and Corporation, and that discusses in detail:

(1) The revisions made by the Covered Company to address the deficiencies jointly identified by the Board and the Corporation;

(2) Any changes to the Covered Company's business operations and corporate structure that the Covered Company proposes to undertake to facilitate implementation of the revised Resolution Plan (including a timeline for the execution of such planned changes); and

(3) Why the Covered Company believes that the revised Resolution Plan is credible and would result in an orderly resolution of the Covered Company under the Bankruptcy Code.

(d) *Extension of time to resubmit Resolution Plan.* Upon a written request by a Covered Company, the Board and Corporation may jointly extend the time to resubmit a Resolution Plan under paragraph (c) of this section. Each extension request shall be supported by a written statement of the company describing the basis and justification for the request.

* * * * *

Additional Substitute Regulatory Text

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§ ____.3

(b) *Interim updates following material events*—(1) *In general.* Each Covered Company shall file with the Board and the Corporation an update to a Resolution Plan within a time period specified by the Board and the Corporation occurrence, change in conditions or circumstances or other change that results in a fundamental change to the Covered Company. Such update should describe the event, occurrence or change, any material effects that the event, occurrence or change may have on the Resolution Plan and any actions the Covered Company has taken or will take to address such material effects.

* * * * *

§ ____.9

(c) *Confidentiality of Resolution Plans and Credit Exposure Reports.* Any Resolution Plan or Credit Exposure Report submitted pursuant to this part, including any information incorporated by reference into such Resolution Plan or Credit Exposure Report, is a report of condition prepared for the use of the Board, the Corporation, and the Council, as well as any other federal, state, or foreign supervisor with which it is shared, as part of the supervisory process for Covered Companies and shall be treated as confidential supervisory information. Confidential supervisory information will not be disclosed except as required by law and with prior written notice to the Covered Company. Any such Resolution Plan or Credit Exposure Report shall remain the property of the Board and the Corporation.