

# Agencies Finalize Changes to Resolution Planning Requirements

January 21, 2020

In October 2019, the Federal Reserve Board (“FRB”) and the Federal Deposit Insurance Corporation (the “FDIC” and, together with the FRB, the “Agencies”) adopted a joint final rule (the “Final Rule”) that revises the initial 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”).<sup>1</sup> The Final Rule follows a notice of proposed rulemaking that the Agencies released in April 2019 (the “Proposed Rule”) and was issued concurrently with final domestic and foreign tailoring rules.<sup>2</sup> The Final Rule amends 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”) and builds on the final domestic and foreign tailoring rules to create categories of covered companies that would be subject to different filing frequencies and resolution plan content requirements. The Final Rule is largely unchanged from the Proposed Rule, except in a few regards discussed below.

The Final Rule became effective on December 31, 2019.

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## Part One: 165(d) Final Rule

### I. Key Observations and Key Differences between the Proposed Rule and the Final Rule

The Final Rule retains many of the Proposed Rule’s key provisions, including:

- **Two- or three-year submission cycles.** The Final Rule moves 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

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<sup>1</sup> The FRB released the [Final Rule](#) on October 10, 2019, and the FDIC released it on October 15, 2019.

<sup>2</sup> See our previous update on the Proposed Rule [here](#). See our concurrent release “[New Prudential Framework for Domestic and Foreign Banking Organizations](#).”

deadlines for resolution plan submissions beyond the annual cycle required by regulation. U.S. global systemically important bank holding companies (“GSIBs”), however, are the only covered companies that, in practice, will be subject to a biennial submission cycle under the Final Rule, as of its effective date. All other covered companies will be subject to some form of triennial cycle, either alternating between full and targeted plans or submitting only a reduced plan.

- **“First-Wave FBOs” are triennial filers.** Consistent with the Proposed Rule, the Agencies placed the foreign banking organizations (“FBOs”) that have received detailed guidance from the Agencies—Barclays, Credit Suisse, Deutsche Bank and UBS (the “First-Wave FBOs”)—on a triennial filing cycle, as opposed to a biennial cycle. The Agencies noted that the preferred outcome for each of these FBOs is a successful home country single point of entry resolution strategy and that the U.S. footprints of these FBOs are significantly smaller than those of, and do not present the same complexities as, the U.S. GSIBs, thus justifying the more extended cycle.
- **Informational content of plans.** The Final Rule generally does not modify the informational requirements of the full resolution plan. The Agencies explained in the Proposed Rule that they have become familiar with the format and content of the information required under the original 165(d) Rule and recognize the utility of the informational requirements, which have facilitated resolvability improvements. The Final Rule adopts the concept of a targeted plan for alternating submission cycles, which generally requires 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).
- **Formal procedures.** The Final Rule establishes several new formal procedures for covered companies to follow in relation to their resolution plan submissions, such as to request waivers of certain informational 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.
- **Identifying critical operations.** The Final Rule makes 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. As noted below, however, certain details of these changes were revised in the Final Rule.
- **Tailoring factors.** The Final Rule 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 with between \$100 billion and \$250 billion in total consolidated assets.

- **Elimination of tailored resolution plan.** The Final Rule eliminates the tailored resolution plan, but the Agencies acknowledge that a covered company previously eligible to file a tailored resolution plan may apply for a waiver to limit the company's required resolution plan content in a manner similar to the previous tailored resolution plan, as discussed below, and that the targeted resolution plan requirements will also be effective substitutes. Moreover, many of the firms that were previously 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.
- **Material changes.** The Final Rule modifies the requirements for the executive summary to the resolution plan by requiring covered companies to include descriptions of material changes experienced by the covered company since its last filing, as discussed further below. Unlike the Proposed Rule, however, the Final Rule also requires that a firm affirmatively state in its resolution plan that no material change has occurred since its prior submission (if the resolution plan does not identify any material changes).

Key changes between the Proposed Rule and the Final Rule include:

- **Waiver requests and approvals.** Under the Final Rule, biennial filers (currently comprised of the U.S. GSIBs) cannot request waivers for informational requirements needed to be submitted as part of their resolution plans, though the Agencies may waive requirements for these filers on their own initiative. The Proposed Rule would have allowed any covered company to request such a waiver. The Final Rule also requires that the Agencies jointly approve waiver requests in order for the waivers to be granted, whereas the Proposed Rule would have considered the waivers granted if not jointly denied within a specific time frame. In addition, the Final Rule requires a waiver request to be submitted at least **18 months** prior to the plan filing date (as opposed to **15 months** under the Proposed Rule) and, if the Agencies do not jointly approve the request at least **12 months** prior to the filing date, then the waiver request is deemed denied.
- **Critical operations.** In a departure from the Proposed Rule, after July 1, 2022, the Final Rule also requires a triennial reduced filer (in addition to biennial and triennial full filers) that has an identified critical operation to establish and implement a process designed to identify its critical operations. The Final Rule also changes the Proposed Rule's notice procedures for requests to waive the requirement to have

such a process, in order to provide the covered company with at least 12 months' notice of the Agencies' decision and to require joint Agency approval, similar to the changes for informational waiver requests.

- **Agencies' review of resolution plans.** The Final Rule requires the Agencies to provide feedback on a resolution plan, including notification of any deficiencies or shortcomings, no later than **12 months** after the plan is submitted (or the date it was required to be submitted, if later), absent extenuating circumstances. The Proposed Rule did not require the Agencies to provide feedback within a specific time frame.
- **Advanced notice from the Agencies.** The Final Rule includes additional changes that will require the Agencies to give covered companies more advanced notice, typically at least **12 months**, of when the Agencies alter submission dates or take actions that would affect resolution plan content requirements. For example, under the Final Rule, the Agencies must provide at least 12 months' notice prior to requiring a full resolution submission or an off-cycle submission.

## II. Tailoring of Filing Frequency and Content

### Scope of Applicability

The Final Rule removes the resolution plan filing requirement for domestic firms and foreign firms with less than \$100 billion in total consolidated assets and imposes 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 Final Rule applies to domestic and foreign firms that fall under Categories I, II and III in the final tailoring rules, 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. The requirements for covered companies' initial resolution plans under the Final Rule will be determined based on their categorization under the final tailoring rules on October 1, 2020.

For firms that will be subject to it, the Final Rule applies 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 Final Rule applies 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 is coextensive with Categories I, II and III for domestic firms.

For FBOs, the Final Rule applies to three groups of firms. First, a triennial filing requirement, alternating between full and targeted plans, applies 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 is coextensive with Categories II and III for FBOs. Second, a triennial reduced plan filing requirement applies to foreign firms with smaller U.S. operations that have \$250 billion or more in global assets, which is a category that overlaps with but is not co-extensive with the final tailoring rule's Category IV.<sup>3</sup> The Agencies emphasize that, for these purposes, risk-based indicators and combined U.S. operations would be measured to include a foreign firm's U.S. branches, agencies and offices, as under the Proposed Rule, noting that "there are interconnections and dependencies between a foreign firm's U.S. branches, agencies, and offices and its U.S. subsidiaries, core business lines, and critical operations."

The Agencies note that, though experience has shown that an annual resolution plan submission is too challenging, they retain the ability under the Final Rule to obtain key information between resolution plan submissions.

### Filing Groups

The Final Rule divides covered companies into the three groups described below. All covered companies will have a July 1 submission date (some firms were previously required to make their submissions by December 31).

- **Biennial filers** are required to file once every two years, alternating between full and targeted resolution plans (discussed below). Biennial filers include entities subject to Category I in the final tailoring rules, which currently includes only U.S. GSIBs. In addition, nonbank financial companies designated by the Financial Stability Oversight Council ("FSOC") could be biennial filers.<sup>4</sup>
- **Triennial full filers** are required to file once every three years, alternating between full and targeted resolution plans (discussed below). Triennial full filers include entities within Categories II and III in the final tailoring rules and any FSOC-designated nonbank financial company identified as a triennial full filer.

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<sup>3</sup> Note that, although a foreign firm with fewer than \$250 billion in global assets may be subject to resolution planning requirements under the Final Rule by virtue of falling within Category II or Category III of the FBO tailoring rules, 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.

<sup>4</sup> These nonbank financial companies would automatically be deemed biennial filers, but the Agencies retain discretion to jointly designate them as triennial full filers and then later redesignate them as biennial filers, as they deem appropriate.

- **Triennial reduced filers** are required to file a reduced resolution plan once every three years, with new covered companies required to submit an initial full resolution plan if they did not already do so under the previous version of the rule.

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

**Overview of Filing Groups**

Group	Frequency of Filing	Covered Companies	Required Submissions	Next Submission Dates**
<b>Biennial filers*</b> <ul style="list-style-type: none"> <li>• Category I</li> <li>• Designated nonbank biennial filers</li> </ul>	Every two years, alternating between full and targeted resolution plans	<ul style="list-style-type: none"> <li>• U.S. GSIBs</li> <li>• Nonbank financial companies designated by FSOC</li> </ul> <p><b>Currently Included</b> Bank of America, Bank of New York Mellon, Citigroup, Goldman Sachs, JPMorgan Chase, Morgan Stanley, State Street, Wells Fargo</p>	Full Resolution Plan	July 1, 2023 July 1, 2027
			Targeted Resolution Plan	July 1, 2021 July 1, 2025
<b>Triennial full filers*</b> <ul style="list-style-type: none"> <li>• Category II or Category III</li> <li>• Designated nonbank triennial full filers</li> </ul>	Every three years, alternating between full and targeted resolution plans	<ul style="list-style-type: none"> <li>• All U.S. firms with over \$250 billion in total consolidated assets</li> <li>• 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</li> <li>• FBOs with \$250 billion or more in combined U.S. assets</li> <li>• 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</li> <li>• Nonbank financial companies designated by FSOC identified as triennial full filers based on facts and circumstances</li> </ul> <p><b>Currently Included</b> 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, U.S. Bancorp</p>	Full Resolution Plan	July 1, 2024
			Targeted Resolution Plan	July 1, 2021 July 1, 2027

Group	Frequency of Filing	Covered Companies	Required Submissions	Next Submission Dates**
<b>Triennial reduced filers*</b> <ul style="list-style-type: none"> <li>Covered companies that are <u>not</u> GSIBs, designated nonbank financial companies, or Category II or Category III</li> </ul>	Every three years, with new covered companies required to submit an initial full resolution plan if they did not already do so under the previous version of the rule	<ul style="list-style-type: none"> <li>Any FBO with at least \$250 billion in global consolidated assets but not within Category II or Category III</li> </ul> <p><b>Currently Included</b> 53 FBOs</p>	Reduced Resolution Plan	July 1, 2022 July 1, 2025

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

\*\* The First-Wave FBOs are expected to address the shortcomings identified in their previous resolution plan submissions and complete their project plans by July 1, 2020. In addition, six of the eight U.S. GSIBs must address shortcomings in their previous resolution plan submissions by March 31, 2020.

- **Transition period.** The Final Rule was published in the Federal Register on November 1, 2019 and went into effect on December 31, 2019.

### Movement of Filing Dates

The Final Rule provides 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 **12 months** (as opposed to 180 days under the Proposed Rule) prior to the new off-cycle 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. If the Agencies require an off-cycle submission from a covered company, the covered company's next resolution plan submission date after the off-cycle submission date would be determined based on the off-cycle submission date. The Final Rule also provides that the Agencies, upon giving **12 months'** notice, may require a covered company to submit a full resolution plan instead of a targeted or reduced plan, which would be submitted on the same date as the replaced targeted or reduced plan, although the Agencies do not expect to exercise this authority regularly. The requirement to submit a full resolution plan instead of a targeted or reduced plan would not alter the type of resolution plan the covered company will subsequently be required to submit.
- **Interim updates.** The Agencies are also 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. There is no fixed notice period for an interim update.

### Transitioning between Filing Groups and Other Notice Requirements

The Final Rule also establishes rules for companies entering into covered company status, transitioning between filing groups and exiting covered company status.

- **New covered companies.** The Final Rule modifies the timing of the initial submission for new covered companies. When a firm first becomes a covered company, its first submission is 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 are 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 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 less than **12 months** after the date as of which the covered company becomes a member of the new group, then the plan may be of the type required by either the new group or the prior group (at the filer's discretion); 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 Final Rule updates 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. 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 have discretion to jointly exclude a firm from covered company status at an earlier time.
- **Mergers.** Where a firm's assets grow due to a merger, acquisition or other transaction, the Agencies 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 Proposed Rule, 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 Final Rule, as well as the contents of the public section, are largely consistent with the requirements under the original 165(d) Rule. The Final Rule, however, modifies 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. Unlike the Proposed Rule, the Final Rule also requires that a firm affirmatively state in its resolution plan that no material change has occurred since its prior submission (if the resolution plan does not identify any material changes).

#### **Material Changes**

The Final Rule 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 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 is required to submit only reduced resolution plans. A reduced resolution plan focuses 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

Section Name	Full Resolution Plan	Targeted Resolution Plan	Reduced Resolution Plan
Public Section	<p>An executive summary of the resolution plan that describes the covered company’s business and includes (where material):</p> <ul style="list-style-type: none"> <li>• The names of material entities.</li> <li>• A description of core business lines.</li> <li>• Consolidated or segment financial information regarding assets, liabilities, capital and major funding sources.</li> <li>• A description of derivative activities and hedging activities.</li> <li>• A list of memberships in material payment, clearing and settlement systems.</li> <li>• A description of foreign operations.</li> </ul>		<p>An executive summary of the resolution plan that describes the covered company’s business and includes (where material):</p> <ul style="list-style-type: none"> <li>• The names of material entities.</li> <li>• A description of core business lines.</li> </ul>

Section Name	Full Resolution Plan	Targeted Resolution Plan	Reduced Resolution Plan
	<ul style="list-style-type: none"> <li>The identities of material supervisory authorities.</li> <li>The identities of the principal officers.</li> <li>A description of the corporate governance structure and processes related to resolution planning.</li> <li>A description of material management information systems.</li> <li>A high-level description of the company's resolution strategy.</li> </ul>		<ul style="list-style-type: none"> <li>The identities of the principal officers.</li> <li>A high-level description of the company's resolution strategy, referencing applicable resolution regimes for its material entities.</li> </ul>
<b>Confidential Section</b>	<p>An executive summary discussing:</p> <ul style="list-style-type: none"> <li>Key elements of the strategic plan for rapid and orderly resolution during material financial distress or failure of the company.</li> <li>Each material change since the last submitted resolution plan, or an affirmation that no material changes have occurred.</li> <li>Changes to the previous resolution plan due to legal or regulatory changes, guidance or feedback from the Agencies, or any material change.</li> <li>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.</li> </ul> <p>A description of:</p> <ul style="list-style-type: none"> <li>The covered company's strategic analysis describing the company's plan for rapid and orderly resolution.</li> <li>Corporate governance relating to resolution planning.</li> <li>Organizational structure and related information.</li> <li>Key management information systems and applications.</li> <li>Interconnections and interdependencies of the company and its material entities and its identified critical operations and core business lines.</li> <li>Supervisory and regulatory information.</li> </ul>	<p>A description of:</p> <ul style="list-style-type: none"> <li>Each material change since the last submitted resolution plan or an affirmation that no material changes have occurred.</li> <li>Changes to the previous resolution plan due to legal or regulatory changes, guidance or feedback from the Agencies, or any material change.</li> </ul> <p>"Core elements" (certain information regarding capital, liquidity and the company's plan for executing any contemplated recapitalization).</p> <ul style="list-style-type: none"> <li>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.</li> </ul> <p>Targeted information identified by the Agencies at least <b>12 months</b> before the plan's required submission date. See Notices Table.</p> <ul style="list-style-type: none"> <li><i>E.g.</i>, the potential effects of Brexit on a covered company's resolvability because of material changes to booking practices or organizational structure.</li> </ul>	<p>A description of:</p> <ul style="list-style-type: none"> <li>Each material change since the last submitted resolution plan or an affirmation that no material changes have occurred.</li> <li>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.</li> </ul>

- Extraordinary events.** The Final Rule replaces 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.** Each covered company is 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 affects 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 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, certain waiver procedures are available under the Final Rule for plan informational content, anticipating that certain aspects of a resolution plan may reach a steady state or become less material over time. The waivers supersede provisions in the 165(d) Rule that were similar and permitted the Agencies to grant exemptions for one or more informational requirements.

- **Agency waiver.** The Final Rule provides 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. The Agencies state in the Final Rule preamble that they will "endeavor" to provide notice of the waiver at least 12 months before the next resolution plan submission date.
- **Covered company waiver request.** The Final Rule also establishes a process for a triennial full or triennial reduced filer,<sup>5</sup> but not a biennial filer, 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 Final Rule, to waive an informational content requirement, the covered company is required to submit the waiver request at least **18 months** (as opposed to 15 months under the Proposed Rule) prior to the plan filing date. Covered companies are limited to one waiver request for each filing cycle, and the

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<sup>5</sup> The Agencies acknowledge that waiver requests will have limited applicability to triennial reduced filers because they do not apply to an initial full resolution plan or reduced resolution plans. However, a waiver request could be used by a triennial reduced filer if the Agencies were to require it to submit a full resolution plan with at least 18 months' prior notice.

Agencies may approve or deny a waiver request in whole or in part. The Agencies advise that failure to provide appropriate explanation or information requested by the Agencies in a timely manner could lead them to deny a waiver request.

- The Final Rule requires 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 must 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 Final Rule preamble 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** approve a covered company's waiver request at least **12 months** prior to the resolution plan filing date, the waiver would be automatically denied. The Agencies note that they will nonetheless "endeavor to respond to waiver requests in a timely manner" and state that they intend to make their decisions on waiver requests public.
- **Excluded information.** Certain requirements are not waivable, including:
  - Any "core element."
  - Information about the changes made to a resolution plan in response to a change in law or regulation, guidance or feedback from the Agencies, or information 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 Final Rule continues to allow, in a manner similar to the original 165(d) Rule, certain information in previously submitted resolution plans to be incorporated by reference. To incorporate information by reference, the covered company must 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 is automatically deemed to be incorporated by reference.

## V. Critical Operations

The Final Rule makes 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 changes stem from the recognition that, as both companies and markets continue to evolve, the critical operations identification process should be flexible. The Proposed Rule noted that original critical operations identifications the Agencies made in 2012 have remained largely unchanged. To address the need for flexibility, the Final Rule adopts 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 Final Rule, biennial and triennial full filers are 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. In a departure from the Proposed

Rule, after July 1, 2022, the Final Rule also requires a triennial reduced filer that has an identified critical operation to establish and implement a process designed to identify its critical operations.

- **Process timing.** The covered company is 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 must 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 must identify and assess (i) the markets and activities in which the covered company participates or has operations; (ii) the significance of those markets and activities with respect to the financial stability of the United States; and (iii) the significance of the covered company as a provider or other participant in those markets and activities.<sup>6</sup>
- **Frequency and documentation.** A covered company is required to engage in this review process at least as frequently as its resolution plan submission cycle. The review process must be documented in the covered company's corporate governance policies and procedures.
- **Limited transition.** A foreign-based covered company is exempt from the requirement to have a process and methodology to identify critical operations, in connection with any requirement to submit a resolution plan on or before July 1, 2021, if the foreign-based covered company does not have an identified critical operation as of the date that is **17 months** before the date by which the covered company is required to submit the resolution plan.
- **Waiver request.** A covered company that has previously submitted a resolution plan may apply for a waiver of the requirement to have a process and methodology to identify critical operations, if the covered company does not have an identified critical operation as of the date it submits the request. See Notices Table.
- The waiver request must be submitted at least **18 months** in advance of the filing date for the resolution plan. With respect to a resolution plan due on or before July 1, 2021, however, the Agencies are requiring waiver requests be submitted at least **17 months** before that submission date.

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<sup>6</sup> The Final Rule eliminates usage of the proposed term "economic function" as part of the methodology. However, the Agencies note that the types of operations that may be critical operations include, but are not limited to, the core banking functions of deposit taking; lending; payments, clearing and settlement; custody; wholesale funding; and capital markets and investment activities. They also state that relevant evaluative factors include substitutability, market concentration, interconnectedness and the impact of cessation.

- 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 must describe that the covered company is seeking to waive the requirement.
- The waiver is automatically denied **12 months** prior to the date the relevant resolution plan is due if the Agencies do not jointly approve the waiver prior to that date.
- An approved waiver request is effective for the resolution plan submission that immediately follows submission of the waiver request and for any resolution plan submitted thereafter until, but not including, the covered company's next full resolution plan submission. To continue the effectiveness of the waiver, the covered company must submit a new waiver request at least **18 months** before its next regularly scheduled full resolution plan.
- **De-identification of critical operations.** Covered companies are required to notify the Agencies if an operation ceases to be identified as a critical operation. The covered company must 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" must be submitted at least **12 months** prior to the covered company's next filing submission; otherwise, the covered company generally is required to continue treating the operation as a critical operation. A covered company's de-identification, however, does not rescind a joint identification made by the Agencies. See Notices Table.
- **Requests for reconsideration.** Covered companies may request that the Agencies reconsider critical operation identifications through submission of a written request. The request for reconsideration must be submitted at least **18 months** before the date on which the covered company is required to submit its next resolution plan, and the Agencies will complete their reconsideration at least **12 months** before the date on which the covered company is required to submit its next resolution plan. If the Agencies jointly find that additional information from the covered company is required to complete their reconsideration, then the Agencies will complete their reconsideration no later than the later of (i) **90 days** after receipt of all additional information and (ii) **12 months** before the date by which the covered company is required to submit its next resolution plan. If the request is submitted **less than 18 months** 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 Final Rule requires periodic review of critical operations identifications made by the Agencies. Specifically, the Agencies will 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 are 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 **12 months** 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. The Agencies state that to align with this notice period, they will endeavor to complete their first joint review under the Final Rule at least **12 months** prior to the 2021 resolution plan submission date.

## VI. Standard of Review—Deficiencies and Shortcomings

As noted in the Proposed Rule, 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.

Under the Final Rule, following their review of a resolution plan, the Agencies will jointly send a notification to each covered company that identifies any deficiencies or shortcomings in a covered company's resolution plan (or confirms that no deficiencies or shortcomings were identified) and provides any feedback on the resolution plan. The Agencies will jointly send the notification no later than **12 months** after the later of (1) the date on which the covered company submitted the resolution plan and (2) the date by which the covered company was required to submit the resolution plan, unless the Agencies jointly determine in their discretion that extenuating circumstances exist that require delay.

- **Definitions.** Under the Final Rule, the terms "deficiency" and "shortcoming" are defined as described below. The Final Rule essentially codifies the definitions of "deficiency" and "shortcoming" that the Agencies have, in practice, used under the original 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 resolution plan but does not rise to the level of a deficiency for both Agencies.
- **Non-credibility determination.** Consistent with the Agencies' administration of the original 165(d) Rule, if the Agencies jointly determine the resolution plan is not credible or would not facilitate an orderly resolution, they will 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 is required to submit a revised resolution plan to the Agencies that addresses the deficiencies. A covered company is 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 are 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.
- **Revised resolution plan.** A revised resolution plan to address a deficiency must discuss in detail (i) the revisions made by the covered company to address the deficiency; (ii) any changes to the covered company's business operations and corporate structure that the covered company proposes to undertake to facilitate implementation of the revised resolution plan (including an execution timeline); and (iii) why the covered company believes that the revised resolution plan is credible and would result in an orderly resolution.
- **Shortcomings.** The Final Rule does not, as a practical matter, change the remediation process with respect to shortcomings. As noted, the Final Rule effectively codifies current practices with respect to identifying and resolving both "deficiencies" and "shortcomings." A shortcoming does not require the resubmission of a resolution plan, but the Agencies are 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. The Agencies also may identify an aspect of a covered company's resolution plan as a deficiency even if such aspect was not identified as a shortcoming in an earlier resolution plan submission.

- **Divestiture.** The Final Rule does 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. Agency Guidance

Existing general resolution planning guidance, including its content and scope, is not modified by the Final Rule. Accordingly, guidance previously directed to certain resolution plan filers will continue to be directed to those specific individual firms. For example, the detailed general guidance issued to the First-Wave FBOs<sup>7</sup> continues to be directed only to those FBOs, and is not directed to all triennial full filers under the Final Rule. The Agencies stated that because general guidance sets forth nonbinding expectations as opposed to rule-based requirements, they did not believe that it was necessary or appropriate to incorporate all general guidance into the Final Rule.

The Agencies noted that public comment on the domestic guidance in 2018 allowed the Agencies to gain valuable insight, and that the Agencies intend to consolidate and request public comment in the near future on all aspects of the FBO guidance. The Agencies also intend to make any future general guidance concerning resolution planning available for public comment, and will aim to finalize any such general guidance at least **12 months** prior to the submission date for the first resolution plan submission to which it would apply. Nevertheless, the Agencies say they will continue to provide firm-specific feedback on resolution plans without first making it available for notice and comment.

## VIII. Certain Clarifications and Technical Changes

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

- **Resolution strategy and U.S. subsidiaries.** The Final Rule clarifies, 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.
- **Multitiered FBO holding companies.** The Proposed Rule noted that the top-tier holding company of certain FBOs may be a government, sovereign entity, or a family

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<sup>7</sup> See Guidance for 2018 § 165(d) Annual Resolution Plan Submissions By Foreign-based Covered Companies that Submitted Resolution Plans in July 2015, available [here](#).

trust. In these cases, the Agencies do not benefit from obtaining resolution plan information regarding such entities. The Final Rule adopts a formal process through which the Agencies identify a subsidiary in a multitiered FBO holding company structure that would be required to file the resolution plan.

- **Removal of the incompleteness concept and related review.** The Final Rule removes 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 Final Rule clarifies the expectations regarding the mapping of intragroup interconnections and interdependencies by FBOs. Specifically, FBOs are 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.

\* \* \*

Please do not hesitate to contact us with any questions.

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## Notice and Response Deadlines for Covered Companies and Agencies

Type	Required Deadline for Submission	Required Deadline for Agency Response
<b><i>Covered Company Waiver Request and Other Procedures</i></b>		
<b>Request for waiver of informational content in full resolution plan (only for triennial full and triennial reduced filers)</b>	Where the covered company would like to omit certain information from its next full resolution plan submission, the covered company must apply for the waiver at least <b>18 months</b> before the filing date. <sup>8</sup> Only one waiver request may be made for any full resolution plan submission.	Waivers would be automatically denied on the date that is <b>12 months</b> before the plan submission deadline if the Agencies do not jointly approve the waiver request before that date.
<b>Notice of extraordinary events</b>	A covered company must provide notice to the Agencies no later than <b>45 days</b> after any material merger, acquisition of assets, or similar transaction or fundamental change to the covered company's resolution strategy (unless the event occurs within <b>90 days</b> before a company's next-required submission deadline, in which case the resolution plan would address the extraordinary event).	N/A
<b>Resubmission of a resolution plan due to deficiencies</b>	A covered company must resubmit within <b>90 days</b> of receiving a notice of deficiencies, unless the Agencies provide an extension or require an earlier submission.	N/A
<b><i>Requests and Notices Regarding Critical Operations</i></b>		
<b>Request for waiver of requirement for process and methodology to identify critical operations</b>	With respect to its next plan submission, the covered company must apply for the waiver at least <b>18 months</b> 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 denied on the date that is <b>12 months</b> before the plan submission deadline if the Agencies do not jointly approve the waiver prior to that date.
<b>Agency notice of critical operations identification</b>	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 <b>12 months</b> before the covered company's resolution plan is due.

<sup>8</sup> A covered company with a resolution plan due on July 1, 2021 may request a waiver **17 months** before such date.

Type	Required Deadline for Submission	Required Deadline for Agency Response
Request for Agency reconsideration of critical operations identified by the Agencies	The covered company submits for reconsideration at least <b>18 months</b> before the date on which it is required to submit its next resolution plan.	The Agencies will complete their reconsideration at least <b>12 months</b> before the date on which the covered company is required to submit its next resolution plan. If additional information is required, then the Agencies will complete their reconsideration no later than the later of (i) <b>90 days</b> after receipt of all additional information and (ii) <b>12 months</b> before the resolution plan submission date.
	The covered company submits a request for reconsideration <b>less than 18 months</b> before the date on which it is required to submit its next resolution plan.	The Agencies may in their discretion defer reconsideration <b>until after the submission, i.e.,</b> the company must include the critical operation in the resolution plan. After such submission, the Agencies will complete their reconsideration as though the covered company had submitted the request after the date by which the covered company is required to submit that 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 <b>12 months</b> after the date on which company notifies the Agencies.	N/A
<b>Agency Notices and Requests</b>		
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 no less than <b>12 months</b> before the applicable resolution plan submission date.
Agency notice for moving a company's submission date	N/A	The Agencies must notify all filers, including new filers, at least <b>12 months</b> before their next submission deadline.
Agency request for a full resolution plan	N/A	The Agencies may jointly require that a covered company submit a full resolution plan with notice no less than <b>12 months</b> before the applicable resolution plan submission date.
Agency request for interim updates	N/A	The Agencies may jointly require a covered company to submit an update to a resolution plan, within a <b>reasonable amount of time</b> , as jointly determined by the Agencies.