Living Will Requirements for Financial Institutions

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This Note discusses the US resolution plan (living will) requirements for financial and depository institutions, covering the substantive and procedural elements of two complementary rules: the Dodd-Frank Act Rule (DFA Rule), which applies to large financial groups operating in the US, and the Insured Depository Institution Rule (IDI Rule), which applies to large US depository institutions. This Note also addresses practical considerations in preparing a living will and provides a glossary of key terms under the living will requirements of both the DFA Rule and the IDI Rule.

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US resolution plan (living will) requirements for financial institutions that may pose systemic risk to the financial stability of the US have been implemented by the Federal Reserve Board (FRB) and the Federal Deposit Insurance Corporation (FDIC). The requirements are in accordance with provisions under the Dodd-Frank Act and the Federal Deposit Insurance Act (FDIA), and are part of a larger package of measures designed to limit the risk certain financial institutions pose to the US economy and financial system (see *Practice Note, Summary of the Dodd-Frank Act: Regulation of Systemically Significant Financial Institutions (http://us.practicallaw.com/1-502-8437)*). The FRB and FDIC have widely touted living wills as a core element of reforms designed to mitigate risks to the US financial system and to contribute to the end of "too big to fail" status for financial giants.

Under the FRB and FDIC rules, financial institutions subject to the requirements must file and periodically update a resolution plan for as long as they continue to meet certain size or systemic-risk criteria. These requirements apply to institutions that meet the criteria irrespective of their current financial condition.

Preparation and review of the resolution plans in accordance with the extensive information requirements of the rules constitute a major undertaking for covered financial institutions, one with important consequences and ramifications that will continue to evolve over time.

In connection with plan preparation, financial institutions need to analyze numerous complex issues that would be presented in the event the plan were to be implemented under quiet or distressed market conditions. These issues generally implicate US (and, in many cases, non-US):

- Insolvency law.
- Regulatory frameworks concerning the "change of control" and operation of regulated businesses. (For more information on change of control issues in the financial industry, see *Practice Note, Investments Involving Banks: Control Issues (http://us.practicallaw.com/2-502-8880).*)
- Tax law.
- Corporate law.

It is a virtual certainty that there will be a significant learning period associated with the development and review of the required resolution plans particularly because:

- There is not yet a proven set of guidelines for either financial institutions or regulators to follow.
- Each financial institution has its own unique -- and constantly evolving-- risk profile, meaning that each institution must create a bespoke plan.

This Note describes the US living wills framework and highlights practical considerations for financial institutions and their advisors. For a glossary of key terms used in the DFA Rule and the IDI Rule, see *Glossary of Key Terms under Living Will Requirements*.

GENERAL OVERVIEW OF THE LIVING WILL REQUIREMENTS

There are two general resolution plan requirements under US law:

- The Dodd-Frank Act Rule (DFA Rule), which requires large financial institutions (such as bank holding companies (BHCs) that are not US depository institutions to periodically submit to the FRB, the FDIC and the Financial Stability Oversight Council (FSOC) a resolution plan (see *The DFA Rule*).
- The Insured Depository Institution Rule (IDI Rule), which requires large US depository institutions, which in most cases

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would be part of a covered financial group that is also subject to the DFA Rule, to periodically submit a resolution plan to the FDIC (see *The IDI Rule*).

The DFA Rule

Section 165(d) of the Dodd-Frank Act requires certain large financial institutions to prepare and periodically revise plans for their rapid and orderly resolution in the event of their material financial distress or failure.

Agency Regulations Implementing the DFA Rule Requirements

On September 13, 2011, and October 17, 2011, the FDIC and FRB respectively approved a joint rule that implements the resolution plan requirements of Section 165(d) of the Dodd-Frank Act (see *Legal Update, FDIC Issues Living Wills Rules for Large Banks and Financial Institutions (http://us.practicallaw.com/9-508-1911)*). The joint rule is codified as Regulation QQ for the FRB (*12 C.F.R. pt. 243*) and Part 381 for the FDIC (*12 C.F.R. pt. 381*). The text of the two agencies' regulations are the same, although the supplemental information explaining the rationale for their actions varies, in mostly non-substantive ways.

Financial Institutions Covered under the DFA Rule

Financial institutions covered under the DFA Rule include:

- US BHCs with at least $50 billion in total consolidated assets. This threshold is determined based on the average of the BHC's four most recent Consolidated Financial Statements for BHCs as reported on the Federal Reserve's Form FR Y-9C.
- Any foreign bank (or any company that controls a foreign bank) that has:
  - a US bank, branch, agency or commercial lending company subsidiary; and
  - at least $50 billion in total global consolidated assets. This threshold is determined based on the institution's most recent annual or, as applicable, the average of the four most recent quarterly Capital and Asset Reports for Foreign Banking Organizations as reported on the Federal Reserve's Form FR Y-7Q.
- Any nonbank financial company designated by the FSOC as a systemically significant financial institution (SSFI). For more information on SSFI designation, see *Practice Note, Summary of the Dodd-Frank Act: Regulation of Systemically Significant Financial Institutions (http://us.practicallaw.com/1-502-8437)*.

If a covered BHC or foreign bank subsequently falls below the $50 billion asset threshold, it will remain subject to the living wills requirements until it has less than $45 billion in total consolidated assets (as determined in its most recent annual report or the average total consolidated assets as reported in the four most recent quarterly reports).

According to official commentary issued with the DFA Rule, 124 banking firms (approximately 90 of which are headquartered outside of the US) are initially subject to the DFA Rule. As the FSOC has yet to designate any non-bank financial institutions as SSFIs, it is not yet clear how many non-banking financial groups will also become subject to the DFA Rule.

Submission Deadlines under DFA Rule

Resolution plans must be submitted to the FDIC, FRB and FSOC beginning July 1, 2012, through December 31, 2013, depending on the size of the financial institution. The implementation timetable is as follows:

- Covered financial institutions with $250 billion or more in non-depository institution assets must file their initial plans by July 1, 2012. In the case of a foreign-based parent of a covered financial institution, this deadline applies if the institution's total US non-depository institution assets are $250 billion or greater.
- Covered financial institutions with total non-depository institution assets between $100 billion and $250 billion must file by July 1, 2013. In the case of a foreign-based parent of a covered financial institution, the deadline applies if the institution's total US non-depository assets fall between these amounts.
- All other covered financial institutions must file by December 31, 2013.

Updated resolution plans must be submitted on an annual basis thereafter. For more information, see *Procedural Elements of the DFA Rule and IDI Rule*.

Minimum DFA Rule Information Requirements

The DFA Rule, which became effective on November 30, 2011, sets out an extensive list of minimum information requirements for a satisfactory resolution plan. An acceptable plan must:

- Provide for the rapid and orderly liquidation or restructuring of the covered financial institution under:
  - the US Bankruptcy Code if the institution is subject to insolvency proceedings under the US Bankruptcy Code; or
  - another resolution regime, as may be applicable, to the particular type of institutions.
- Provide regulators with an understanding of the institution's:
  - structure;
  - complexity; and
  - international operations.
- Assist the FRB and FDIC in their efforts to ensure that the institution operates in a manner that is both safe and sound and that does not pose risks to the financial stability of the US. (Martin Gruenberg, the Acting Chairman of the FDIC, has stated that the resolution plan requirements are intended both to assist the ability of the FDIC to conduct advanced resolution planning for covered institutions facing financial distress and also "to facilitate improved efficiencies and risk management practices amongst systemically important financial institutions as they produce and evaluate these plans" (See *FDIC Board Meetings, Sept. 13, 2011*).)
- Provide a plan to fund critical operations during the resolution process.

(See *DFA Rule: Key Substantive Elements and Concepts.*)

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Institution-Specific Factors under DFA Rule

The FRB and the FDIC recognize that resolution plans will vary by company and, in their evaluation of plans, will take into account variances among companies in relevant factors, including their:

- Core business lines.
- Critical operations.
- Foreign operations.
- Capital structure.
- Risk.
- Complexity.
- Financial activities (including those of their subsidiaries).
- Size.

(See *DFA Rule: Key Substantive Elements and Concepts*.)

The IDI Rule

The purpose of the IDI Rule is to facilitate the FDIC's resolution of a covered depository institution in the event the depository institution were to fail, under Sections 11 and 13 of the FDIA. Although not mandated under the Dodd-Frank Act, the IDI Rule plan is intended to complement the DFA Rule.

FDIC Regulations Implementing the IDI Rule Requirements

On September 13, 2011, the FDIC approved an interim final rule requiring large FDIC-insured depository institutions to submit periodic contingency plans to the FDIC for resolution in the event of the institution's failure (see *Legal Update, FDIC Issues Living Wills Rules for Large Banks and Financial Institutions (http://us.practicallaw.com/9-508-1911)*). On January 17, 2012, the FDIC approved the final IDI Rule, which did not significantly modify the interim rule's requirements (see *Legal Update, FDIC Issues Final Living Wills Rule for Large Banks (http://us.practicallaw.com/0-517-3043)*). The IDI Rule became effective on April 1, 2012.

Banks Subject to the IDI Rule

FDIC-insured depository institutions with $50 billion or more in total assets are required to submit resolution plans. The threshold is based on the average of the depository institution's four most recent Reports of Condition and Income (Call Reports) or Thrift Financial Reports, as applicable. According to official commentary issued along with the IDI Rule, there are approximately 37 depository institutions initially subject to the IDI Rule.

Submission Deadlines under IDI Rule

Resolution plans are filed with the FDIC on an annual basis, beginning July 1, 2012, through December 31, 2013, depending on the size of the covered depository institution's parent company. These deadlines are aligned with those under the DFA Rule, so that institutions subject to both rules (covered financial institutions with covered depository institution subsidiaries) with be subject to the same deadlines for both. For more information, see *Procedural Elements of the DFA Rule and IDI Rule.*

Minimum IDI Rule Information Requirements

The IDI Rule plan must lay out a strategy to carry out the resolution in a manner that:

- Provides depositors access to insured deposits within one day.
- Maximizes net present value return on assets.
- Minimizes loss to creditors, including the Deposit Insurance Fund.

As part of the resolution plan, a covered depository institution must show how it would:

- Separate itself and its subsidiaries from the organizational structure of its parent company in a cost-effective and timely fashion.
- Sell or dispose of the deposit franchise, core business lines and assets.

Differences between the DFA Rule and the IDI Rule

The DFA Rule and the IDI Rule, while designed to be complementary, have some fundamental differences. The DFA Rule enters uncharted territory in requiring covered financial institutions to analyze what they would do in order to protect both their insured banking operations and US financial stability generally if they (or a material subsidiary) become insolvent. The IDI Rule, on the other hand, requires the preparation of a roadmap for the FDIC, as receiver, to follow if a covered depository institution is declared insolvent. Other key differences between the DFA Rule and IDI Rule are that they:

- Are conceived under different insolvency regimes (see *Different Insolvency Regimes*).
- Have different fundamental purposes (see *Different Fundamental Purposes*).

Different Insolvency Regimes

The DFA Rule requires a plan for a rapid and orderly resolution (liquidation or orderly restructuring) under the US Bankruptcy Code and other insolvency regimes applicable to particular types of regulated entities (such as broker-dealers). The IDI Rule, on the other hand, requires a plan for resolution under the FDIA with the FDIC acting as receiver. Although the US Bankruptcy Code and FDIA share some similarities, the differences between the two statutes are significant.

Different Fundamental Purposes

The DFA Rule and IDI Rule have fundamentally different purposes. The DFA Rule focuses on minimizing systemic risk in the resolution of a failed institution in order to:

- Protect the stability of the US financial system while maximizing recovery for creditors
- Reduce moral hazard, or the lack of market discipline based on the expectation that it would be less costly for the government to bail out a SSFI than to allow it to fail.

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The driving concept under the DFA Rule is that steps should be taken to prevent the discontinuance of critical operations of a SSFI, or mitigate its fallout, through a restructuring or other measures. The DFA Rule plan is intended to outline those steps, including any impediments to taking them and efforts needed to avoid these impediments.

The IDI Rule, on the other hand, focuses on:

- Ensuring that depositors receive prompt access to insured deposits on the failure of a covered depository institution.
- Minimizing costs to the FDIC and creditors.
- Maximizing recovery value for creditors.

Categories of Financial Groups For Purposes of the US Resolution Plan Requirements

Financial groups required to submit a plan under the DFA Rule and that have depository institution subsidiaries that meet the $50 billion threshold under the IDI Rule are required to prepare both a group resolution plan (submitted by the covered financial institution under the DFA Rule) and a depository institution plan under the IDI Rule (submitted by the insured depository institution(s)).

For purposes of the applicability of the DFA Rule plan and the IDI Rule plan requirements, financial groups fall into one the following seven general categories.

CATEGORY OF FINANCIAL GROUP	US RESOLUTION PLAN REQUIREMENT
Designated Non-Bank SSFI	DFA Rule Plan Only
Covered US BHC (with no Covered IDI Subsidiary)	DFA Rule Plan Only
Covered Foreign Bank (with no Covered IDI Subsidiary)	DFA Rule Plan Only
Covered IDI	IDI Rule Plan Only
Designated Non-Bank SSFI + Covered IDI Subsidiary	DFA Rule Plan and IDI Rule Plan
Covered US BHC + Covered IDI Subsidiary	DFA Rule Plan and IDI Rule Plan
Covered Foreign Bank + Covered IDI Subsidiary	DFA Rule Plan and IDI Rule Plan

DFA RULE: KEY SUBSTANTIVE ELEMENTS AND CONCEPTS

General Overview of DFA Rule Resolution Plan Requirements

The DFA Rule plans generally must contain a detailed:

- Analysis of how an institution can be resolved in an insolvency proceeding, including a range of specific actions to be taken during a resolution.
- Description of the financial institution's:
  - organizational structure;
  - material entities;
  - interconnections and interdependencies;
  - management information systems; and
  - other key components of its business activities.

The requirements for covered financial institutions under the DFA Rule are broken down into eight major areas and about 40 individual components. The eight key components of a covered financial institution's resolution plan are:

- The executive summary (see *Executive Summary*).
- The strategic analysis (see *Strategic Analysis*).
- The description of the covered financial institution's corporate governance structure for resolution planning (see *Description of the Covered Company's Corporate Governance Structure for Resolution Planning*).
- The description of the covered company's overall organizational structure and related information (see *Information Regarding the Covered Company's Overall Organizational Structure and Related Information*).
- The description of the covered company's management information systems (see *Information Regarding the Covered Company's Management Information Systems*).
- The description of the interconnections and interdependencies among the covered company and its material entities (see *Description of Interconnections and Interdependencies among the Covered Company and its Material Entities*).
- The supervisory and regulatory information (see *Supervisory and Regulatory Information*).
- The contact information (see *Contact Information*).

However, the FRB and the FDIC may jointly exempt a covered financial institution from one or more of these information requirements.

Executive Summary

The executive summary must provide an overview of the plan, including key elements of the financial institution's strategic plan. For subsequent plans after the initial plan, it must also include:

- Any material changes to prior plans.
- Any actions taken by the financial institution since the filing of the previous resolution plan to improve the effectiveness of the resolution plan.

Strategic Analysis

The living will's strategic analysis must include a description of the financial institution's:

- Plan for rapid and orderly resolution, including:
  - key assumptions and supporting analysis underlying the resolution plan; and
  - the range of specific actions to be taken to facilitate a rapid and orderly resolution of the financial institution, its material entities, and its critical operations and core business lines in the event of material financial distress or failure.

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- Information regarding funding, liquidity, support functions, and other resources and needs, including capital resources and needs, mapped to the financial institution's material entities, core business lines and critical operations.
- Strategy for maintaining and funding the critical operations and core business lines in an environment of material financial distress (see *Critical Operations, Core Business Lines and Material Entities*).
- Strategy for ensuring that any insured depository institution subsidiary will be adequately protected from risks arising from the activities of any subsidiaries that are not depository institutions.

In addition, for each "material entity" (subsidiary) of the financial institution that is either subject to the US Bankruptcy Code or another specialized insolvency regime and has either $50 billion in total assets or conducts a "critical operation," the financial institution must provide a description of:

- Its strategy in the event of a failure or discontinuation of the subsidiary (or core business line or critical operation).
- Actions that will be taken to prevent or mitigate any adverse effects of any failure or discontinuation on the financial stability of the US.

Description of the Covered Company's Corporate Governance Structure for Resolution Planning

The financial institution must provide a description of:

- Policies, procedures and internal controls governing preparation and approval of a resolution plan.
- Relevant risk measures used to report credit risk exposures and other data underlying the plan to senior executives and the board of directors.

Information Regarding the Covered Company's Overall Organizational Structure and Related Information

The financial institution must provide a description of its organizational structure, including:

- A list of all material entities within its organizational structure and information relating to each material entity.
- A mapping of critical operations and core business lines, including material asset holdings and liabilities, to material entities.
- An unconsolidated balance sheet and consolidating schedules for material entities.
- Information regarding material liabilities, collateral pledged, off-balance sheet exposures, derivatives, trading, hedges and major counterparties (mapped to material entities along with location information).
- An analysis of whether the bankruptcy of a major counterparty would likely have an adverse effect on, or result in the material financial distress or failure of, the financial institution.
- Trading, payment, clearing or settlement system of which the financial institution is a member.

Information Regarding the Covered Company's Management Information Systems

The financial institution must provide information about the management information systems that support its core business lines and critical operations, including information regarding:

- The legal ownership of these systems.
- Associated software, licenses or other associated intellectual property.

Description of Interconnections and Interdependencies among the Covered Company and its Material Entities

The financial institution must provide a description of interconnections and interdependencies among the financial institution and its material entities and affiliates, and among the critical operations and core business lines that, if disrupted, would materially affect the funding or operations of the financial institution, its material entities, or its critical operations or core business lines.

Supervisory and Regulatory Information

The financial institution must identify US and foreign regulatory authorities that have supervisory or regulatory authority or responsibility over it, or that are responsible for resolving a non-US based material entity or critical operations or core business lines of the financial institution.

Contact Information

The financial institution must identify:

- Its senior management officials responsible for serving as a point of contact for the resolution plan.
- Senior management officials of the financial institution's material entities (subsidiaries).

Less Detailed (Tailored) Resolution Plan Alternative for Certain Financial Institutions

Distinctions are made based on asset size and complexity of the financial institution. In particular, a smaller, less complex institution may provide a less detailed tailored resolution plan (see *Comparison of Information Requirements: The Standard DFA Rule Plan and the "Tailored Plan" Alternative*).

Financial institutions qualifying for a tailored plan are:

- US covered financial institutions that:
  - have total non-depository institution assets of less than $100 billion; and
  - are engaged primarily in banking activities (meaning that total US depository institution assets comprise 85% or more of the financial institution's total consolidated assets).
- Non-US covered financial institutions that:
  - have total US non-depository institution assets of less than $100 billion; and
  - are, in the US, engaged primarily in banking activities (meaning that their total US bank operations, branches or agencies comprise 85% or more of total US consolidated assets).

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Resolution Strategies under the DFA Rule Plan

The FDIC and FRB have emphasized that they will not accept a plan that amounts to a pure data submission. Rather, they expect covered financial institutions to submit information to support resolution strategies and a description of how to implement the resolution plan.

The focus of the strategic plan should be on the bankruptcy process. In particular, the plan should focus on how a covered financial institution and its material subsidiaries subject to the US Bankruptcy Code (or other applicable insolvency regime) would carry out a liquidation or reorganization to emerge from bankruptcy proceedings. For more information on applicable insolvency regimes, see *Applicable Insolvency Regimes*.

The description of the resolution plan must set out:

- Key assumptions underlying the plan (see *Key Assumptions Underlying the Resolution Plan*).
- Supporting analysis for why the plan would have the desired effect of rapid and orderly resolution without adverse affect to US financial stability (see *Supporting Analysis for why Plan Would Have Desired Effect*).

Key Assumptions Underlying the Resolution Plan

Key stated assumptions underlying the financial institution's resolution plan should include:

- How creditors and other stakeholders would behave.
- How international aspects of the business would be affected in view of any non-US laws that may be applicable.
- How a US bankruptcy court presiding over the bankruptcy proceeding of the covered financial institution would be likely to evaluate the strategy.
- Applicable tax, regulatory, intellectual property and corporate law issues associated with the strategy.

FDIC officials have suggested that assumptions are to be evaluated based on a reasonableness standard.

To assist in establishing the assumptions for the economic conditions triggering a resolution plan, the DFA Rule requires covered financial institutions to conduct their evaluations under baseline, adverse and severely adverse economic conditions developed by the FRB. These economic conditions are the same as those employed by the FRB in conducting annual stress tests of SSFIs under Section 165(i)(1) of the Dodd-Frank Act (see *Practice Note, Summary of the Dodd-Frank Act: Regulation of Systemically Significant Financial Institutions: Stress Tests (http://us.practicallaw.com/1-502-8437)*).

The scenarios, which largely consist of future paths of a series of economic and financial variables (for example, real GDP, the unemployment rate, equity and property prices, and various other key financial variables), may change from year to year. The FRB may update, make additions to, or otherwise revise these scenarios as it deems appropriate. For initial resolution plans only, a covered financial institution may assume that failure would occur under a baseline scenario (and only need to address adverse and severely adverse conditions in subsequent submissions).

Supporting Analysis for Why Plan Would Have Desired Effect

Covered financial institutions must provide supporting analysis for why the plan would have the desired effect of a rapid and orderly resolution of the financial institution (or its material subsidiaries) in a manner that mitigates serious adverse effects on US financial stability.

In order to satisfy the "rapid and orderly" resolution standard of the DFA Rule, a financial institution's strategic analysis must provide for a liquidation or reorganization that, if implemented, would be non-disruptive to the operation of financial markets and would minimize the impact of failure on counterparties and other stakeholders.

The strategic plan must provide for the continuation and funding of critical operations (operations of systemic significance). The plan must also describe how core business lines of the covered financial institution (generally, business operations with significant franchise value) would be affected in the event of material distress or failure under the relevant governing insolvency regimes (in most cases, the US Bankruptcy Code). A specific explanation for how critical operations and core business lines would operate, and strategies to maintain the continuing function of these operations or business lines, through each stage of the resolution and recovery process is required (see *Critical Operations, Core Business Lines and Material Entities*).

The DFA Rule does not specifically define or limit the time period in which a rapid and orderly resolution would need to take place. A reasonable period for resolution will depend on factors such as size and complexity of the covered financial institution.

Applicable Insolvency Regimes

A financial institution's resolution strategy depends in part on which insolvency laws it and its affiliates are subject to. With certain limited exceptions, eligible debtors under the US Bankruptcy Code are legal entities that either:

- Reside or have a domicile in the US.
- Have a place of business in the US.
- Own property in the US.

Other insolvency regimes, however, may be applicable as well since banks and insurance companies are not eligible for relief under the US Bankruptcy Code and, although a registered broker dealer is technically eligible to be liquidated under Chapter 7 of the US Bankruptcy Code, it is more likely to be liquidated under the Securities Investor Protection Act (*15 U.S.C. §§ 78-78lll (2011)*). The following table illustrates the insolvency laws applicable to various types of institutions in the US.

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INSTITUTION	APPLICABLE INSOLVENCY LAW
US Holding Company	US Bankruptcy Code
US FDIC-Insured Depository Institution	Federal Deposit Insurance Act (FDIA)
US Insurance Subsidiary	State Insurance Law
US Broker-Dealer	Securities Investor Protection Act (SIPA)
US Commodity Broker	US Bankruptcy Code
US Uninsured Branch or US Agency of Bank	State Banking Law
Unregulated US Non-Bank Subsidiary	US Bankruptcy Code
Non-US Organized Entity	Non-US Insolvency Regime

Critical Operations, Core Business Lines and Material Entities

As part of the resolution plan, covered financial institutions are required to identify their:

- Critical operations (see *Critical Operations*).
- Core business lines (see *Core Business Lines*).
- Material entities (see *Material Entities*).

Covered financial institutions must also clearly show the relationship among these operations and business lines to either the financial institution itself or its subsidiaries.

Critical Operations

Critical operations are those operations (or associated services, functions and support) the failure or discontinuance of which would pose a threat to the financial stability of the US. The covered financial institution determines which operations are deemed critical, but the FRB and the FDIC may also jointly make a determination. Indeed, as a practical matter, the US regulatory agencies can be expected to form a view as to which products, services or business lines of the institution may be considered critical operations. The threshold of significance for a disruption to US financial stability resulting from the failure or discontinuance of a critical operation must be severe enough to pose a threat to the financial stability of the US. For example, a critical operation of a covered financial institution would include an operation, such as a clearing, payment, or settlement system, which plays a role in the financial markets for which other firms lack the expertise or capacity to provide a ready substitute. Certain significant derivatives, financing, servicing, liquidity/cash management, capital markets and other platforms are also potential candidates for critical operation status where warranted based on the size, scope, and lack of substitutes of the platform as well as other relevant factors.

Core Business Lines

Core business lines are those business lines, including associated operations, services, functions and support that on failure would result in a material loss of revenue, profit or franchise value. The financial institution is required to identify core business lines as part of the resolution plan process.

Material Entities

Material entities are subsidiaries of a covered financial institution that conduct core business lines or critical operations of the financial institution. In general, only material entities need to be addressed in the resolution plan. The strategic plan need not cover non-material entities (for example, special purpose entities and non-operating holding companies).

Impediments to Rapid and Orderly Resolution

The resolution planning process requires each covered financial institution to examine the manner in which the failure of a single entity within a financial conglomerate could adversely affect other entities or US financial stability. The task includes identifying how inter-connections between entities and structural complexities could lead to domino effects (whereby the failure of one entity causes the failure of further entities) within a financial group, which would materially impede an effective and timely execution of the resolution plan.

There is a general expectation that covered financial institutions will take, or at least consider taking, actions to streamline complex legal structures in order to facilitate a resolution under the applicable insolvency regime. Actions taken to eliminate impediments and weaknesses of a plan should be disclosed in the Executive Summary section of the resolution plan.

The DFA Rule does not set out a general standard for permissible group complexity. Indeed, the FRB and the FDIC specifically state in the commentary to the DFA Rule that they recognize that resolution plans will vary by company and, in their evaluation of plans, they will take into account variances among companies in factors such as their:

- Operations.
- Capital structure.
- Risk complexity.
- Financial activities (including those of their subsidiaries).
- Size.

The FDIC staff has provided some informal public guidance on focus areas during speeches and a meeting of the FDIC Advisory Committee on Systemic Resolution on January 25, 2012. Areas of focus include:

- Complexity of the organizational structure (see *Complexity of Organization Structure*).
- Extent of international operations (see *Extent of International (Non-US) Operations*).
- Extent of derivatives activity (see *Extent of Derivatives Activity*).
- Liquidity and funding mechanisms (see *Liquidity Needs and Funding Mechanisms*).

Complexity of Organization Structure

Intra-group financial and operational dependencies have the potential to create a ripple effect of failures through a financial group if a single key affiliate faces material distress or failure.

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Examples include:

- Centralized cash management and information systems and other shared services arrangements that create interdependencies between the service entity providing the management, systems or services and other members of the group reliant on them for their continued operation. Indeed, the US regulatory agencies can be expected to closely scrutinize these services and arrangements to understand precisely how they function and in which legal entity or entities they are located.
- Cross-default provisions in contracts, particularly for derivatives contracts, that could cause a single failure to quickly lead to a string of failures. For example, in the Lehman Brothers Chapter 11 cases (Lehman Cases), the filing of the holding company eventually lead to the filing of its operating subsidiaries because, among other things, the holding company was a credit support provider for the payment obligations of those subsidiaries under their derivatives contracts.

Extent of International (Non-US) Operations

An international footprint creates the potential for non-US insolvency proceedings and therefore, in many cases, the need to address in the resolution plan implications of an insolvency proceeding of a non-US office or entity under non-US law. Moreover, non-US regulatory authorities may take actions (like preventing the cross-border flow of funds) that could complicate a resolution. Some potential obstacles to a successful execution of a cross-border resolution strategy that may need to be addressed in a resolution plan include:

- The possibility of triggering ownership thresholds or change of control requirements under non-US law.
- Non-US insolvency laws that provide for the "ring-fencing" of assets or liabilities outside of the US.
- The existence of divergent insolvency legal frameworks.
- The existence of diverse regulatory frameworks.

Moreover, while US bankruptcy courts purport to have worldwide jurisdiction over a debtor's property, in practice it can be difficult to enforce a US bankruptcy court's orders abroad. US bankruptcy court orders may also not be fully compatible with insolvency proceedings commenced in other jurisdictions around the world. The complexity of an international resolution of a global financial institution was illustrated by the Lehman Cases, where there were over 75 local proceedings with more than 15 administrators. Negotiations regarding information sharing, intercompany claims, and other issues between the US Chapter 11 debtors and the non-US administrators significantly delayed the cases.

Extent of Derivatives Activity

Derivatives contracts can generally be terminated, and collateral posted by a debtor can generally be offset, in a proceeding under the US Bankruptcy Code through the operation of certain derivatives "safe harbors" to the automatic stay. The automatic stay operates to prohibit creditors from taking action against a debtor or its property based on prepetition obligations. The ability of counterparties to immediately terminate contracts could prevent a more orderly unwind of the debtor's derivatives portfolio as demonstrated by the Lehman Cases. Derivatives termination, valuation and related issues impeded rapid resolution in those proceedings. Different considerations may apply to derivatives positions of entities subject to other insolvency regimes (for example, the FDIA as opposed to the US Bankruptcy Code).

Liquidity Needs and Funding Mechanisms

The lack of available funding mechanisms sufficient to meet the liquidity needs of a covered financial institution's critical operations, if any, during the resolution process could prevent an orderly and rapid resolution. Accordingly, the resolution plan must demonstrate sufficient access to emergency or contingency liquidity and funding for these operations. The DFA Rule specifies that a covered financial institution may not rely on the provision of extraordinary support by the US or any other government to the covered company or its subsidiaries to prevent the failure of the covered company. The commentary to the DFA Rule clarifies that this provision is intended to prohibit the covered company from assuming in its resolution plan that the US or any other government will provide the covered company funding or capital other than in the ordinary course of business.

Requirements for Plans Prepared by Non-US Headquartered Institutions

Under the DFA Rule, the following types of non-US institutions are treated differently than US covered financial institutions:

- A covered financial institution organized or incorporated in a jurisdiction other than in the US (other than a US bank holding company) such as a non-US headquartered, non-bank SSFI.
- A covered foreign bank (a non-US bank with US banking operations such as a US bank, commercial lending company or Edge corporation subsidiary, or a US branch or agency).

In particular, the plans for these non-US headquartered institutions only need to provide:

- Information relating to any US-domiciled branches and agencies, subsidiaries and operations (including operations that are considered critical operations and core businesses domiciled in the US).
- Information relating to any other operations that are conducted in whole or in material part in the US.
- Identification, detailed description and mapping to legal entity of the interconnections and interdependencies among the US subsidiaries, branches and agencies, and critical operations and core business lines of the non-US-based covered financial institution and any non-US-based affiliate.
- Description of how resolution planning for the US-based operations are integrated into the covered financial institution's overall (global or head office) resolution or other contingency planning process.

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For non-US-headquartered institutions, senior FDIC staff has stated that a particular emphasis will be placed on how the US analysis interrelates with the home country resolution process and the manner in which the US plan functions together with the head office plan to reduce systemic risks.

The applicable insolvency law that must be addressed as part of the resolution plan's strategic analysis will depend on the types of US operations maintained by the non-US-headquartered covered financial institution in the US. Insolvency regimes that could be applicable include the following:

US OPERATIONS	APPLICABLE INSOLVENCY LAW
US State-Licensed Uninsured Branch or US Agency	State Banking Law
US Non-Bank Subsidiary	US Bankruptcy Code
US FDIC-Insured Depository Institution	FDIA

Comparison of Information Requirements: The Standard DFA Rule Plan and the "Tailored Plan" Alternative

For a financial conglomerate subject to the DFA Rule, the resolution plan under the DFA Rule must be submitted by the top-tier entity in the group. Nonetheless, the specific information that must be provided for any particular subsidiary or affiliate of the covered financial institution may be based on several factors, including:

- The type of insolvency regime that applies to the affiliate or subsidiary.
- The size of the affiliate or subsidiary.
- Whether the covered financial institution qualifies for the tailored plan approach (see *General Overview of DFA Rule Resolution Plan Requirements*).

For a comparison of the information requirements of the standard plan under the DFA Rule to those of a tailored plan (on an entity-type by entity-type basis) for a US financial institution subject to the DFA Rule, see *Diagram: Standard Versus Tailored DFA Rule Plan Comparison (US Company) (http://us.practicallaw.com/9-519-5173)*. For a corresponding comparison for a non-US financial institution subject to the DFA Rule, see *Diagram: Standard Versus Tailored DFA Rule Plan Comparison (Foreign Company) (http://us.practicallaw.com/7-519-5174)*. As illustrated in these diagrams:

- Information requirements may vary on an affiliate-by-affiliate basis.
- Under the tailored plan approach, information requirements for the non-banking operations of a covered financial institution (for example, non-bank advisory operations or non-bank lending operations), are more extensive than those for the banking operations of a covered financial institution (for example, an depository institution subsidiary, US branch or agency operations).

IDI RULE: KEY SUBSTANTIVE ELEMENTS AND CONCEPTS

General Overview of IDI Rule Resolution Plan Requirements

The requirements for covered IDI Rule plans include:

- Items similar to those required for a financial institution covered under the DFA Rule.
- Other items relevant only for depository institutions.

An IDI Rule plan must include DFA Rule-type elements such as detailed descriptions of organizational structure, business practices, core business lines, interconnections with affiliates, and operations, as well as other requirements reflecting considerations specific to the FDIA.

Executive Summary

The IDI Rule plan's executive summary must include the key elements of the depository institution's strategic plan for resolution under the FDIA in the event of its insolvency. For subsequent plans after the initial plan, it must also include:

- Material changes to prior plans.
- Any actions taken by the depository institution since its previous resolution plan filing to improve the effectiveness of the resolution plan.

IDI-specific Strategic Analysis

The IDI Rule plan must include a description of how the depository institution can be resolved in the least costly manner to the Deposit Insurance Fund, including strategies for:

- Separating the depository institution from the parent company's organization.
- The sale or disposition of the deposit franchise, business lines and assets.

Overall Organizational Structure and Related Information

The IDI Rule plan must include a:

- Description of the legal and functional structures and core business lines of both the depository institution and its parent holding company.
- Mapping of core business lines to material entities.
- Description of the depository institution's overall deposit activities and branch organization.
- List of key personnel tasked with managing core business lines and deposit activities.

Critical Services

The IDI Rule plan must include a mapping of critical services to material entities and core business lines and strategies to maintain the operation of critical services.

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Interconnectedness to Parent Company's Organization and Potential Barriers or Material Obstacles to Orderly Resolution

The IDI Rule plan must identify:

- Elements or aspects of the holding company structure, the interconnectedness of its legal entities, the structure of legal or contractual arrangements, or its overall business operations that would, in the event the depository institution were placed in receivership:
  - diminish the depository institution's franchise value;
  - obstruct the depository institution's continued business operations; or
  - increase the operational complexity to the FDIC of resolution of the depository institution.
- Barriers and obstacles to an orderly and timely resolution of the depository institution.

Methodology Relating to Asset Valuation and Sales

The IDI Rule plan must provide a detailed description of the processes employed for:

- Determining the current market values and marketability of core business lines and material asset holdings of the depository institution.
- Assessing the feasibility and impact of the depository institution's plans, under baseline, adverse and severely adverse economic conditions.

Counterparties, Exposures, Collateral, Trading, Derivatives and Hedges

The IDI Rule plan must include information on the depository institution's:

- Major counterparties and the effect on the depository institution of the failure of each one.
- Off-balance-sheet exposures.
- Collateral pledged.
- Trading and derivative activities, including material hedges.
- Material affiliate funding relationships, accounts and exposures.

The plan must also describe:

- Funding resources and needs for the depository institution and its material subsidiaries, including short term and long term liabilities by type and term to maturity.
- Payment, clearing and settlement systems of which the depository institution is a member.

The plan must also provide material entity financial statements and an unconsolidated balance sheet for the depository institution.

Affiliate Funding, Transactions, Accounts, Exposures and Concentrations

The IDI Rule plan must describe the depository institution's material funding relationships, accounts and exposures with affiliates.

Systemically Important Functions

The IDI Rule plan must describe systemically important functions that the depository institution and its subsidiaries and affiliates provide, including:

- Payments systems.
- Custodial or clearing operations.
- Large sweep programs and similar programs, along with estimated vulnerabilities and exposure.

Description of the Covered Company's Corporate Governance Structure for Resolution Planning

The IDI Rule plan must describe:

- The depository institution's policies, procedures and internal controls governing preparation and approval of a resolution plan.
- The identity and position of the depository institution's senior management official who is primarily responsible and accountable for the development, maintenance, implementation and filing of the resolution plan.

Resolution Strategies under the IDI Rule Plan

Like the DFA Rule resolution plan, the IDI Rule plan must include a strategic resolution analysis. In particular, each covered depository institution must describe a resolution strategy for:

- The sale or disposition of its deposit franchise. (FDIC staff guidance has confirmed that the depository institution may address brokered deposits separately from core deposits and that access to brokered deposits (unlike core deposits) is not required within one day.)
- The separation of the depository institution and its subsidiaries from the holding company's organizational structure.

The IDI Rule requires covered depository institutions to demonstrate how the chosen resolution strategy could be carried out by the FDIC under the FDIA and would be the least costly to the Deposit Insurance Fund relative to liquidation or other possible resolution methods. Depository institutions can demonstrate a selected strategy is least costly by offering a range of possible transactions and ensuring that these transactions will be offered broadly to the market in a competitive bidding process. Any chosen resolution strategy should be tailored to the size, complexity and risk profile of the institution.

Among the potential strategies for the payment of depositors that a covered depository institution should consider when developing a resolution plan under the IDI Rule are:

- A cash payment of insured deposits.
- A purchase and assumption transaction with another insured depository institution to assume insured deposits.
- A purchase and assumption transaction with another insured depository institution to assume all deposits.
- A purchase and assumption transaction with multiple insured depository institutions in which branches are broken up and sold separately to maximize franchise value.

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- Transfer of insured deposits to a bridge institution chartered to assume the deposits, as an interim step before the purchase of the deposit franchise and assumption of the deposits by one or more insured depository institutions.

Among potential strategies for the sale of the depository institution's core business lines and assets that should be considered are:

- Retention of some or all of the assets in receivership to be marketed broadly to eligible purchasers, including insured depository institutions as well as other interested purchasers.
- Sale of all or a portion of the core business lines and assets in a purchase and assumption agreement to one or more insured depository institutions.
- Transfer of all or a portion of the core business lines and assets to a bridge institution chartered to continue operating the core business lines and service the assets transferred to it, as an interim step before the sale of the core business lines and assets through appropriate marketing strategies.

As in the case of covered financial institutions under the DFA Rule, a covered depository institution must assess the feasibility of its plan under baseline, adverse and severely adverse economic conditions developed by the FRB. A covered depository institution, however, may submit its initial resolution plan using a baseline scenario only. For purposes of the initial resolution plan, a baseline scenario assumes an idiosyncratic problem with the depository institution itself rather than, for example, a systemic financial crisis affecting a number of financial institutions.

Particular aspects of the depository institution's structure, operations or deposit base that would create unusual resolution issues or hinder a timely resolution must be identified and remediation steps offered. Further, when critical services are provided by affiliates, the resolution plan should describe the depository institution's strategy for continuing these services in the event of the provider's failure. For example, a strategy may need to be presented when a depository institution is dependent on the information technology services or credit card account servicing provided by its holding company or subsidiaries.

Critical Services, Core Business Lines and Material Entities

As part of the resolution plan, covered depository institutions are required to identify their critical services and core business lines, as well as map these services and business lines to legal entities (for example, to the depository institution itself or to other relevant entities).

Critical services

Critical services are those services and operations that are necessary to continue the day-to-day operation of the depository institution. They include, for example:

- Servicing.
- Information technology support and operations.
- Human resources and personnel.

The resolution plan must describe how these services will be kept operational during the resolution process to allow the FDIC to conduct the resolution in an orderly and efficient manner. The ability of each parent company affiliate providing critical services to function on a stand-alone basis in the event of the parent company's failure will also be assessed.

Core business lines

Core business lines are those business lines (including associated operations, services, functions and support) that the depository institution believes would, on failure, result in a material loss to its revenue, profit or franchise value. The depository institution must describe the process used for determining the current market values and marketability of core business lines and material asset holdings.

Material entities

Material entities are companies that are significant to the activities of a critical service or core business line. This could include, for example, an unaffiliated contractor that provides functions necessary to conduct the day-to-day operations of the depository institution's core business lines or critical services.

PROCEDURAL ELEMENTS OF THE DFA RULE AND IDI RULE

Initial Submission Dates

Both the DFA Rule and IDI Rule have staggered deadlines for covered financial and depository institutions to submit their resolutions plans. The deadlines are based on the institution's total non bank assets (for a non-US bank, US non-bank assets). The timing under the IDI Rule is based on the size of the total non bank assets of the covered depository institution's parent company. This ensures that the deadlines for the initial submission for resolution plans under both the DFA Rule and IDI Rule are aligned.

The deadlines for filing subsequent annual resolutions plans are also aligned. This is helpful to institutions affected by both rules, as financial institutions covered at both the holding company level under the DFA Rule and the depository institution subsidiary level under the IDI Rule will be subject to the same deadlines for both sets of plans.

The initial submission deadline is July 1, 2012, for:

- A DFA Rule plan, for a covered financial institution with $250 billion or more in total non-bank assets (or, in the case of a foreign-based financial institution, the company's total US non-bank assets) as of November 30, 2011.
- An IDI Rule plan, for a covered depository institution whose parent company had $250 billion or more in total non-bank assets (or in the case of a foreign-based parent, the company's total US non-bank assets) as of November 30, 2011.

The initial submission deadline is July 1, 2013, for:

- A DFA Rule plan, for a covered financial institution with between $100 billion and $250 billion in total non-bank assets (or, in the case of a foreign-based financial institution, the company's total US non-bank assets) as of November 30, 2011.

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- An IDI Rule plan, for a covered depository institution whose parent company had between $100 billion and $250 billion in total non-bank assets (or in the case of a foreign-based parent, the company's total US non-bank assets) as of November 30, 2011.

For all other covered financial and depository institutions, the initial submission deadline is December 31, 2013.

Financial or depository institutions that trigger resolution plan requirements under the DFA Rule or IDI Rule after the effective dates of these rules must submit their resolution plans no later than the next July 1 that is no earlier than 270 days after the triggering of those requirements. In effect, this gives these institutions at least 270 days to prepare a resolution plan.

Annual Submission of Resolution Plans

Under both the DFA Rule and IDI Rule, after a covered institution submits its initial resolution plan, it must submit a new resolution plan annually on or before the anniversary date of the date for the submission of the its initial plan. The annual updated plan should describe material events, such as acquisitions, sales, litigation and operational changes, since the most recently filed plan that may have a material effect on the plan. Any actions taken since filing of the previous plan to improve the effectiveness of the resolution plan or remediate or otherwise mitigate any material weaknesses or impediments to the effective and timely execution of the resolution plan should also be addressed.

Notice of the Occurrence of an Event with a Material Effect on the Resolution Plan

Both the DFA Rule and IDI Rule require further filings beyond the filing of resolution plans. Covered non-bank financial institutions must file with the FRB and FDIC, and covered depository institutions must file with the FDIC, a notice within 45 days of the occurrence of any event or change in circumstances that results in, or could reasonably be foreseen to have, a material effect on the resolution plan. An exception applies where the event takes place within 90 days prior to the date on which an annual resolution plan is required to be filed.

The notice must describe:

- The event that took place.
- Any material effects it may have on the resolution plan.
- The changes that may be required to the resolution plan.

While the DFA Rule and IDI Rule are not explicit about what constitutes a material effect, the releases accompanying the rules note that it would be brought about by an event or change that would render the resolution plan ineffective in whole or in part. The FDIC and FRB, in the case of a covered financial institution, and the FDIC in the case of a covered depository institution, have the authority to determine whether a revised plan is in order based on the information provided in the notice.

Required Changes to Resolution Plans on Account of Stress Test Results

Under proposed regulations issued by the FRB on December 20, 2011, to implement heightened "prudential" requirements for SSFIs (see *Legal Update, Federal Reserve Board Issues Rules for Systemically Significant Financial Institutions (http://us.practicallaw.com/0-517-0092)*), a resolution plan under the DFA Rule would be required to be updated as the FRB determines appropriate, based on the results of supervisory stress tests for the covered financial institution. To the extent required, the update would need to be filed within 90 days of the FRB publishing the summary results of the stress tests. According to the proposed regulations, the results will be publicly available each year no later than mid-April.

Review of the Resolution Plans

Once submitted, both the DFA Rule and IDI Rule provide for a two -stage review process by the regulatory agencies. The process includes:

- A completeness review (see *Completeness Review*).
- A credibility review (see *Credibility Review*).

Completeness Review

The FDIC and the FRB first review, within 60 days, a DFA Rule plan and determine whether it satisfies the minimum informational requirements.

The FDIC conducts the same type of review of IDI Rule Plans. The IDI Rule does not require the FDIC to complete its review within a particular time frame.

If deemed incomplete, the submitting financial or depository institution will have an opportunity to submit a completed plan. Under both the DFA Rule and IDI Rule, any required additional information must be furnished no later than 30 days after receipt of a deficiency notice from the relevant regulatory agencies.

Credibility Review

Once a complete plan has been submitted, it will be reviewed for credibility. The DFA Rule provides that the FBR and FDIC may jointly determine that a submitted plan is not credible or would not facilitate the orderly resolution of the submitting financial institution.

The IDI Rule states that a resolution plan is credible if its strategies for resolving the depository institution and the information provided pursuant to the IDI Rule are well-founded and based on information and data related to the depository institution that are observable or otherwise verifiable and employ reasonable projections from current and historical conditions within broader financial markets. Under the IDI Rule, the FDIC will review an IDI Rule Plan in consultation with the depository institution's primary regulator and the regulator of its parent company, but the FDIC alone will make a determination about credibility For information on primary regulators, see *Practice Note, US Banking Law: Overview: US Banking Organizations, Their Regulators and Scope of Permissible Activities (http://us.practicallaw.com/0-504-4367)*.

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If a plan under either the DFA Rule or IDI Rule has been determined to be not credible or deficient, the covered financial or depository institution must submit a revised plan that addresses the deficiencies. The default rule is that the revised plan must be submitted within 90 days of receipt of written notice of a determination of deficiency, although both agencies would have the power to lengthen or shorten the time period.

There are a few key implications of the review schemes set forth in the DFA Rule and IDI Rule. As the process underlying the resolution plan requirements is iterative, the determination that a plan is credible should be informed by the back-and-forth conversation between a covered financial or depository institution and the relevant agencies. This is appropriate and beneficial as credibility will be a custom determination and there will be opportunity for the financial or depository institution to provide its input about credibility. Since the DFA Rule does not establish a clear standard of acceptability, there is room for the FDIC and FRB to develop their own standards over time for the requirements to be met by DFA Rule Plans.

Consequences of Failure to Cure a Deficient Plan

Under the DFA Rule, if a covered financial institution fails to submit a revised DFA Rule plan in the required time frame or if the FRB and FDIC determine that the revised plan does not adequately remedy the deficiencies identified in the deficiency notice, then the FDIC and FRB may jointly:

- Determine that the financial institution may be subject to more stringent capital, leverage, or liquidity requirements.
- Restrict the growth, activities, or operations of the financial institution or its subsidiaries.
- Direct the financial institution to divest assets and operations if it fails within two years to submit a revised plan that adequately remedies the deficiencies.

Given these consequences and the novelty of the resolution plan requirement, the FDIC and FRB note that they do not expect that a financial institution's initial resolution plan would be found deficient, but rather that the initial plan would serve as a foundation for the development of more robust resolution plans to be filed subsequently on an annual basis.

The IDI Rule does not set out specific sanctions the FDIC would impose on a covered depository institution that has failed to cure any deficiencies in its IDI Plan. In the absence of specific enforcement or punitive authority, the FDIC would presumably rely upon its supervisory and enforcement authority under the FDIA.

Confidentiality

Under both the DFA Rule and IDI Rule, the resolution plan must be divided into a public section and a confidential section. Each covered financial and depository institution must explicitly identify the confidential and public sections of its plan.

The public section consists of an executive summary of the resolution plan. The executive summary would contain information that is most likely otherwise publicly available, except that the executive summary must contain a "high level" description of the company's resolution strategy, including a range of potential purchasers.

Importantly, both rules state that the confidential section of resolution plans will be treated as confidential to the extent permitted by law. The rules state that confidential sections will be protected from Freedom of Information Act (FOIA) requests through applicable exemptions in that statute, and the accompanying releases note that regulators expect that information in the confidential sections will likely be protected through the trade secret and confidential supervisory information exemptions to public disclosure under FOIA (*5 U.S.C. § 552 (2011)*).

PRACTICAL CONSIDERATIONS IN PREPARING A RESOLUTION PLAN

To satisfy their DFA Rule and IDI Rule requirements, covered financial and depository institutions must compile reams of data and develop a complex strategic analysis. Many affected firms have already established internal resolution planning teams consisting of legal/compliance, back-office, and business-line managers and personnel to assist with the effort. In some cases, new offices or departments have been established to manage or supervise the process. In addition, firms, particularly those that must file in July 2012, have commenced a dialogue relating to resolution planning with the FDIC and FRB staffs. This section describes key practical considerations for preparing the initial resolution plans.

Format and Organization of the Resolution Plan

Neither the DFA Rule nor the IDI Rule requires that any one specific format (or formats) be used for the resolution plan other than each plan should include an executive summary, and be divided into public and confidential sections. The FDIC and FRB, however, can be expected to provide institutions with guidance on expectations relating to how plans should be presented and organized prior to a given institution's respective filing date. In deciding how best to organize the plan, resolution planning teams, together with their legal and financial advisors, may take into account factors such as:

- The information requirements for the plan at issue.
- The structure of the institution.
- Correspondence with the US regulatory authorities relating to the resolution plan requirement, including any specific guidelines that the authorities may provide to the institution in this regard.
- Relevant living will-related requirements of non-US regulators, if any.

Materiality Thresholds

There are several materiality thresholds in the rules. For example, the DFA Rule requires identification of interconnections and interdependencies that, if disrupted, would materially affect

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funding or operations. Moreover, DFA resolution plans need only generally address the possible failure of a "material entity". There is not a single, objective definition of the word "material" that could be applied to each threshold. Resolution teams and their advisors should endeavor to make "materiality" determinations based on all of the relevant facts and circumstances, as well as feedback provided by the staffs of the FDIC or FRB.

Referencing Already Published Materials

Some of the information required by the rules has been prepared by almost all of the largest banks by virtue of the public disclosure documents required by the securities laws or requirements of US and non-US regulatory bodies. Virtually all of the covered financial institutions under the DFA Rule are publicly held and have regularly prepared annual reports describing in some detail their organization, lines of business and risk management procedures. It should be possible to use information prepared for other purposes so long as the information is complete, accurate and meets the information requirements of the rules. This information, however, may not be merely incorporated by reference.

Board of Directors Approval

A US-headquartered institution's initial and annual resolution plan (whether covered under the DFA Rule or the IDI Rule) must be approved by the institution's board of directors prior to submission. Accordingly, internal resolution planning teams as well as their advisors should build into their project timetables sufficient time to secure board level consent, which, as a practical matter, may mean in many cases that plans will need to be finalized or near finalized well ahead of the formal submission date. This is particularly so as members of the board of directors may not have the relevant experience and expertise to efficiently and effectively carry out their responsibilities in this regard and may therefore need time and assistance to enhance their understanding of the relevant requirements. The DFA Rule resolution plan of a non-US headquartered institution must be approved by a delegate acting under the express authority of the board of directors of the company.

Confidentiality Issues

The process of distinguishing public information to be included in the public section of the resolution plan from confidential information to be included in the confidential section should be done with considerable care to ensure, among other matters, that commercially sensitive information is protected to the fullest extent possible under FOIA and other applicable law.

CONTINUED EVOLUTION OF THE LIVING WILL REQUIREMENTS

While best practices will emerge over time, each institution's resolution plan will remain a unique and evolving document.

The plans are intended to be dynamic documents periodically updated and revised as necessary taking into account structural changes to the institution over time until the relevant US regulators are satisfied. The process of devising approaches to address hypothetical scenarios and issues is a fundamental component of the resolution planning requirement. This will generally include addressing scenarios such as:

- Whether there will be sufficient liquidity or some other means to maintain critical operations in the event of insolvency.
- How the creditor process will work in an insolvency under the Bankruptcy Code.
- How diverse regulatory and legal frameworks may affect possible resolution strategies.

The annual resolution plan will need to include both a realistic and well-founded resolution strategy, often taking into account US and non-US bankruptcy, regulatory, tax, intellectual property and corporate law issues, as well as the other information required under the DFA Rule and IDI Rule.

In view of the complexity of the planning requirements, there will be a learning and testing period for both institutions and the US regulators as they attempt to better understand organizational structures, the impact of non-US requirements on US resolution plans and a host of other intricate issues.

GLOSSARY OF KEY TERMS UNDER LIVING WILL REQUIREMENTS

Term	Definition
Core Business Lines	The IDI Rule and DFA Rule require that a resolution plan take into account how a resolution of the financial or depository institution would impact Core Business Lines . These include those business lines, including associated operations, services, functions and support, that, in the view of the of the financial or depository institution, on failure would result in a material loss of revenue, profit, or franchise value (see *DFA Rule: Core Business Lines* and *IDI Rule, Core Business Lines*).
Covered Company	The term used under the DFA Rule to refer to financial institutions subject to the DFA Rule resolution plan requirements. Covered companies include: ■ US BHCs with total consolidated assets of $50 billion or more. ■ Non-bank SSFIs. ■ Non-US banking organizations with a US branch or agency or commercial lending company subsidiary, with total assets of $50 billion or more. (See *Financial Institutions Covered under the DFA Rule*.)

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Covered Insured Depository Institution	The term used under the IDI Rule to refer to US depository institutions subject to the IDI Rule resolution plan requirements. They include US insured depository institutions with $50 billion or more in total assets (see *Banks Subject to the IDI Rule*).
Credible Resolution Plan	Under the IDI Rule, this refers to the requirement that strategies for resolving the depository institution, and detailed information included in the resolution plan, be well-founded and based on information and data related to the depository institution that are observable or otherwise verifiable and employ reasonable projections from current and historical conditions within the broader financial markets (see *Credibility Review*).
Critical Operations	Under the DFA Rule, Critical Operations are those operations, including associated services, functions and support, the failure or discontinuance of which, in the view of the financial institution, or as jointly directed by the FDIC and FRB, would pose a threat to the financial stability of the US (for example, important clearing, payment and settlement services for which there is no ready substitute) (see *Critical Operations*).
Critical Services	Under the IDI Rule, Critical Services includes services and operations of the depository institution, such as servicing, information technology support and operations, human resources and personnel, that are necessary to continue its day-to-day operations. These services must be kept operational during the resolution process to allow the receiver to conduct the resolution in an orderly and efficient manner (see *Critical services*).
Material Entity	Under the DFA Rule, a Material Entity is a subsidiary or foreign office of the covered financial institution that is significant to the activities of a Critical Operation or Core Business Line (see DFA Rule Material Entities). Under the IDI Rule, a Material Entity is a a company that is significant to the activities of a Critical Service or Core Business Line (for example, a legal entity utilized by the depository institution as the contracting entity for a Core Business Line or a subsidiary of the depository institution that provides a Critical Service) (see IDI Rule Material Entities).
Material Event	Under the DFA Rule and IDI Rule, a notice to the regulators is required no later than 45 days from a Material Event, which is 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.
Material Financial Distress	Under the DFA Rule, Material Financial Distress means either: ▪ The financial institution has incurred, or is likely to incur, losses that will deplete all or substantially all of its capital, and there is no reasonable prospect for the company to avoid the depletion. ▪ The financial institution's assets are, or are likely to be, less than its obligations to creditors and others. ▪ The financial institution is, or is likely to be, unable to pay its obligations in the normal course of business.
Rapid and Orderly Resolution	Under the DFA Rule, a resolution plan must set out a strategy for the Rapid and Orderly Resolution of the covered financial institution (or, in the case of a non-US institution, its subsidiaries and operations that are domiciled in the US). This means a reorganization or liquidation of the financial institution under the applicable insolvency regime (for example, the Bankruptcy Code) that can be accomplished within a reasonable period of time and in a manner that substantially mitigates the risk that the failure of the financial institution would have serious adverse effects on financial stability in the US. (*See Resolution Strategies under the DFA Rule Plan*).
Tailored Plan	Under the DFA Rule, a tailored plan is a type of resolution plan applicable to certain smaller, less complex BHCs and non-US banking organizations with content and analysis focused on the nonbanking operations of the organization, and the interconnections between the nonbanking operations and the banking operations of the covered financial institution (see *Less Detailed (Tailored) Resolution Plan Alternative for Certain Financial Institutions*).

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