Agencies Propose Significant Changes to Resolution Planning Requirements

April 30, 2019

As has been anticipated, the Federal Reserve Board ("FRB") and the Federal Deposit Insurance Corporation (the "FDIC" and, together with the FRB, the "Agencies") jointly released a notice of proposed rulemaking (the "Proposal") that would revise the regulations implementing the resolution planning requirements of section 165(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "165(d) Rule").[1] The Proposal would revise the resolution planning rules applicable to certain domestic and foreign firms ("covered companies") to reflect resolvability improvements identified over the past eight years and as a response to the Economic Growth, Regulatory Relief, and Consumer Protection Act (the "Regulatory Relief Act"). The Proposal builds on the domestic and foreign tailoring proposals to create categories of covered companies that would be subject to different filing frequencies and resolution plan content requirements.

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Separately, the FDIC issued and invited comment on an advance notice of proposed rulemaking ("ANPR") regarding its rule (the "IDI Rule") requiring "covered" insured depository institutions ("CIDIs") with $50 billion or more in total assets to prepare and submit resolution plans to the FDIC.[2] The ANPR requests comment on two potential approaches to tailoring the IDI Rule based on categorizing CIDIs into three groups and contemplates a schedule in which filing cycles alternate between full and streamlined resolution plan submissions, similar to the 165(d) Rule Proposal.

Comments are due on June 21, 2019 on the ANPR, which also is the contemplated comment deadline for the 165(d) Rule Proposal (this proposal has not yet been published in the *Federal Register*). Below we summarize in greater detail the Agencies' joint 165(d) Rule Proposal and then the FDIC's ANPR regarding the IDI Rule, including our key observations.

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1 The FRB released the Proposal on April 8, 2019, followed by the FDIC on April 16, 2019. *See* Proposal to Amend and Restate the Jointly Issued Regulation Implementing the Resolution Planning Requirements of Section 165(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Apr. 8, 2019).

2 Resolution Plans Required for Insured Depository Institutions with $50 Billion or More in Total Assets, 84 Fed. Reg. 16620 (April 22, 2019), *available* here.

Part One: 165(d) Rule Proposal

I. Key Observations

- The Proposal generally would not modify the informational requirements of the full resolution plan, other than certain changes to the executive summary, and the Agencies note that applicable guidance, such as the final guidance applicable to U.S. global systemically important bank holding companies ("GSIBs"),[3] would continue to apply to covered companies. The Agencies explain they have become familiar with the format and content of the information currently required and recognize the utility of the informational requirements, which have facilitated resolvability improvements. The Proposal introduces the concept of a targeted plan for alternating submission cycles, which generally would require a description of material changes and certain "core elements" of the full resolution plan (certain information regarding capital, liquidity and the company's plan for executing any contemplated recapitalization).

- The Proposal would introduce several new formal procedures for covered companies to follow in relation to their resolution plan submissions, such as to request waivers of certain information requirements and to identify and rescind critical operations, among others. *See* Table on Notice Deadlines for Covered Companies and Agencies ("Notices Table") attached hereto and the summary below for more detail.

- The Proposal would move to a two- or three-year submission cycle for covered companies rather than the current annual cycle, which is more consistent with current practice in which the Agencies have extended deadlines for resolution plan submissions beyond the annual cycle required by regulation. U.S. GSIBs, however, would be the only covered companies in practice subject to a biennial submission cycle under the Proposal. All other covered companies would be subject to some form of triennial cycle—either alternating between full and targeted plans or submitting only a reduced plan.

- The Agencies would place the foreign banking organizations ("FBOs") that have received detailed guidance from the Agencies[4]—Barclays, Credit Suisse, Deutsche Bank and UBS (the "First Wave FBOs")—on a triennial filing cycle, as opposed to a biennial cycle, noting that the preferred outcome for each of these FBOs is a

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[3] Final Guidance for 2019 and Subsequent Resolution Plan Submissions, 84 Fed. Reg. 1438 (Feb. 4, 2019), *available* here.

[4] Guidance for 2018 §165(d) Annual Resolution Plan Submissions By Foreign-based Covered Companies that Submitted Resolution Plans in July 2015, *available* here.

successful home country single point of entry resolution strategy, thus justifying the more extended cycle.

- The Proposal emphasizes that the presence of tailoring factors, including cross-jurisdictional activity, nonbank assets, short-term wholesale funding and off-balance sheet exposure, increases the difficulty of resolving a company and, therefore, relies on these factors to apply resolution planning requirements to U.S. and foreign covered companies between $100 billion and $250 billion in total consolidated assets.

- The Proposal would eliminate the tailored resolution plan, but acknowledges that a covered company currently eligible to file a tailored resolution plan might apply for a waiver to limit the company's required resolution plan content in a manner similar to the current tailored resolution plan, as discussed below. The Agencies also note that many of the companies currently eligible for tailored plans have ceased, post-Regulatory Relief Act, to be subject to 165(d) Rule resolution plan requirements, or would become triennial reduced filers.

II. Tailoring of Filing Frequency and Content

Scope of Applicability

The Proposal would remove the resolution plan filing requirement for domestic firms and foreign firms with less than $100 billion in total consolidated assets and would impose such requirement on all domestic and foreign firms with over $250 billion in total consolidated assets and on certain domestic and foreign firms between $100 billion and $250 billion in total consolidated assets based on tailoring factors. More specifically, the 165(d) Rule would apply to domestic and foreign firms that fall under Categories I, II and III in the tailoring proposals released in October 2018 and April 2019 (see our prior analyses on the tailoring proposals for domestic firms and foreign firms), plus on a reduced basis to an additional group of foreign firms with global assets of $250 billion or more, but relatively smaller U.S. operations.

For firms that would be subject to the 165(d) Rule, the Proposal would move to a two- or three-year submission cycle, alternating between full and targeted plans or, for certain foreign firms, requiring an even further streamlined reduced plan. Specifically, the Proposal would apply a biennial filing requirement to U.S. GSIBs and a triennial filing requirement to domestic firms with over $250 billion in total consolidated assets and to domestic firms with between $100 billion and $250 billion in total consolidated assets if the firm also has $75 billion or more in any of: cross-jurisdictional activity; nonbank assets; weighted short-term wholesale funding; or off-balance sheet exposures. This group would be coextensive with Category I, II and III for domestic firms. For FBOs, the Proposal would apply to three groups of firms. First, a triennial filing

requirement, alternating between full and targeted plans, would apply to foreign firms with $250 billion or more in combined U.S. assets and to foreign firms with: (a) combined U.S. assets of $100 billion or more and (b) with respect to combined U.S. operations, $75 billion or more in any of: cross-jurisdictional activity; nonbank assets; weighted short-term wholesale funding; or off-balance sheet exposures. This group would be coextensive with Category II and III for FBOs. Second, a triennial reduced plan filing requirement would apply to foreign firms with smaller U.S. operations that have $250 billion or more in global assets, which is a category similar to but not co-extensive with the tailoring proposal's Category IV.[5]

Filing Groups

The Proposal would divide covered companies into the three groups described below. All covered companies would have a July 1 submission date (some firms are currently required to make their submissions by December 31).

- **Biennial filers** would be required to file once every two years, alternating between full and targeted resolution plans (discussed below). Biennial filers would include entities subject to Category I in the tailoring proposals, which currently includes only U.S. GSIBs. In addition, nonbank financial companies designated by the Financial Stability Oversight Council ("FSOC") could be biennial filers.[6]

- **Triennial full filers** would be required to file once every three years, alternating between full and targeted resolution plans (discussed below). Triennial full filers would include entities within Category II and III in the tailoring proposals and any FSOC-designated nonbank financial company identified as a triennial full filer.

- **Triennial reduced filers** would be required to file a reduced resolution plan once every three years, with new covered companies required to submit an initial full resolution plan.

The table below summarizes the required frequency and content of resolution plan submissions for each filing group covered by the Proposal.

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[5] Note that although a foreign firm with fewer than $250 billion in global assets may be subject to resolution planning requirements under the Proposal by virtue of falling within Category II or III of the FBO tailoring proposal, at the moment no firms fall within this bucket, such that as of today, no foreign firms with fewer than $250 billion in global assets would be subject to resolution planning requirements.

[6] These nonbank financial companies would automatically be deemed biennial filers, but the Agencies would retain discretion to designate them as triennial full filers.

Overview of Filing Groups

Group	Frequency of Filing	Covered Companies	Required Submissions	Proposed Next Submission Dates**
Biennial full filers* • Category I • Designated nonbank biennial full filers	Every two years, alternating between full and targeted resolution plans	• U.S. GSIBs • Nonbank financial companies designated by FSOC ***Currently Included*** Bank of America, Bank of New York Mellon, Citigroup, Goldman Sachs, JPMorgan Chase, Morgan Stanley, State Street, Wells Fargo	Full Resolution Plan	July 1, 2019 July 1, 2023
			Targeted Resolution Plan	July 1, 2021 July 1, 2025
Triennial full filers* • Category II or III • Designated nonbank triennial full filers	Every three years, alternating between full and targeted resolution plans	• All U.S. firms with over $250 billion in total consolidated assets • U.S. firms with between $100 billion and $250 billion in total consolidated assets with $75 billion or more in any of cross-jurisdictional activity, nonbank assets, weighted short-term wholesale funding, or off-balance sheet exposure • FBOs with $250 billion or more in combined U.S. assets • FBOs with between $100 billion and $250 billion in combined U.S. assets with $75 billion or more (based on combined U.S. operations) in any of cross-jurisdictional activity, nonbank assets, weighted short-term wholesale funding, or off-balance sheet exposure • Nonbank financial companies designated by FSOC identified as triennial full filers based on facts and circumstances ***Currently Included*** First Wave FBOs (Barclays, Credit Suisse, Deutsche Bank and UBS), Capital One, HSBC, Mizuho, MUFG, Northern Trust, PNC Financial, Royal Bank of Canada, Toronto-Dominion, US Bancorp	Full Resolution Plan	July 1, 2021 July 1, 2027
			Targeted Resolution Plan	July 1, 2024 July 1, 2030
Triennial reduced filers • Covered companies that are <u>not</u> GSIBs, designated nonbank financial companies, or Category II or III	Every three years, with new covered companies required to submit an initial full resolution plan	• Any FBO with at least $250 billion in global consolidated assets but not within Category II or III ***Currently Included*** 53 FBOs	Reduced Resolution Plan	July 1, 2022 July 1, 2025

* Biennial and triennial full filers must maintain a process for identification of critical operations, discussed further below.

** The First Wave FBOs would be expected to address the shortcomings identified in their previous resolution plan submissions and complete their project plans by July 1, 2020.

- **Transition period**. Under the Proposal, the revised 165(d) Rule would go into effect on the earlier of (i) the first day of the first calendar quarter after the issuance of the final rule and (ii) November 24, 2019.

Movement of Filing Dates

The Proposal would provide the Agencies discretion to move resolution plan filing dates (in either direction) when appropriate. *See* Notices Table.

- **Resolution plans.** The Agencies would notify a covered company that has previously submitted a resolution plan at least **180 days** prior to the new filing date, and would notify a new covered company (that has not previously submitted a resolution plan) at least **12 months** prior to the new filing date. However, the Proposal also would give the Agencies broad authority to jointly require that a covered company submit a full resolution plan within a reasonable period of time, notwithstanding otherwise applicable filing dates.

- **Interim updates.** The Agencies also would be able to jointly require interim updates to a resolution plan within a reasonable amount of time. Interim updates may be required, for instance, when the Agencies have identified one or more shortcomings with respect to a resolution plan, consistent with current practice.

Transitioning Between Filing Groups and Other Notice Requirements

The Proposal also would establish rules for companies entering into covered company status, transitioning between filing groups, and exiting covered company status.

- **New covered companies.** The Proposal would modify the timing of the initial submission for new covered companies. When a firm first becomes a covered company, its first submission would be a full resolution plan, which would be due the next time its filing group (biennial, triennial full or triennial reduced) submits resolution plans, as long as the submission deadline is at least **12 months** after the time the firm becomes a covered company. The Agencies would be permitted to require the initial plan earlier than the date of the filing group's next filing, however, so long as the submission deadline would be at least **12 months** from the date on which the Agencies jointly determined to require the covered company to submit its resolution plan.

- **Change of filing group.** When a covered company changes filing groups, the following rules generally would apply:

- If the submission deadline of the covered company's new group is the same as the deadline for the prior group, then the covered company would be required to submit the plan by that same submission date, and:
  - If the deadline is within **12 months** of the covered company becoming a member of the new group, then the plan may be of the type required by either the new group or the prior group; or
  - If the deadline is **12 months** or later from the time the covered company becomes a member of the new group, then the plan must be of the type required by the new group.
- If the submission deadline of the new group is different from the deadline for the prior group, then the covered company must submit a plan on the next submission deadline of the new group that is at least **12 months** after the covered company became a member of the new group, and the plan must be of the type required by the new group.
- If the covered company is a triennial reduced filer that becomes a biennial filer or triennial full filer, its first required submission that occurs at least **12 months** after becoming a biennial filer or triennial full filer must be a full resolution plan. Afterwards, the covered company would submit, on future submissions dates, the same type of plan as other members of the new group.

- **Exiting covered company status.** The Proposal would update the methodology for determining when a company exits covered company status. If a company is no longer part of a filing group after a decrease in assets (and is not otherwise subject to Category II or Category III standards based on the risk-based indicators), it would not have any filing requirements. The Agencies propose that for domestic companies, categorization for these purposes would be based on the company's total consolidated assets reported on its Form FR Y-9C being below $250 billion for each of its last four calendar quarters. For an FBO, categorization would be based on either its last four FR Y-7Qs' reporting total global assets below $250 billion, if filed quarterly, or its last two FR Y-7Qs' reporting below $250 billion, if filed annually. The Agencies would have discretion to jointly exclude a firm from covered company status at an earlier time.

- **Mergers.** Under the Proposal, where a firm's assets grow due to a merger, acquisition, or other transaction, the Agencies would have the discretion to consider the relevant assets as reflected on one or more of the four most recent reports (the FR Y-9C for U.S. firms and the FR Y-7Q for FBOs) of the pre-combined entities. For instance, as described in the Proposal, if the acquiring entity previously reported total

consolidated assets of $175 billion over the preceding four quarters, and the acquired entity previously reported total consolidated assets of $80 billion over that period, then the Agencies would be able to determine that the combined entity is a covered company at closing of the transaction (*i.e.*, the Agencies would make a determination that the combined entity has more than $250 billion in total consolidated assets based on previously reported assets of the pre-combined entities).

III. Plan Content

The contents of the full resolution plan in the Proposal, as well as the contents of the public section, are largely consistent with the requirements under the current version of the 165(d) Rule. The Proposal, however, would modify the requirements for the executive summary by requiring covered companies to include descriptions of **material changes** experienced by the covered company since its last filing, the covered company's response to such material changes in its resolution plan, and a description of changes to the resolution plan in response to any change in law or regulation or guidance or feedback from the Agencies.

Material Changes

The Proposal defines a material change to mean 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 resolvability of the covered company, its resolution strategy, or how its strategy is implemented. Such changes include, but are not limited to:

- Identification of a new critical operation or core business line.
- Identification of a new material entity or de-identification of a material entity.
- Significant increase or decrease in the business, operations, or funding or interconnections of a material entity, including operational and financial interconnectivity.
- Changes in the primary regulatory authorities of a material entity or the covered company.

As noted, biennial and triennial full filers would alternate between submitting full and targeted resolution plans. The targeted resolution plan is meant to strike a balance between receiving updates on a covered company's resolution plan without requiring submission of largely unchanged information. After its initial filing, a triennial reduced filer would be required to submit only reduced resolution plans. A reduced resolution plan would focus largely on changes to the resolution plan since the previous submission. The table below summarizes the required informational content for each resolution plan type.

Informational Content Requirements

<table>
<tr><th>Section Name</th><th>Full Resolution Plan</th><th>Targeted Resolution Plan</th><th>Reduced Resolution Plan</th></tr>
<tr><td>Public Section</td><td colspan="2">An executive summary of the resolution plan that describes the covered company's business and includes (where material):
The names of material entities.
A description of core business lines.
Consolidated or segment financial information regarding assets, liabilities, capital and major funding sources.
A description of derivative activities and hedging activities.
A list of memberships in material payment, clearing and settlement systems.
A description of foreign operations.
The identities of material supervisory authorities.
The identities of the principal officers.
A description of the corporate governance structure and processes related to resolution planning.
A description of material management information systems.
A high-level description of the company's resolution strategy.</td><td>An executive summary of the resolution plan that describes the covered company's business and includes (where material):
The names of material entities.
A description of core business lines.
The identities of the principal officers.
A high-level description of the company's resolution strategy, referencing applicable resolution regimes for its material entities.</td></tr>
<tr><td>Confidential Section</td><td>An executive summary discussing:
Key elements of the strategic plan for rapid and orderly resolution during material financial distress or failure of the company.
Each material change since the last submitted resolution plan.
Changes to the previous resolution plan due to legal or regulatory changes, guidance or feedback from the Agencies, or any material change.
Any actions taken since submission of the previous plan to improve effectiveness of such resolution plan or otherwise mitigate material weaknesses or impediments to effective and timely execution of the plan.
A description of:
The covered company's strategic analysis describing the company's plan for rapid and orderly resolution.
Corporate governance relating to resolution planning.
Organizational structure and related information.
Key management information systems and applications.
Interconnections and interdependencies of the company and its material entities and its identified critical operations and core business lines.
Supervisory and regulatory information.</td><td>A description of:
Each material change since the last submitted resolution plan.
Changes to the previous resolution plan due to legal or regulatory changes, guidance or feedback from the Agencies, or any material change.
"Core elements" (certain information regarding capital, liquidity and the company's plan for executing any contemplated recapitalization).
For covered companies that have received detailed guidance from the Agencies regarding capital, liquidity, and governance mechanisms, such as the U.S. GSIBs and the First Wave FBOs, these core elements could include changes to the triggers upon which the company relies to execute a recapitalization, including triggers based on capital or liquidity modeling.
Targeted information identified by the Agencies at least 12 months prior to the plan's required submission date. See Notices Table.
E.g., the potential effects of Brexit on a covered company's resolvability because of material changes to booking practices or organizational structure.</td><td>A description of:
Each material change since the last submitted resolution plan.
Changes to the strategic analysis in the previous resolution plan due to legal or regulatory changes, guidance or feedback from the Agencies, or any material change.</td></tr>
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- **Extraordinary events.** The Proposal would replace the notice requirement for material events with a notice requirement for "extraordinary events" (as opposed to for the newly defined "material change").

  - **Definition of extraordinary event**: A material merger, acquisition of assets or other similar transaction, or a fundamental change to a company's resolution strategy.

  - **Notice required**. Under the Proposal, each covered company would be required to provide notice to the Agencies within **45 days** after an extraordinary event, and such notice should describe the event and explain how the event would affect the resolvability of the covered company. There is an exception, however, where the date on which the covered company would be required to submit the notice would be within **90 days** prior to the date of the next resolution plan submission, in which case the resolution plan would presumably address the extraordinary event. *See* Notices Table.

IV. Waivers and Incorporation by Reference

In addition to reducing filing frequency and resolution planning content requirements through targeted and reduced filings, the Agencies are proposing certain waiver procedures for plan informational content, anticipating that certain aspects of a resolution plan may reach a steady state or become less material. The proposed waivers would supersede existing provisions in the 165(d) Rule that are similar and permit the Agencies to grant exemptions for one or more informational requirements.[7]

- **Agency waiver.** The Proposal would provide a method for the Agencies to jointly waive certain informational content requirements for one or more covered companies on the Agencies' own joint initiative, which could be granted for one or more filing cycles. This process gives the Agencies the authority to waive informational content for full, targeted and reduced resolution plans.

- **Covered company waiver request.** The Proposal also would establish a process for a covered company to apply for a waiver of certain informational content requirements for a full resolution plan (but not for a targeted or reduced resolution plan). *See* Notices Table.

  - Under the Proposal, to waive an informational content requirement, the covered company would be required to submit the waiver request at least **15 months** prior

[7] *See* 165(d) Rule Section 4(k).

to the plan filing date. Covered companies would be limited to one waiver request for each filing cycle.

- The Proposal would require a public section of the waiver request containing the list of requirements sought to be waived, as well as a confidential section. The confidential section would be required to explain why approval of the request is appropriate, why the information for which a waiver is sought would not be relevant to the Agencies' review of the company's resolution plan, and confirmation that the request meets the eligibility requirements for a waiver described below (*i.e.*, does not request a waiver for excluded information).

- The Proposal includes examples of circumstances in which a waiver may be granted, such as to reduce the burden for informational content that may be of limited utility because the Agencies recently completed an in-depth review of that information. For instance, if the Agencies recently conducted an in-depth review of a covered company's payments, clearing and settlement activities, it may be appropriate to waive the requirement for that covered company to submit information regarding those activities.

- If the Agencies do not **jointly** deny a covered company's waiver request at least **nine months** prior to the resolution plan filing date, the waiver would be automatically granted.

- **Excluded information.** Certain requirements would not be waivable, including:

  - Any "core element."

  - Information about the changes made to a resolution plan in response to a change in law, change in regulation, guidance or feedback from the Agencies, or regarding a material change.

  - Information required in the public section of a full resolution plan. *See* chart above on Informational Content Requirements.

  - Information about remediation of an identified deficiency or shortcoming (discussed below), unless the Agencies have jointly determined that the covered company has satisfactorily remedied the deficiency or shortcoming prior to the waiver request.

  - Information that is statutorily required; *i.e.*, information regarding (i) the manner and extent to which any IDI affiliated with the covered company is adequately protected from risks arising from the activities of any nonbank subsidiaries of the

company; (ii) a full description of the ownership structure, assets, liabilities and contractual obligations of the covered company; and (iii) identification of the cross-guarantees tied to different securities, identification of major counterparties, and a process for determining to whom the collateral of the covered company is pledged.

- **Incorporation by reference.** The Proposal would continue to allow, in a manner similar to the current 165(d) Rule, certain information in previously submitted resolution plans to be incorporated by reference. To incorporate information by reference, the covered company would be required to clearly identify the relevant information and the location of the information in the previous plan (*e.g.*, page numbers or names of subsections). Further, the reference must remain accurate in all respects that are material to the covered company's resolution plan. Even if an application for a waiver is denied with respect to certain information, a covered company may still be able to incorporate that piece of information by reference.

    - If the targeted or reduced resolution plan does not include a description of changes to any information that is statutorily required (listed above) since the covered company's previously submitted plan, such information from the covered company's previously submitted plan automatically would be deemed to be incorporated by reference.

V. Critical Operations

The Proposal would make significant changes to the identification process for critical operations, including by establishing processes for both covered companies and the Agencies to identify critical operations and to rescind prior critical operations. The proposed changes stem from the recognition that, as both companies and markets continue to evolve, the critical operations identification process should be flexible. The Proposal notes that original critical operations identifications the Agencies made in 2012 have remained largely unchanged. To address the need for flexibility, the Proposal would introduce several mechanisms through which critical operations identifications may be more responsive to changing conditions, both within individual covered companies and the broader market.

- **Covered company identification and periodic review.** Under the Proposal, biennial and triennial full filers would be required to maintain a process and methodology for the identification of critical operations, commensurate with a covered company's nature, size, complexity, and scope of operations.

    - **Process timing.** The covered company would be required to conduct the process sufficiently in advance of its next resolution plan submission so that it

is prepared to submit the relevant information regarding each critical operation.

- **Methodology.** The process would need to include a methodology for evaluating the covered company's participation in activities and markets that may be critical to U.S. financial stability. The methodology would need to identify and assess (i) the economic functions engaged in by the covered company (*e.g.*, deposit-taking, lending, payments, clearing and settlement, custody, capital markets and investment activities, etc.);[8] (ii) the markets and activities through which the covered company engages in those economic functions; (iii) the significance of those markets and activities with respect to the financial stability of the United States; and (iv) the significance of the covered company as a provider or other participant in those markets and activities.

- **Frequency and documentation.** A covered company would be required to engage in this review process at least as frequently as its resolution plan submission cycle. The review process would have to be documented in the covered company's corporate governance policies and procedures.

- **Waiver request.** Covered companies that do not currently have an identified critical operation would be eligible to apply for a waiver of the requirement to have a process and methodology to identify critical operations. *See* Notices Table.

  - The waiver request would have to be submitted at least **15 months** in advance of the filing date for the resolution plan. In the confidential section of the waiver request, the covered company must explain why a waiver of the requirement would be appropriate, including why the process and methodology are not likely to identify any critical operation given its business model, operations, and organizational structure. The public section of the waiver request would describe that the covered company is seeking to waive the requirement.

  - The waiver would be automatically granted **nine months** prior to the date the relevant resolution plan is due if the Agencies do not jointly deny the waiver prior to that date.

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[8] The Agencies note that the economic function is likely to represent a critical operation where (i) a market or activity engaged in by the company is significant to U.S. financial stability and (ii) the company is a significant provider or participant in such a market or activity. Evaluative factors to consider when determining whether an operation is critical include substitutability, market concentration, interconnectedness, and the impact of cessation.

- **De-identification of critical operations.** Covered companies would be required to notify the Agencies if an operation ceases to be identified as a critical operation. The covered company would have to explain the basis for the previous identification and why the operation should no longer be identified as a critical operation. Notice of the "de-identification" would have to be submitted at least **12 months** prior to the covered company's next filing submission; otherwise, the covered company generally would be required to continue treating the operation as a critical operation. A covered company's de-identification, however, would not rescind a joint identification made by the Agencies. *See* Notices Table.

- **Requests for reconsideration.** Under the Proposal, covered companies would be able to request that the Agencies reconsider critical operation identifications through submission of a written request. The request for reconsideration would have to be submitted "sufficiently before [the covered company's] next resolution plan to provide the [Agencies] with a reasonable period of time to reconsider the joint identification." If the covered company submits a request for reconsideration **at least 270 days** before the date on which it is required to submit its next resolution plan, the Agencies will complete their reconsideration at least **180 days** before the date on which the covered company is required to submit its next resolution plan (with the option of a **90-day** extension). If the request is submitted **less than 270 days** before the date on which the covered company is required to submit its next resolution plan, then the Agencies may defer reconsideration until after the submission of that resolution plan. Any request should include all arguments and relevant, material information that should be considered. If the covered company previously submitted a request for reconsideration, and submits a new written request regarding the same operation as in the prior request, then the new request must also describe material differences between the two requests. *See* Notices Table.

- **Agency identification and periodic agency review.** The Proposal would require periodic review of critical operations identifications made by the Agencies. Specifically, the Agencies would review all identified critical operations and the operations of covered companies at least every **six years** to determine whether to jointly identify or rescind critical operations of a covered company. The Agencies also would be able to identify a critical operation or rescind a prior identification at any time. If the Agencies jointly identify an operation as a critical operation, they will notify the covered company in writing. The covered company is not required to include the information required for a critical operation in any resolution plan required to be submitted within **180 days** after the joint notification unless the operation had been identified by the company as a critical operation prior to the joint Agency notification. *See* Notices Table.

VI. Standard of Review—Deficiencies and Shortcomings

As noted in the Proposal, the Agencies' practice to date has been to conduct an assessment of whether a covered company's resolution plan contains any "deficiencies" or "shortcomings." At the conclusion of the Agencies' review, the Agencies have issued feedback letters to covered companies that explain the rationale behind the Agencies' assessments and explain how any deficiencies or shortcomings could be addressed.

- **Definitions.** Under the Proposal, and in order to provide an opportunity for public comment on these terms and the Agencies' standard of review, the terms "deficiency" and "shortcoming" would be defined as described below. The Proposal essentially would codify the definitions of "deficiency" and "shortcoming" that the Agencies have, in practice, used under the current 165(d) Rule.

  - **Deficiency:** An aspect of a covered company's resolution plan that the Agencies jointly determine presents a weakness that individually or in conjunction with other aspects could undermine the feasibility of the covered company's resolution plan.

  - **Shortcoming:** A weakness or gap that raises questions about the feasibility of a covered company's plan but does not rise to the level of a deficiency for both Agencies.

- **Non-credibility determination.** Consistent with the Agencies' administration of the current 165(d) Rule, if the Agencies jointly determine the resolution plan is not credible or would not facilitate an orderly resolution, they would jointly notify the covered company in writing of such determination and identify the deficiencies. Within **90 days** of receiving a notice of deficiencies, or such shorter or longer period as determined by the Agencies, a covered company would be required to submit a revised resolution plan to the Agencies that addresses the deficiencies. A covered company would be required to correct an identified deficiency and resubmit a revised resolution plan (or otherwise risk becoming subject to more stringent capital, leverage or liquidity requirements, or restrictions on the growth, activities or operation of the covered company or subsidiary). The Agencies would be permitted to, upon their own initiative or upon receiving a written request by a covered company, jointly extend the time period for resubmission. *See* Notices Table.

- **Shortcomings.** The Proposal would not, as a practical matter, change the remediation process with respect to shortcomings. As noted, the Proposal effectively would codify current practices with respect to identifying and resolving both "deficiencies" and "shortcomings" (and offer an opportunity for comment on those current practices). A shortcoming would not require the resubmission of a resolution

plan, but the Agencies would be able to require a covered company to provide an interim update to evidence progress that the covered company has made in remediating the shortcoming. Shortcomings left unresolved may become deficiencies in the next resolution plan.

- **Divestiture.** The Proposal would not alter the Agencies' ability to direct covered companies to divest certain assets or operations in the event the covered company fails to cure an identified deficiency within **two years** of becoming subject to more stringent capital, leverage, or liquidity requirements, or restrictions on growth, activities or operations as a result of such deficiencies.

VII. Certain Clarifications and Technical Changes

The Proposal includes certain clarifications and other technical changes to the 165(d) Rule.

- **Resolution strategy and U.S. subsidiaries.** The Proposal would clarify, consistent with prior guidance, that FBOs should not assume that if the FBO takes resolution actions outside of the United States (for example, through a single point of entry resolution strategy) that the need for U.S. subsidiaries to enter into resolution proceedings would be eliminated.

- **Multi-tier FBO holding companies.** The Proposal notes that the top-tier holding company of certain FBOs may be a government, sovereign entity, or a family trust. In these cases, the Agencies do not benefit from obtaining resolution plan information regarding such entities. The Proposal would introduce a formal process through which the Agencies would identify a subsidiary in a multi-tiered FBO holding company structure that would be required to file the resolution plan.

- **Removal of the incompleteness concept and related review.** The Proposal would remove the requirement that the Agencies review a resolution plan within **60 days** of submission and jointly inform the covered company if the plan is informationally incomplete or additional information is required.

- **Mapping expectations.** The Proposal would clarify the expectations regarding the mapping of intragroup interconnections and interdependencies by FBOs. Specifically, FBOs would be expected to map the interconnections and interdependencies between and among:

  - their U.S. subsidiaries, branches and agencies;

  - their U.S. entities and any critical operations and core business lines; and

  - their U.S. entities and any foreign-based affiliates.

- **Alternative Scoring Methodology.** As alternatives to the proposed thresholds for applicability, the Proposal also seeks comment on whether firms should instead be categorized by GSIB score. The proposed alternative scoping methodology for U.S. firms is identical to the alternative methodology set out in the tailoring proposal for domestic firms (see page 3 of our prior analysis on the tailoring proposal for domestic firms). Similarly, the alternative scoping methodology for foreign firms is identical to the alternative methodology set out in the tailoring proposal for foreign firms (see pages 2 to 3 of our prior analysis on the tailoring proposal for foreign firms).

Part Two: IDI Rule ANPR

As noted above, the ANPR was issued by the FDIC alone and is separate from the Proposal issued jointly by the FDIC and the FRB to amend the 165(d) Rule. Below are preliminary key observations and a high-level summary of the ANPR.

I. Key Observations

- Although the FDIC acknowledges that certain companies rely on a single point of entry resolution strategy for their resolution plans under the 165(d) Rule, it notes that a separate CIDI resolution plan remains important because the single point of entry strategy is untested. This is consistent with statements made by the Agencies in the preamble to their joint final guidance on 165(d) plans for the U.S. GSIBs.[9]

- The FDIC discusses certain characteristics of CIDIs that can complicate their resolution. Those characteristics include **size**, **complexity** and **funding**.

  - In relation to size, the ANPR refers to the bridge bank resolution of IndyMac in 2008, a company of approximately $30 billion in assets at the time, as "a complicated resolution that caused significant losses for the [Deposit Insurance Fund] and posed considerable operational challenges." The ANPR also notes that the purchase and assumption resolution of Washington Mutual, a company with over $300 billion in assets at the time, was the only resolution of a company with greater than $50 billion in assets and that the same resolution method cannot be assumed to be available today. These examples suggest that the FDIC may be considering whether institutions with $50 billion or more in assets should be required to file CIDI resolution plans.

  - The FDIC mentions that indicators of complexity include cross-jurisdictional activity, the presence of foreign branches, reliance on affiliated legal entities, conduct of capital markets in multiple jurisdictions and participation in multiple payment, clearing and settlement systems.

  - Regarding funding, the ANPR states that reliance on uninsured deposits and market funding can make a resolution more challenging due to the increased run-ability of such funding sources.

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[9] 84 Fed. Reg. at 1442 ("While significant progress has been made, like any resolution strategy for large bank holding companies, SPOE is untested and there remain inherent challenges and uncertainties associated with the resolution of a systemically important financial institution under any specific resolution strategy. In light of this uncertainty, the final guidance provides that the firms should develop and maintain capabilities to address situations where their selected strategy presents vulnerabilities.").

II. Two Potential Approaches to Tailoring the IDI Rule

The FDIC requests comment on two potential approaches to tailoring the IDI Rule. Under each approach, CIDIs would be categorized into three groups as follows:

- Group A: Largest, most complex internationally active CIDIs.
- Group B: Larger, more complex regional CIDIs.
- Group C: Smaller, less complex regional CIDIs.

The FDIC does not indicate in the ANPR which companies it believes fall into which category, the metrics or thresholds that would apply to each category, or whether these categories would be similar to categories created by the various tailoring proposals to implement the Regulatory Relief Act.

The table below summarizes how the IDI Rule would be applied under each approach.

Approach 1	Approach 2
• **Group A:** Required to submit a resolution plan covering all content requirements (streamlined from the current rule, as discussed below). Submission would be biennial.[10] • **Group B:** Required to submit a streamlined resolution plan. Submission would be triennial. • **Group C:** No resolution plan required.	• **Larger CIDIs:** Group A and Group B subject to continuum of disclosure obligations for resolution plan submissions based upon size, complexity and other factors.[11] Submission would be biennial or triennial based on tailoring factors. • **Group C:** No resolution plan required.

III. Informational Content

- **Modification of required content.** The FDIC is considering modifying the IDI Rule's content requirements to eliminate the requirement that CIDIs develop their own strategies for resolution. Instead, the FDIC would develop the strategies and make the least-cost test determination using the information provided by the CIDI.

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[10] The FDIC is also considering a schedule in all cases in which the filing cycle would alternate between full resolution plan submissions and further streamlined submissions, consistent with the 165(d) Rule Proposal.

[11] Informational requirements that may be impacted based on tailoring factors include information on: major counterparties; off-balance-sheet exposures; pledged collateral; trading, derivatives and hedging activities; description of systemic functions; and description of cross-border elements.

(Under relevant statutory authority, the FDIC is required to conduct a resolution in the manner least costly to the Deposit Insurance Fund.)

- **Incorporation by reference.** The FDIC says it would consider encouraging the use of incorporation by reference to resolution plans under the 165(d) Rule where practicable, as well as incorporating content from prior IDI Rule submissions.

- **Waivers.** The FDIC is also considering expanding the practice of providing waivers for certain informational content for Group A and Group B CIDIs.

IV. Engagement and Capabilities Testing

As noted, the FDIC is considering modifying informational requirements so that resolution strategies would be developed by the FDIC. In this vein, the FDIC requests comment on modifying the IDI Rule to require CIDIs to engage with the FDIC to provide feedback on the development of the FDIC's resolution strategy. Areas of focus could include: operational continuity; disposition of the CIDI's franchise components; management information systems reporting capabilities; and liquidity needs and liquidity management practices. The format for the engagement could include: in-person meetings; requests for data and analysis; or other in-person or electronic outreach.

- **For Group A and Group B CIDIs**. The engagement would cover the general information requirements of their resolution plans.

- **For Group C CIDIs**. The outreach would be expected to cover a limited number of items, such as: information on the structure and core business lines; information about critical services; and management information systems.

All CIDIs would continue to be subject to periodic capabilities testing to verify the accuracy of the resolution plan information (as applicable) and the ability of the CIDI to promptly provide critical information if required. This testing would be tailored according to size, complexity and other factors based on the three groups. Areas of testing could include: liabilities data; operational continuity and bridge bank management (critical services; key personnel; subsidiaries and affiliates; key accounting processes; and key operational processes); and determination of franchise value.

The FDIC is also considering implementing supplemental resolution planning engagement if the FDIC determines that a CIDI is distressed. Trigger events for this type of engagement could relate to ratings, liquidity measures, market indicators, or other indicators. After a trigger event, the FDIC would be able to engage with the CIDI on resolution planning matters, regardless of where the CIDI is in its planning cycle.

This engagement would include the same activities and subject matters associated with a typical engagement. In a non-distressed situation, the FDIC would be focused on general preparedness to meet challenges that any type of failure or resolution of the CIDI would present. In a distressed case, the FDIC would be able to consider the particular circumstances of the case and whether those circumstances warrant developing a more specific pathway to resolution.

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Please do not hesitate to contact us with any questions.

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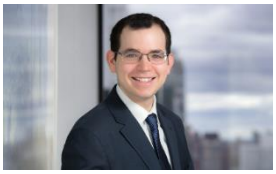

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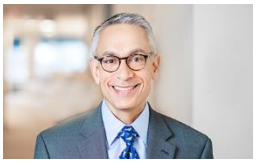

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Notice and Response Deadlines for Covered Companies and Agencies

Type	Required Deadline for Submission	Required Deadline for Agency Response
Covered Company Waiver Request and Other Procedures		
Request for waiver of informational content in full resolution plan	Where the covered company would like to omit certain information from its next full resolution plan submission, the covered company would need to apply for the waiver at least **15 months** prior to the filing date. Only one waiver request may be made for any full resolution plan submission.	Waivers would be automatically granted on the date that is **nine months** prior to the plan submission deadline if the Agencies do not jointly deny the waiver request prior to that date.
Notice of extraordinary events	A covered company must provide notice to the Agencies no later than **45 days** after any material merger, acquisition of assets, or similar transaction or fundamental change to the covered company's resolution strategy (unless the event occurs at least **90 days** before a company's next-required submission deadline, in which case the resolution plan would address the extraordinary event).	N/A
Resubmission of a resolution plan due to deficiencies	A covered company must resubmit within **90 days** of receiving a notice of deficiencies, unless the Agencies provide an extension or require an earlier submission.	N/A
Requests and Notices Regarding Critical Operations		
Request for waiver of requirement for process and methodology to identify critical operations	With respect to its next plan submission, the covered company would need to apply for the waiver at least **15 months** in advance of the filing date for that resolution plan. Available only to covered companies that do not currently have an identified critical operation.	Waivers would be automatically granted on the date that is **nine months** prior to the plan submission deadline if the Agencies do not jointly deny the waiver prior to that date.
Agency notice of critical operations identification	N/A	The covered company will be required to provide information related to the identified critical operation in its next resolution plan if the Agencies provide notice of the identification at least **180 days** prior to when the covered company's resolution plan is due.
Request for Agency reconsideration of critical operations identified by the Agencies	The covered company submits for reconsideration **at least 270 days** before the date on which it is required to submit its next resolution plan.	The Agencies will complete their reconsideration at least **180 days** before the date on which the covered company is required to submit its next resolution plan (with the option of a **90-day** extension). If additional information is required, then the Agencies will complete their reconsideration no later than **90 days** after receipt of all additional information.
	The covered company submits a request for reconsideration **less than 270 days** before the date on which it is required to submit its next resolution plan.	The Agencies may in their discretion defer reconsideration of the joint identification **until after the submission**, *i.e.*, the company must include the critical operation in the resolution plan.
Notice of de-identification of critical operation (as previously identified by the covered company but not jointly by the Agencies)	There is no deadline, but the covered company must notify the Agencies. The covered company is still required to include applicable information in any resolution plan the covered company is required to submit during the period ending **12 months** after the date on which company notifies the Agencies.	N/A

Type	Required Deadline for Submission	Required Deadline for Agency Response
Agency Notices and Requests		
Agency notice for moving a company's submission date	N/A	The Agencies must notify current filers at least **180 days** before their next submission deadline and must notify new filers at least **12 months** before their next submission deadline.
Agency notice of targeted areas of interest for the purpose of the targeted resolution plan	N/A	The Agencies will notify companies of their targeted areas of interest at least **12 months** prior to the applicable resolution plan submission date.
Agency request for a full resolution plan	N/A	The Agencies may jointly require that a covered company submit a full resolution plan within a **reasonable period of time**.
Agency request for interim updates	N/A	The Agencies may require a covered company to file an update to a resolution plan, within a **reasonable amount of time**, as jointly determined by the Agencies.