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Preparing for the Big 'What-Ifs' of Corporate Life: The Final 'Living Wills' Requirements for Large Financial Institutions

A major step in the prevention of future financial bailouts has been taken by Federal bank supervisors with the adoption on October 17 and September 13 of final joint regulations requiring a resolution plan (or "living will") for the largest financial institutions active in the United States. Preparation of these plans will constitute a major undertaking for the institutions with consequences and ramifications that will continue to evolve over time. The following provides the background of the new regulations, the requirements that the regulations impose, tips for compliance, and possible difficulties to be faced as the process unfolds.

The Federal Deposit Insurance Corporation (the "FDIC") and the Board of Governors of the Federal Reserve System (the "Federal Reserve") approved final resolution-plan regulations for the largest financial groups operating in the United States on September 13 and October 17, respectively. The FDIC also approved a final interim regulation requiring plans of FDIC-insured institutions with $50 billion or more in total assets. Both sets of requirements follow from previously issued proposals but include important clarifications and additional accommodations to the financial industry.

The joint rule approved by the FDIC and the Federal Reserve implements the resolution-plan requirements of Section 165(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").[1] This rule (the "DFA Rule") requires the largest US bank holding companies and non-US headquartered institutions that conduct US banking operations, and any financial companies designated as systemically important by the new US systemic risk council (the Financial Stability Oversight Council ("FSOC")), to prepare and periodically revise a plan that would facilitate its resolution

1 A copy is on the FDIC's website at www.fdic.gov/news/board/Sept13no4.pdf. The joint rule will be Regulation QQ for the Federal Reserve (12 C.F.R. Part 243) and Part 381 for the FDIC (12 C.F.R. Part 381). It is not clear why the Federal Reserve delayed its announcement for over a month after the FDIC's actions. The text of the two agencies' regulations are the same, but the supplemental information explaining the rationale for their actions varies in largely non-substantive ways.

in the event of material financial distress or failure. The DFA Rule sets out an extensive list of minimum information requirements for a satisfactory resolution plan.

The rule approved by the FDIC is an interim final rule (the "IDI Rule") requiring a US insured depository institution (an "IDI") with $50 billion or more in total assets (a "Covered IDI") to submit periodic contingency plans to the FDIC for resolution in the event of the institution's failure. The IDI Rule becomes effective on January 1, 2012 without further action, but, as an interim rule, it remains subject to public comment and further modification.[2] Although the IDI Rule was originally proposed in May 2010, the FDIC delayed its issuance in anticipation of the resolution-plan requirement of the Dodd-Frank Act.[3] In delaying the issuance of the IDI Rule, the FDIC sought to make it complementary with the DFA Rule in order to avoid duplication of efforts, costs, and burdens on the covered institutions.

It currently is estimated that there are 124 banking firms (approximately 90 of which are headquartered outside of the United States) initially subject to the DFA Rule and 37 IDIs initially subject to the IDI Rule. As the FSOC has yet to identify systemically important non-bank financial institutions, it is unclear how many non-banks will also become subject to the DFA Rule.

Different Aims of the DFA Rule and IDI Rule

The DFA and IDI Rules form a core element of the US regulatory reforms designed in the Dodd-Frank Act to identify and mitigate systemic risks and to contribute to the end of so-called "too big to fail" status. Martin Gruenberg, the Acting Chairman of the FDIC, noted that the 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."[4]

However, the two Rules, while complementary, have some fundamental differences. The DFA Rule requires a plan for a rapid and orderly resolution – liquidation or orderly restructuring – under the Bankruptcy Code and other insolvency statutes applicable to particular types of regulated entities (such as securities broker-dealers), while the IDI Rule requires a plan for resolution under the Federal Deposit Insurance Act ("FDIA") with the FDIC acting as receiver. Although the Bankruptcy Code and FDIA share some similarities, the differences between the two statutes are significant.

The DFA Rule and IDI Rule also 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. Thus, the driving concept is that steps should be taken to prevent the discontinuance of critical operations of a systemically significant institution, or mitigate its fallout, through a restructuring, and the DFA Rule plan is intended to outline those steps, including any impediments to taking them and efforts needed to avoid them. The IDI Rule, on the other hand, focuses on ensuring that depositors receive prompt access to insured deposits upon the failure of a Covered IDI, minimizing costs to the FDIC and creditors, and maximizing recovery value for creditors.

[2] The comment period on the IDI Rule ends on November 21, 2011. 76 Fed. Reg. 58379 (Sept. 21, 2011). The IDI Rule is added to Part 360 of the FDIC's regulations at Section 360.10.

[3] 75 Fed. Reg. 27464 (May 17, 2010). If you would like to have a detailed discussion of the proposed rule, you may wish to refer to our previous client publication, available at http://www.shearman.com/financial-institution-recovery-and-resolution-plans-05-26-2010/.

[4] Minutes of the FDIC Board meeting on September 13, 2011.

In a nutshell, the DFA Rule enters uncharted territory in requiring Covered Companies 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) were on the verge of insolvency, while the IDI Rule requires the preparation of a roadmap for the FDIC, as receiver of an insolvent IDI, to follow in the event that the Covered IDI is declared insolvent. The FDIC generally knows what to do with an insolvent IDI using its powers under the FDIA but wants help in the event that it has to do so with one of the largest IDIs. Because no agency has had formal legal responsibility for liquidating one of the largest financial conglomerates, the Dodd-Frank Act requires each one to have a plan that will assist the agencies in making determinations on how best to respond to the failure or impending failure of such a conglomerate.[5]

Key Procedural Elements of the Resolution Plan Requirements

Institutions Required to File Resolution Plans

The following institutions are required to submit resolution plans under the DFA Rule:

1. any nonbank financial company designated by the FSOC for heightened supervision by the Federal Reserve pursuant to Title I of the Dodd-Frank Act;
2. any bank holding company with at least $50 billion in total consolidated assets; and
3. any foreign bank with a US branch, agency or commercial lending company subsidiary, as well as any company that controls such a foreign bank, if the foreign bank or company has at least $50 billion in total global consolidated assets (together with the entities described in (1) and (2) above, "Covered Companies").[6]

If a Covered Company subsequently falls below the $50 billion asset threshold, it will remain a Covered Company 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.

Under the IDI Rule, IDIs with $50 billion or more in total assets are required to submit resolution plans. The original proposal in May 2010 would have required IDIs with total assets of at least $10 billion and parent companies with at least $100 billion in total consolidated assets to submit a resolution plan, but the FDIC changed the threshold in response to negative comments.

Timing

Both the DFA and IDI Rules have staggered deadlines for Covered Companies and Covered IDIs to submit their resolutions plans, based on an 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 Covered IDI's parent company's total non-bank assets so that the deadlines for the initial

[5] As an example, the Federal Government intends to use the information in the plans to help determine whether Title II of the Dodd-Frank Act, which provides for special resolution by the FDIC as an alternative to a Bankruptcy Code proceeding, should be invoked.

[6] In a multi-tiered holding company structure, the "Covered Company" is only the top-tier holding company.

submission for resolution plans under both Rules are aligned, thereby lessening the burden on Covered Companies and Covered IDIs. The deadlines for filing subsequent annual resolutions plans are also aligned. This is helpful to institutions affected by both rules, as Covered Companies with Covered IDIs will be subject to the same deadlines for both sets of plans.

The initial submission date is July 1, 2012, for the following:

- A DFA Rule plan, with respect to a Covered Company with $250 billion or more in total non-bank assets (or, in the case of a foreign-based Covered Company, such company's total US non-bank assets); and
- An IDI Rule plan, with respect to a Covered IDI whose parent company has $250 billion or more in total non-bank assets (or in the case of a foreign-based parent, such company's total US non-bank assets).[7]

The date is July 1, 2013, for the following:

- A DFA Rule plan, with respect to a Covered Company with $100 billion or more (but less than $250 billion) in total non-bank assets (or, in the case of a foreign-based Covered Company, such company's total US non-bank assets); and
- An IDI Rule plan, with respect to a Covered IDI whose parent company has $100 billion or more (but less than $250 billion) in total non-bank assets (or in the case of a foreign-based parent, such company's total US non-bank assets).

For all others, the date is December 31, 2013.

Any IDI that becomes a Covered IDI after the effectiveness of the IDI Rule or any company that becomes a Covered Company after the effectiveness of the DFA Rule generally must submit its resolution plan no later than July of the following calendar year. After filing its initial resolution plan, each Covered IDI and Covered Company must submit a resolution plan annually on or before each anniversary of its initial submission.[8]

The staggered deadlines, which did not appear in the proposed rules, benefit both the agencies and the companies that will file resolution plans. With staggered deadlines, the agencies will not be inundated with more than 150 plans to review at once (a concern voiced by commenters), and with the largest institutions filing first, regulatory resources would be focused initially on those companies that theoretically pose the largest systemic concern. Also, all of the staggered deadlines fall later than the deadlines in the proposed rules, giving Covered Companies and Covered IDIs more time to understand and process the plan requirements and develop adequately responsive resolution plans.

[7] "Non-bank assets" are not defined in the DFA Rule, but it appears that the usual meaning given to such a term for BHCA purposes would apply. Thus, they would generally be those assets held by legal entities that are not themselves U.S. banks or U.S. branches or agencies of non-U.S. banks. For example, a securities broker-dealer subsidiary, futures commission merchant, investment adviser, and consumer lending subsidiary would be a non-bank entity, and their assets would be non-bank assets. It is not clear how non-bank subsidiaries of an IDI would be classified.

[8] Both Rules authorize the FDIC and Federal Reserve to determine that a Covered IDI or Covered Company must submit its initial or annual resolution plan on a date other than those enumerated above.

Notice Filings for Material Events

Both Rules also require further filings beyond the filing of resolution plans. Covered Companies must file with the Federal Reserve and FDIC, and Covered IDIs 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. The notice must describe the event, describe any material effects it may have on the resolution plan, and summarize the changes that may be required to the resolution plan. While the Rules are not explicit as to what constitutes a "material effect," the releases accompanying the rules note that a "material effect" would be brought about by an event or change that would render the resolution plan "ineffective, in whole or in part."

Confidentiality

Unlike the proposed Rules, there is now a requirement that a portion of the resolution plan be made public, and there is meaningful guidance on the confidentiality of sensitive information. Under both Rules, the resolution plan must be divided into a public section and a confidential section, and each Covered Company and Covered IDI 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.

To ease commenters' concerns, 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, as discussed below.

Key Substantive Elements of the Resolution Plan Requirements under the DFA Rule

The requirements for Covered Companies under the DFA Rule are broken down into seven major areas and about 40 individual components. The DFA Rule plans generally must contain a detailed analysis of how a Covered Company can be resolved in a bankruptcy proceeding, including a range of specific actions to be taken in a resolution, and a detailed description of the Covered Company's organization, material entities, interconnections and interdependencies, management information systems, other key components of their business activities among other elements.

Distinctions are made based on asset size and complexity of the Covered Company. In particular, a smaller, less complex institution may provide a less detailed "tailored" resolution plan. Covered Companies qualifying for such a "tailored" plan are:

- US Covered Companies with total non-bank assets of less than $100 billion that are engaged primarily in insured depository institution activities (i.e., total US IDI assets comprise 85% or more of total consolidated assets).
- Non-US Covered Companies with total US non-bank assets of less than $100 billion that, in the United States, are engaged primarily in banking activities (i.e., the total US IDI operations, branches, and/or agencies comprise 85% or more of total US consolidated assets).

The status of a Covered Company subject to the DFA Rule is based on total global (i.e., not only US) assets; however, non-US headquartered institutions with limited US non-bank operations may be permitted to provide a "tailored" resolution plan with fewer information requirements. In general, the DFA Rule plan for such a company only needs to cover US-domiciled subsidiaries and operations, with some information on interconnections with non-US operations, and identify how the DFA Rule plan is integrated into the institution's global resolution plan. This provision arguably recognizes the importance of deferring to a non-US institution's home country supervisor and limitations on the territorial reach of the US agencies as the "host country" supervisor.

The seven key components of, and a summary of the required information that must be included as part of, a Covered Company's resolution plan are set out below.

- An Executive Summary: An overview of the plan, including (a) key elements of the Covered Company's strategic plan, (b) material changes to prior plans, and (c) any actions taken by the Covered Company (since filing of the previous resolution plan) to improve the effectiveness of a resolution plan.
- A Strategic Analysis of the Resolution Plan's Components:
  - Description of (a) the plan for rapid and orderly resolution and 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 Covered Company, its material entities, and its critical operations and core business lines in the event of material financial distress or failure of the Covered Company, (b) information regarding funding, liquidity, support functions, and other resources and needs, including capital resources and needs, mapped to the Covered Company's material entities, core business lines and critical operations, (c) the Covered Company's strategy for maintaining and funding the "critical operations" and "core business lines" in an environment of material financial distress, (d) the strategy for ensuring that any insured depository institution subsidiary will be adequately protected from risks arising from the activities of any nonbank subsidiaries.
  - For each "material entity" (subsidiary) that is either (i) subject to the Bankruptcy Code or (ii) subject to another specialized insolvency regime and has either $50 billion in total assets or conducts a "critical operation": description of strategy in the event of a failure or discontinuation of the subsidiary (or core business line/critical operation) and actions that will be taken to prevent or mitigate any adverse effects of such failure or discontinuation on the financial stability of the United States.
  - Time period that would be needed to execute each material aspect of the plan.
  - Identification of weaknesses/deficiencies in systems and processes to collect, maintain, and report information and plans to remedy any such deficiencies.
  - Description of processes for determining the value of core business lines/critical operations, and feasibility of the resolution plans.
- A Description of the Covered Company's Corporate Governance Structure for Resolution Planning: Description of policies, procedures, and internal controls governing preparation and approval of a resolution plan and 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: Information regarding material assets, liabilities, derivatives, licensees, hedges, capital and funding sources and

major counterparties (in general, mapped to material entities along with location information), and 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 Covered Company.

- Information Regarding the Covered Company's Management Information Systems (MIS): Information regarding MISs supporting the Covered Company's core business lines and critical operations, including information regarding the legal ownership of such systems as well as associated software, licenses, or other associated intellectual property.
- Description of Interconnections and Interdependencies among the Covered Company and its Material Entities: Description of interconnections and interdependencies among the Covered Company 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 Covered Company, its material entities, or its critical operations or core business lines.
- Supervisory and Regulatory Information: Identification of regulatory authorities (whether US or non-US) that have supervisory or regulatory authority or responsibility with respect to the Covered Company or that are responsible for resolving a non-US based material entity or critical operations or core business lines of the Covered Company.

Key Substantive Elements of the Resolution Plan Requirements under the IDI Rule

The requirements for Covered IDIs generally includes items like those listed above for a Covered Company under the DFA Rule as well as other items relevant only for banks. Thus, an IDI Rule plan must include detailed descriptions of organizational structure, business practices, including core business lines, and operations.

In addition, several specific items reflect the types of activities conducted by most large IDIs:

- A detailed analysis of how a Covered IDI can be resolved in an orderly and timely manner by the FDIC in the event of receivership.
- Granular information on (a) major counterparties and the effect on the bank of the failure of each one, (b) off-balance-sheet exposures, (c) the process for determining to whom to pledge collateral, (d) practices for the booking of trading and derivative activities, including material hedges, (e) material entity financial statements and an unconsolidated balance sheet for the bank, (f) payment, clearing and settlement systems used by the bank, (g) funding sources for the bank and its material subsidiaries including short-term and long-term liabilities by type and term to maturity, and (h) material affiliate funding relationships, accounts and exposures.
- Systemically important functions that the Covered IDI and its subsidiaries and affiliates provide, including payments systems, custodial or clearing operations, large sweep programs and the like, along with estimated vulnerabilities and exposure.
- Cross-border elements, including branches and other components located outside the United States, the location and amount of foreign deposits and assets, and the nature and extent of cross-border assets, operations, interrelationships and exposures.

Regulatory Review of Resolution Plans

The FDIC and the Federal Reserve must review a DFA Rule plan to determine that it is complete with respect to the minimum informational requirements, and the FDIC will conduct the same type of review of IDI Plans. Under the DFA Rule, such a determination must be made within 60 days of submission; no such timeframe is provided in the IDI Rule. If a plan were deemed incomplete, the Covered Company or Covered IDI would then have time to revise and submit a complete resolution plan.

After a complete resolution plan is submitted, it will be reviewed pursuant to a standard of credibility. This standard is implicit in the DFA Rule and explicit in the IDI Rule. The DFA Rule provides that the Federal Reserve and FDIC jointly may determine that a submitted plan is not credible or would not facilitate the orderly resolution of the Covered Company, while the IDI Rule states unequivocally that "[e]ach resolution plan submitted shall be credible." The IDI Rule says that a resolution plan is credible if its strategies for resolving the Covered IDI and the information provided pursuant to the IDI Rule are "well-founded and based on information and data related to the [Covered IDI] that are observable or otherwise verifiable and employ reasonable projections from current and historical conditions within broader financial markets."[9]

Under the IDI Rule, the FDIC will review an IDI Plan in consultation with a Covered IDI's primary regulator, but the FDIC alone will make a determination as to credibility.

If a plan under either Rule has been determined to be not credible or deficient, the Covered Company or Covered IDI 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 such a determination, 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 and IDI Rules. As the process underlying the resolution plan requirements is an iterative one, the determination that a plan is credible will likely be informed by the back-and-forth conversation between a Covered Company or Covered IDI and the relevant agencies. This seems appropriate and beneficial as credibility will be a bespoke determination and there will be opportunity for a Covered Company or Covered IDI to provide its input as to credibility. Since the DFA Rule does not establish a clear standard of acceptability, there is room for the FDIC and Federal Reserve to develop their own standards over time with respect to the requirements to be met by DFA Plans.

Consequences of Failure to Cure a Deficient Plan

If a Covered Company fails to submit a revised DFA Rule plan in the required timeframe or if the Federal Reserve and FDIC determine that the revised plan does not adequately remedy the deficiencies identified in the deficiency notice, then the FDIC and Federal Reserve may jointly determine that the Covered Company be subject to more stringent capital, leverage, or liquidity requirements, or they may restrict the growth, activities, or operations of the Covered Company or its subsidiaries. In addition, if a Covered Company fails within two years to submit a revised plan that adequately remedies the deficiencies, the Covered Company may be directed to divest assets and operations.

Given these consequences and the novelty of the resolution plan requirement, the FDIC and Federal Reserve note that they do not expect that the initial resolution plan submitted by a Covered Company 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. This evinces some understanding on the part of the agencies of the novelty, uncertainty, and complexity of the

[9] Section 360.10(c)(4)(i). The word "credible" is used in the DFA Rule, but without a definition, at Section __.5(b).

resolution plan requirements as well as the attendant unease this set of circumstances may cause at Covered Companies. It also may show sensitivity to non-US supervisors of non-US banks, which might arrive at a different view from the FDIC and Federal Reserve on the credibility of a plan and the risks posed by the US operations and corporate structure of the bank.

The IDI Rule does not set out specific sanctions the FDIC would impose on a Covered IDI 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.

Orderly Liquidation Authority

DFA and IDI Rule Plans are two of three resolution planning schemes the FDIC has been developing. Under the "Orderly Liquidation Authority" ("OLA") of Title II of the Dodd-Frank Act, the FDIC has authority to manage, as receiver, the resolution of certain systemically important financial companies under a regime modeled after the FDIA. This would replace the mechanisms under the Bankruptcy Code that would otherwise be applicable to such institutions and is a response to the *ad hoc* approaches taken by US authorities to the failures and near failures of financial institutions such as Lehman Brothers, Bear Stearns, and AIG. The FDIC prepares OLA resolution plans for financial institutions that could be subject to that insolvency regime. The FDIC has indicated that it will use information provided by financial institutions in their DFA/IDI Rule plans to assist in its ongoing development of the OLA resolution plans.

Global Coordination of Resolution Planning

The United States is not alone in requiring resolutions plans as a measure to mitigate systemic risk and end the "too big to fail" problem. At the global level, resolution planning for large, complex financial institutions was urged by the Group of Twenty Finance Ministers and Central Bank Governors ("G20") at its summit in Pittsburgh in 2009. The G20 called for the development of "internationally consistent firm-specific contingency and resolution plans." The Financial Stability Board ("FSB"), formed by the G20, has been at the forefront of the development of international standards for contingency and resolution planning. In July 2011, the FSB released the *Consultative Document on Effective Resolution of Systemically Important Financial Institutions* ("FSB Consultative Document").

A degree of global coordination of resolution planning is evident. The FSB Consultative Document calls for resolution plans to be submitted by June 2012, consonant with the timing of resolution plan submission under the DFA and IDI Rules. Other members of the G20 are not far behind the United States on the issue of resolution planning. In August 2011, the UK's Financial Services Authority issued its *Consultation Paper on Recovery and Resolution Plans*, a proposal which has also set out an iterative resolution plan process in which initial plans would be due by June 2012. The European Union is behind the United Kingdom, with its resolution planning process in a pre-legislative stage and further progress expected by the end of 2011.

Some Tips on the Preparation of an Initial Living Will

1. It seems likely that at least some of the information required by the Rules has already been prepared by almost all of the largest banks by virtue of the public disclosure documents required by the securities laws. Virtually all of the Covered Companies under the DFA Rule are publicly held and accordingly have regularly prepared annual reports describing in some detail their organization, lines of business, risk management procedures and the like. Most institutions will likely find that they can take that material and add on the specific information and analysis required by the Rules.

2. There is no specified "as-of" date that a Covered Company or IDI must use for purposes of the plans. Presumably the Federal Reserve and FDIC do not expect institutions to update all of the information in the plans up to the date that they are submitted, especially in light of the size of the project. It may be that institutions will be free to say that the information is current as of, for example, April 1, 2012, and submit it by the July deadline. However, this may depend on several factors specific to the institution and the information at issue (e.g., the systemic significance of the Covered Company, and whether the two agencies would have ready access to updated information promptly upon request).
3. It appears that, at least for IDI Rule plans, those Covered IDIs with non-US branches will need to explain, possibly for the first time, how the local banking supervisor for each of those branches would handle the liquidation of the branch. Some countries have a type of rule called a "ring fence," as does Federal law for Federally-licensed branches of non-US banks and New York law for those licensed by New York. Under those laws, the local supervisor has the authority to take possession of the branch's assets, and possibly other assets of the Covered IDI located in the jurisdiction, and use them to repay branch depositors. Any remaining funds would be paid over to the FDIC as US liquidator of the bank. Most countries appear not to have such laws, in which case the FDIC may have a freer hand in taking possession of branch assets. However, depositors in those branches would not have the same priority as depositors of US branches of the bank. Providing an explanation of this process may prove challenging.
4. Similarly, for non-US banks, it appears that the DFA Rule plan must describe the resolution process and strategy for a US branch or agency under the law of its licensing authority in those cases in which total branch or agency assets equal or exceed $50 billion.[10] According to Federal Reserve data, several US branches would be covered. Federal and New York law are relatively clear on this process.
5. Confidentiality should be of great concern to institutions for several separate reasons:
    a. FOIA requires effectively that any document in the possession of the US Government must be disclosed upon request unless one of the specific exceptions provided in FOIA is applicable. The Rules mention two exceptions: trade secrets and other internal information the disclosure of which would cause substantial competitive harm to the party that submitted it to the Government and that is not otherwise public, and confidential bank supervisory material. Reliance on the supervisory-material exception would have been the much more clear choice, but the agencies have interpreted the exception strictly to apply effectively only to examination reports. The Rules also appear to say that a final decision on the confidentiality of any material submitted by an institution as part of the confidential submission will be made at the time that someone makes a FOIA request. As a result, whether sensitive material in a plan will actually be kept confidential will be uncertain.
    b. FOIA precedent states that any confidential material cannot have been disclosed publicly. Care will have to be taken in drafting a plan's public portion to avoid the possibility that the Federal Reserve or FDIC, or a court, would find that the public portion effectively disclosed the detail in the confidential one. Also, if an agency or court finds that something that the institutions claim is confidential was in fact publicly disclosed elsewhere, such as a securities filing, any presumption in favor of the institution is likely to be lessened.

[10] A non-US bank would not have to do so if it is approved to use the "tailored plan" option described above.

c. The FOIA exceptions do not apply to subpoenas issued by Congress. Thus, confidential treatment would not bar Congress from demanding that the Federal Reserve or FDIC provide it. The high public profile of the Covered Companies, the political turmoil over "too big to fail", and the timing of the largest Covered Companies submitting their plans in the middle of 2012, a Presidential election year, may heighten the possibility of a Congressional subpoena. After the material is submitted, nothing prevents a member from disclosing it.

6. In preparing the strategic plan for rapid and orderly resolution, Covered Companies are required to take into account and disclose key assumptions and supporting analysis underlying the plan. These assumptions and analyses should include legal issues, regulatory clearances and other similar considerations expected to be associated with implementation of the strategy. For example, the plan should cover the appropriate array of legal issues presented by any organizational/structural changes—including divestitures—that form part of the plan.

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We will continue to follow developments on the preparation of DFA and IDI Rule plans.

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