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Living Wills: The Final Rule
A User Guide

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LIVING WILLS: THE FINAL RULE

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"The really hard work is just beginning."

— Director Thomas J. Curry, FDIC
September 13, 2011

With a final rule recently approved by the Federal Reserve Board of Governors ("FRB") and the Federal Deposit Insurance Corporation ("FDIC"), and a related interim rule applying to covered insured depository institutions, every covered company, U.S. and worldwide, should now begin its early-stage resolution plan process.

For a number of covered companies, this will involve submitting a resolution plan, or "living will," for the organization as a whole, as well as a separate resolution plan for its covered insured depository institution(s). For all covered companies, this process involves a significant amount of internal organization and coordination, including participation by the board of directors and highest levels of management.

Committed staff and a clear internal communications policy accordingly are essential to effective planning.

We have designed these materials with three principal objectives:

1. To provide a high-level summary of the fundamental and most pressing issues covered companies are now facing;

2. To suggest ways to streamline early-stage planning; and

3. To discuss the practical implications of resolution planning, including useful background analyses and related regulatory requirements.

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Resolution Planning

Recent approval by the FRB and the FDIC (collectively, the "Agencies") of a final rule required by section 165(d) of the Dodd-Frank Act[1] (the "DFA Rule") marks the official beginning of a new oversight paradigm for covered companies.

The DFA Plan

Certain large bank holding companies and nonbank financial companies supervised by the FRB (collectively, "Covered Companies") must now prepare resolution plans that detail how, when facing the risk of default, such companies could be sold, broken up, or wound down quickly and effectively in a way that mitigates serious adverse effects to U.S. financial stability (the "DFA Plan").

The IDI Plan

In a related development, the FDIC recently approved a separate interim final rule (the "IDI Rule," together with the DFA Rule, the "Rules")[2] regarding resolution planning affecting large banks and other insured depository institutions ("IDIs") with $50 billion or more in consolidated assets ("CIDIs").[3] The plan required by the IDI Rule (the "IDI Plan," together with the DFA Plan, the "Plans") will in most cases require covered bank holding companies to simultaneously file both Plans.[4]

The following Q&A addresses many of the questions concerning the applicability and nature of the Rules' requirements.

1. Which financial institutions must submit a Plan?

All Covered Companies must file a DFA Plan and may be required to file an IDI Plan. Covered Companies include (i) all bank holding companies (including foreign bank organizations that are, or are treated as, bank holding companies) with consolidated assets of $50 billion or more, as determined based on the average of the company's four most recent Consolidated Financial Statements for Bank Holding Companies as reported on the FRB's Form FR Y-9C; and (ii) all nonbank financial institutions (collectively, the "NBFIs") that the Financial Stability Oversight

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[1] 76 Fed. Reg. 67323 (November 1, 2011). The full text for the final rule is attached as Annex A. Section 165 can be found in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1426 (July 21, 2010). We refer to this statute hereinafter as "Dodd-Frank" or the "Act."

[2] The full text of this interim final rule is available at http://fdic.gov/news/board/Sept13no6.pdf.

[3] The $50 billion threshold reflects two modifications to the proposed IDI Rule. Under the proposal, a bank would have been covered if it had more than $10 billion in assets and if it was owned or controlled by a company with more than $100 billion in assets. The FDIC has identified 37 CIDIs. Unlike the DFA Rule, the FDIC is the sole agency responsible for the IDI Rule.

[4] The FDIC published the IDI Rule as an interim final rule because the proposed rule was published, and the comment period ended, before the enactment of the Act. *See* 75 Fed. Reg. 27464 (May 17, 2010). Comments on the IDI Rule are due within 60 days of publication in the Federal Register. The IDI Rule has an effective date of January 1, 2012.

Council ("FSOC") designates for supervision by the FRB.[5] A Covered Company is the top-tier holding company in a multi-tiered holding company structure.

There are currently 124 Covered Companies, the vast majority of which are foreign banking organizations ("FBOs").[6]

Covered Companies with insured depository institutions with $50 billion or more in total assets are required to file IDI Plans. IDI Plans are filed only with the FDIC, but can incorporate data from a DFA Plan filed by the parent company.

2. Which nonbank financial companies will be deemed systemically important and therefore required to submit a DFA Plan?

The FSOC has yet to designate any of the NBFIs as systemically important, but this group would probably include the largest insurance companies, asset managers, and hedge funds. According to a proposed rule issued by the FSOC on October 11, 2011 (the "NBFI NPR"), the primary quantitative thresholds for individual potential NBFIs include, among others, more than $50 billion in global total consolidated assets (or $50 billion in U.S. total consolidated assets for foreign nonbanks), $3.5 billion in derivative liabilities, and $20 billion in outstanding loans borrowed and bonds issued. The FSOC currently plans a three-stage process to identify the NBFIs that are systemically important. There has been at least one report that the FSOC will not designate any NBFIs until early to mid-2012, at the earliest.[7]

The FSOC seeks to identify a set of nonbank financial companies after a three-stage process, which will include (i) an analysis based on various quantitative thresholds (Stage 1); (ii) a robust analysis of the potential threat that each of the entities identified in Stage 1 could pose to U.S. financial stability (Stage 2); and (iii) a review of each entity identified in Stage 2, using information collected directly from each entity, as well as information used in Stages 1 and 2, to determine whether the entity could pose a threat to U.S. financial stability because of the entity's material financial distress or the nature, scope, size, scale, concentration, interconnectedness, or mix of the entity's activities (Stage 3).

The NBFI NPR will be subject to a 60-day public comment period, and will likely not become final for at least several months.

3. When are the initial Plans due?

The DFA Rule establishes three tiers of deadlines for the submission of the initial DFA Plan.

- ***Group 1 — July 1, 2012*** for Covered Companies that, as of the effective date of the DFA Rule, have $250 billion or more in total nonbank assets (or in the case of a

[5] The FSOC issued a notice of proposed rulemaking on October 11, 2011, setting forth qualitative thresholds that apply to nonbanking institutions as part of FSOC's designation of NBFIs under § 113 of the Act. The notice is available at: http://www.gpo.gov/fdsys/pkg/FR-2011-10-18/pdf/2011-26783.pdf.
[6] *See* Cady North, *Bloomberg Government Study: How Foreign Banks Are Regulated Under Dodd-Frank*, July 4, 2011, at 19 (noting that out of the 124 Covered Companies, an estimated 100 foreign banks will need to comply with section 165(d)).
[7] *See* http://www.reuters.com/article/2011/10/11/financial-regulation-sifi-idUSN1E79A1NA20111011.

Covered Company that is foreign-based, such company's total U.S. nonbank assets);

- ***Group 2 — July 1, 2013*** for Covered Companies that, as of the effective date of the DFA Rule, have $100 billion or more in total nonbank assets (or in the case of a Covered Company that is foreign-based, such company's total U.S. nonbank assets); and

- ***Group 3 — December 31, 2013*** for the remaining Covered Companies that do not belong to Group 1 or 2.

Upon the initiative of the Agencies or a written request by a Covered Company, the above deadlines may be extended. A company that becomes a Covered Company after the effective date of the DFA Rule (e.g., a NBFI or a bank holding company that grows over the $50 billion threshold) must submit its resolution plan by the next July 1 following the date the company becomes a Covered Company, provided such date is at least 270 days (or approximately nine months) after the date the company becomes a Covered Company. A table summarizing the group assignments is below.

The amount of nonbank assets may not be the sole criterion for the assignment of a specific Covered Company to a particular group. For example, simply on the basis of the quantitative thresholds for the three groupings, the Group 1 assignments do not appear to match up against the list of globally systemically important financial institutions released by the Financial Stability Board ("FSB") on November 4, 2011. Several FBOs and possibly at least one U.S. Covered Company that are on the FSB's list of globally systemically important financial institutions would not, on the basis of asset size, fall into Group 1. Moreover, a number of the Group 1 Covered Companies are not on the FSB list. The apparent divergences in filing deadlines that would arise in these circumstances should cause U.S. and foreign regulators to coordinate their procedures for resolution planning by large, global Covered Companies. In any event, a Covered Company that faces differing deadlines should be prepared to synchronize work on a DFA Plan with its work on resolution planning outside the U.S. On a related note, we understood earlier this year that the FRB would notify a small number of Group 2 Covered Companies that they would be assigned to Group 1; whether this in fact has happened has not been made public.

COVERED COMPANY	SIZE OF NONBANK ASSETS	REPORTING OBLIGATION	PLAN DEADLINE[8]
Nonbank financial institution supervised by the Federal Reserve Board	Group 1	Standard Resolution Plan	July 1, 201_[9]
	Group 2	Standard Resolution Plan	July 1, 201_
	Group 3	Standard or Tailored Resolution Plan	Dec. 31, 2013
Bank Holding Company ("BHC") with ≥ $50 billion in total assets	Group 1	Standard Resolution Plan	July 1, 2012
	Group 2	Standard Resolution Plan	July 1, 2013
	Group 3	Standard or Tailored Resolution Plan	Dec. 31, 2013
FBO with ≥ $50 billion in total assets	Group 1	Standard Resolution Plan[10]	July 1, 2012
	Group 2	Standard Resolution Plan	July 1, 2013
	Group 3	Standard or Tailored Resolution Plan	December 31, 2013

An FBO that is a Covered Company will determine its size and the appropriate filing deadline by computing the total U.S. nonbank assets of all of its intermediate holding companies. Non-U.S. assets and assets of a U.S. branch, agency, or IDI subsidiary are not included in this determination.

If a Covered Company is required to file an IDI Plan, the IDI Plan is due on the same day as the DFA Plan. For IDIs that must file an IDI Plan but that are not part of a Covered Company, the IDI Plan is due on December 31, 2013.

4. When must subsequent Plans be filed?

A Covered Company must submit a DFA Plan annually on or before the anniversary date of the date of submission of its initial plan. A Covered Company must also submit a notice identifying any event, occurrence, change in conditions or circumstances, or other change that results in, or could reasonably be foreseen to have, a material effect on the resolution plan of the Covered

[8] These deadlines also currently apply to CIDIs, subject to FDIC regulation 12 C.F.R. § 360.10.
[9] NBFIs that become Covered Companies after the effective date of the DFA Rule must submit their resolution plan by the next July 1 following the date the company becomes a Covered Company, provided such date is at least 270 days (or approximately nine months) after the date the company becomes a Covered Company.
[10] Note that, for FBOs, the information required in the Standard and Tailored Resolution Plans is data with respect to the subsidiaries, branches and agencies, and critical operations and core business lines, as applicable, that are domiciled in the United States or conducted in whole or material part in the United States. With respect to § __.4(g), the plan must also identify, describe in detail, and map to the legal entity the interconnections and interdependencies among the U.S. subsidiaries, branches and agencies, and critical operations and core business lines of the FBO and any foreign-based affiliate.

Company, no later than 45 days after the event. The Covered Company requires such notice to summarize why the event, occurrence, or change may require changes in the DFA Plan.

5. What is the scope of a Plan?

The central purpose of a DFA Plan is to explain how a Covered Company's "critical operations" may be maintained, continued, and funded in the event of the failure or material financial distress of the Covered Company or one of its material entities. The heart of the DFA Plan requires an analysis of a broad range of material events of financial distress or failure, and a strategic analysis of how a covered company could be resolved under the U.S. Bankruptcy Code, or other applicable insolvency regime, in a way that mitigates serious adverse effects to U.S. financial stability. A DFA Plan must explain how a Covered Company may be resolved in a "rapid and orderly fashion" if it defaults. "Rapid and orderly resolution" is "a reorganization or liquidation of the Covered Company . . . under the Bankruptcy Code that can be accomplished within a reasonable period of time and in a manner that substantially mitigates the risk that the failure of the Covered Company would have serious adverse effects on financial stability in the United States."[11] Therefore, a DFA Plan will require at least two strategic components: (1) a recovery plan/going concern/reorganization analysis and (2) a resolution/potential liquidation analysis.

The IDI Plan, by contrast, has a narrower focus. The FDIC expects an IDI Plan to explain how the FDIC as receiver would resolve the CIDI to achieve three goals: (1) providing depositors with access to their insured deposits within one business day of the IDI's failure (two business days if the failure occurs on a day other than Friday); (2) maximizing the net present value return from the sale or disposition of the IDI's assets; and (3) minimizing the amount of any loss to be realized by the IDI's creditors.

Minimum Requirements. Regardless of a Covered Company's size, all Plans will be required to meet the minimum requirements set forth in the Rules. These minimum requirements generally cover detail on a Covered Company's:

- Access to liquidity;
- Corporate governance structure, and related policies and procedures;
- Credit/derivative exposures (domestic and worldwide);
- Organizational structure and entity-specific functions;
- Core business lines;
- Detailed descriptions of material on- and off-balance sheet exposures;
- Core management and employees critical to the bankruptcy process;
- Interrelationships between corporate entities; and
- Management information systems.

The DFA Plan is required to contain a strategy that encompasses the next steps to be taken in the event of a failure of the Covered Company, but also in the event of a failure of the Covered Company's material entities, core business lines, or critical operations. The Plan should be based on assumptions about material distress or failure that may occur under baseline, adverse, and severely adverse economic conditions. The FRB is to provide the specific elements of these assumptions. For initial Plans, Covered Companies can assume that failure

[11] 76 Fed. Reg. at 22649.

would occur under a baseline economic scenario; if no baseline scenario is available from the FRB, then Covered Companies may develop reasonable substitutes.

The preamble to the DFA Rule defines a "material entity" to include a subsidiary that conducts core business lines or critical operations of the Covered Company. To the extent a material entity could be a debtor under the Bankruptcy Code, the applicable strategic analysis in a DFA Plan is driven by the Bankruptcy Code. For an indication of what the Agencies might expect in this regard, the IDI Rule cites to a FSB consultative document that recently resulted in a new international standard for resolution regimes (attached hereto at Annex B[12]), and recommends use of fact sheets that could easily be used by insolvency practitioners.[13]

If, however, a material entity is subject to an insolvency regime other than the Bankruptcy Code, the DFA Rule provides that a Covered Company may limit its strategic analysis of other applicable insolvency regimes. Specifically, if any such material entity is subject to an insolvency regime other than the Bankruptcy Code, a Covered Company may exclude that entity from its strategic analysis unless that entity either has $50 billion or more in total assets or conducts a critical operation. If either requirement is met, the relevant strategic analysis should be in reference to the corresponding alternative insolvency regime (e.g., foreign insolvency regimes, state insolvency regimes for insurance companies, or proceedings under the Securities Investor Protection Act for broker-dealers).

An operation is "critical" if its failure or discontinuance would pose a threat to the financial stability of the United States. The Agencies cite as one example the operation of a clearing, payment, or settlement system that plays a role in the financial markets and for which other firms lack the expertise or capacity to provide a ready substitute.

As a practical matter, the DFA Rule will require Covered Companies to identify all of their material entities, calculate their respective combined assets, and determine whether such entity conducts a "critical operation." Depending on the results, Covered Companies may have to employ special experts to devise those portions of the DFA Plan that deal specifically with non-Bankruptcy Code resolution strategies.

6. What are the specific elements of a Plan?

Generally, Plans must include:

1. **An executive summary**, which summarizes the key elements of a strategic plan. After the initial submission, the summary should address any material changes from the most recent filing, and any actions taken by a Covered Company to improve the effectiveness of the Plan or address any material weaknesses of the Plan.

2. **A strategic analysis**, which includes an analysis describing the Covered Company's plan for rapid and orderly resolution in the event of material financial distress or failure.

[12] Annex B contains the final standard. The consultative document referred to in the IDI Rule, Consultative Document: Effective Resolution of Systemically Important Financial Institutions, Annex 3 (July 19, 2011) may be found at http://www.financialstabilityboard.org/publications/r_110719.pdf.
[13] *See* Annex A.

The final rule does not specifically define or limit the "rapid and orderly" time period in recognition of a reasonable period for resolution that will depend on the size, complexity, and structure of the Covered Company. This analysis includes detailed descriptions of key assumptions, the range of specific actions a Covered Company could take, and a plan to utilize resources (e.g., funding, liquidity, and capital) in order to facilitate an orderly resolution of "material entities," "core business lines," and "critical operations."

3. **A description of the corporate governance structure for resolution planning**, which describes the integration of resolution planning into a Covered Company's corporate governance structure and identifies the senior management officials primarily responsible for overseeing compliance with the rule. Covered Companies may find it necessary to create a central planning function that reports to the chief risk officer or chief executive officer and makes periodic reports to the board of directors. A Covered Company should consider adopting procedures similar to those in place for Sarbanes-Oxley Act disclosures and compliance with internal controls.[14]

4. **A description of the overall organization structure**, a voluminous requirement which includes (a) a hierarchical list of all material entities, as well as jurisdictional and ownership information and a mapping of core business lines and critical operations; (b) an unconsolidated balance sheet and a consolidating schedule for all entities that are subject to consolidation; (c) information regarding material entities, critical operations and core business lines that, at a minimum, identifies types and amounts of liabilities; (d) practices relating to the booking of trading and derivatives activities; (e) identification of major counterparties, including interconnections and interdependencies; and (f) identification of material trading, payment, clearing, and settlement systems utilized by a Covered Company. Foreign operations would also have to be described in considerable detail.

5. **A description of management information systems**, which describes the management information systems ("MIS") that support a Covered Company and its material entities. This section would contain a detailed inventory and description of key MIS and applications, including identification of the legal owner or licensor, related service level agreements, and any associated intellectual property. This section would include a description of how appropriate regulators would access a Covered Company's MIS, and a mapping of key MIS to the material entities, critical operations, and core business lines of the Covered Company that use or rely on such systems and applications.

6. **A description of interconnections and interdependencies**, which identifies interconnections and interdependencies (a) among a Covered Company and its material entities and (b) among the Covered Company's critical operations and core business lines. This section also describes how a Covered Company would ensure continued availability and sustained service levels during material financial distress or insolvency.

[14] For more information on how a Covered Company can use existing Sarbanes-Oxley Act methodology for implementing the Living Wills requirement, *see* http://www.mofo.com/files/Uploads/Images/110614-Using-Existing-Sarbanes-Oxley-Methodology-to-Implement-Living-Wills-Requirement.pdf.

7. **An identification of supervisory authorities and regulators** that includes all U.S. and foreign agencies that supervise or regulate the Covered Company.

7. What is a "tailored plan" and which Covered Companies are eligible to file one?

The DFA Rule provides a "tailored" resolution plan option for qualifying Covered Companies. A tailored plan focuses on the nonbanking operations of each Covered Company. A tailored plan would include all of the elements identified above for a standard plan, but a Covered Company may limit the information required for the strategic analysis, corporate governance, organizational structure, management information systems, and supervisory and regulatory matters to the Covered Company itself and its nonbanking material entities and operations. A tailored plan must, however, discuss the full range of interconnections and interdependencies, including those involving any IDI subsidiaries of the Covered Company. Contact information for a senior management official of each IDI subsidiary must also be provided.

The tailored plan option is available only to Covered Companies that are BHCs that have less than $100 billion in total nonbank assets, and whose IDI assets comprise at least 85 percent of the total consolidated assets of the Covered Company. Foreign-based Covered Companies are eligible if the assets of any of their U.S. IDI operations, branches and agencies constitute 85% or more of the company's U.S. total consolidated assets. Of the 124 Covered Companies, 104 (all necessarily in the third tier of filing deadlines) would currently be eligible to file a tailored plan.[15]

The benefit of the tailored plan option in reducing the regulatory burden for any qualifying U.S.-based Covered Company may be modest. The IDIs of these Covered Companies will still be required to file IDI Plans, which will likely involve the same level of detail and information as a standard DFA Plan would have required. Many FBOs that are Covered Companies will benefit from the tailored plan option since an IDI Plan is required only if the FBO controls a bank or branch that receives federal deposit insurance.[16]

Of course, even if a Covered Company does not qualify for a tailored plan, the standard plan will reflect the complexity (or lack thereof) of the Covered Company.

8. How should the DFA Plan take account of foreign operations and requirements?

A Covered Company that is domiciled in the United States is required to provide information in its DFA Plan with regard to both its U.S. operations and its foreign operations. For a U.S.-based Covered Company with foreign operations, the DFA Plan should identify the extent of the risks

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[15] Under the DFA Rule, Covered Companies with less than $100 billion in total nonbank assets (or, total U.S. nonbank assets for foreign Covered Companies) that predominantly operate through one or more IDIs may file a tailored resolution plan. The tailored resolution plan must contain elements in § __.4(b); §§ __.4(c)-(f) and (h), but only with respect to the Covered Company and its nonbank material entities and operations, and in §§ __.4(g) and (i), with respect to the Covered Company, all of its IDIs, and any nonbank material entities and operations.

[16] Even this benefit may be evanescent for some. For foreign-based Covered Companies with branches or agencies licensed in New York, state banking law essentially provides for the ring-fencing of the branch or agency office if the foreign bank fails. Thus, even if such a Covered Company were required to provide a resolution strategy for its New York branches or agency offices, the plan would simply refer to applicable New York banking law.

to the U.S. operations of the Covered Company related to its foreign operations, and the Covered Company's strategy for addressing such risks. These elements of the DFA Plan should take into consideration the complications created by differing national laws, regulations, and policies, and should also include a mapping of core business lines and critical operations to legal entities operating in, or with assets, liabilities, operations, or service providers in, foreign jurisdictions.

Global Operations. Covered Companies with global operations must also be mindful of resolution planning efforts underway internationally, including targeted submission dates. On November 4, 2011, the FSB proposed several policy measures to address systemically important financial institutions, including an international standard on resolution regimes for financial institutions. Global systemically important financial institutions are expected to have final, approved plans in place by December 31, 2012. The underlying consultative document called for first drafts of recovery plans in December 2011, and first drafts of resolution plans in June 2012. In addition, the UK Financial Services Authority ("FSA") published a consultation paper in August 2011 addressing resolution plans, with a proposed initial submission deadline also of June 2012.[17]

Nearly all Covered Companies will need to assess the impact of the proposals in the FSB and FSA papers in light of the Rules. At a minimum, it is clear that the DFA Rule "supports and complements" the international efforts of the FSB. Nevertheless, although the proposals share the same underlying policies, there are differences that present the possibility of divergence in resolution policy, particularly in early stage planning. Actual or potential differences that Covered Companies need to consider include such issues as the universe of institutions covered, the scope of resolution plans, the nature of a "resolvability" assessment, "bail-in" power, the treatment of branch offices or subsidiaries of Covered Companies based elsewhere, and the treatment of custodial functions.

U.S. and foreign submission deadlines appear to vary for some Covered Companies and accordingly should cause U.S. and foreign authorities to synchronize their timing for review and approval of resolution planning. At a minimum, several Covered Companies should expect to engage in some internal synchronization of planning processes. Some U.S. Covered Companies that are in Group 1 for deadline purposes (described above on pp. 3-5) have not been deemed globally systemically important by the FSB and could have a longer period for resolution planning in foreign jurisdictions. Conversely, several FBOs and, apparently, at least one U.S. BHC have been designated by the FSB as systemically important on a global basis, yet do not (at least on a quantitative basis) belong to Group 1.

9. What are the planning considerations for FBOs?

The DFA Plan submitted by an FBO needs to address the Covered Company's U.S. entities and operations, an explanation of how resolution planning for its U.S. operations is integrated into the FBO's overall contingency planning process, and information regarding the interconnections and interdependencies among its U.S. operations and its foreign-based operations. In applying the DFA Rule requirements to an FBO, the Agencies will "give due regard to the principle of national treatment and equality of competitive opportunity" and take into account the regulatory standards for consolidated supervision by the home-country regulator.

[17] FSA, CP11/16, Recovery and Resolution Plans (Aug. 2011).

A possible mechanism to satisfy this "due regard" requirement is the Crisis Management Group ("CMG") that the FSB has discussed. Each Covered Company would have its own CMG, which would consist of representatives of all of the jurisdictions in which the Covered Company had operations and would be led by the home-country supervisor. Institution-specific cross-border agreements would be necessary.

10. What other regulatory requirements could affect preparation of a Plan?

Plans are dynamic documents. Their contents will influence and be influenced by actions taken to comply with other Dodd-Frank requirements. Plans cannot be drafted or implemented solely by reference to the Rules. Instead, Covered Companies will need to adopt a comprehensive approach, incorporating (or at least synchronizing with) related initiatives and requirements.

In developing a Plan, a Covered Company should keep in mind the following:

- ***Credit exposure reports.*** Intertwined with the DFA Plan requirements in the statute is a requirement for credit exposure reports. These reports would measure the credit exposure of a Covered Company to or from "significant" NBFIs and significant bank holding companies. Data in these reports will be used to test the feasibility of a DFA Plan. The reports were discussed in the proposed rule on resolution planning, but the Agencies have deferred final action until the FRB has issued rules on exposure limits, described immediately below.

- ***Counterparty credit exposure limits.*** The FRB will issue regulations to limit credit exposures to third parties. The regulations must include a ceiling on exposures to any one counterparty of 25 percent of total capital. The limits would not take effect until July 21, 2013, and the FRB may extend the deadline to July 21, 2015. Covered Companies should be aware as well of interagency guidance on counterparty credit risk management that the Agencies and Office of the Comptroller of the Currency issued on June 29, 2011.[18] This guidance covers all U.S. bank holding companies and banks (not just Covered Companies), but does not cover NBFIs. Ideally, this guidance should be read together with the proposed rule on credit exposure limits. The continuity of counterparty relationships is a key element of the DFA Plan, and limits on counterparty exposures will inform the resolution process in order to support such continuity.

- ***Stress testing.*** Nearly all Covered Companies have been engaged in stress testing for some time. Section 165(i) of the Act formally requires that the FRB conduct annual stress tests of all Covered Companies, and Covered Companies must conduct their own tests on a semiannual basis.[19] In June 2011, the FRB (together with Treasury, the FDIC, and the Office of the Comptroller of the Currency) proposed stress test guidance that would inform the section 165(i) rule.[20] In addition, the DFA Rule notes that the FDIC expects to provide Covered Companies with different sets of economic conditions under

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[18] *See* Interagency Counterparty Credit Risk Management Guidance, S&R Letter 11-10 (July 5, 2011).
[19] *See* 12 U.S.C. § 5365(i). The stress testing requirement extends to BHCs that are not subject to the resolution planning requirements, including those companies with more than $10 billion but fewer than $50 billion in consolidated assets.
[20] *See* 76 Fed. Reg. 35072 (June 15, 2011).

which stress test evaluations will be conducted: baseline, adverse, and severely adverse economic conditions. The nature and results of the stress tests are vital to the DFA Plan because the FRB may require revisions to a DFA Plan based on stress test results.

- ***Early remediation regime.*** Section 166 of the Act requires that the FRB (in consultation with the FSOC and FDIC) establish a series of specific remedial actions—e.g., more stringent prudential standards—as a Covered Company experiences increasing financial distress. (The model for this regime is the prompt corrective action framework for insured depository institutions.) Plans will have to take into account any new limitations that will have taken effect before a resolution strategy is implemented.

- ***Capital requirements.*** Several provisions in the Act address capital requirements for Covered Companies. In June 2011, the FRB, FDIC, and Office of the Comptroller of the Currency issued a final rule implementing a portion of the Collins Amendment (section 171 of the Act) to establish a capital floor for U.S. bank holding companies that have adopted Basel II.[21] The proposed section 165 rule should address enhanced capital standards for Covered Companies. Capital standards are an important starting point for assessing the impact of adverse events and whether they would trigger resolution.

- ***Capital plans.*** In a June 2011 release, technically separate from the Act, the FRB proposed an annual capital plan requirement for individual U.S. BHCs with consolidated assets of $50 billion or more.[22] The annual capital plan would be a companion piece to the DFA Plan, since it would explain how a company would maintain its financial condition under stressful conditions. The proposed rule builds on several programs undertaken by the FRB (and other agencies) in response to the financial crisis.

- ***The Orderly Liquidation Authority.*** This authority,[23] which will be exercised by the FDIC in specific cases, will play a role in the FDIC's review of a Plan.

11. How will the Agencies review and approve a Plan?

The Agencies will review Plans within 60 days and will first determine whether the Plans appear "informationally complete," in which case they will be accepted for further review. If the Plans are jointly determined to be "informationally incomplete," the Agencies would require that a Covered Company resubmit an informationally complete plan within 30 days.

After accepting Plans for further review, the Agencies will make a "credibility" determination. As part of this determination, the Agencies acknowledge there is no "one-size-fits-all" approach. The Agencies' evaluation will take into account variances among companies in their core business lines, critical operations, foreign operations, capital structure, risk, complexity, financial activities (including the financial activities of their subsidiaries), size, and other relevant factors. Likewise, the FDIC acknowledges that resolution plans of more complex Covered Companies

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[21] *See* 76 Fed. Reg. 37620 (June 28, 2011). Note that all of the U.S. bank holding companies that have adopted Basel II are also Covered Companies.
[22] *See* 76 Fed. Reg. 35351 (June 17, 2011).
[23] For more on the framework of the Orderly Liquidation Authority framework, see our client alerts, which are available at: http://www.mofo.com/files/Uploads/Images/110711-Dodd-Frank-Rulemaking-Update.pdf and http://www.mofo.com/files/Uploads/Images/100831TitleII.pdf.

will be more complicated and require information that may not be relevant for smaller, less complex Covered Companies.

If the Agencies jointly determine that a DFA Plan is not credible, a Covered Company must resubmit a revised plan within 90 days of receiving notice that its plan is deemed deficient, with the possibility for an extension of time. Failure to remedy deficiencies within the operable timeframes, however, could result in the imposition of a wide range of measures, including additional capital, leverage, or liquidity requirements, and forced divestiture of assets or operations as necessary to facilitate an orderly resolution under the Bankruptcy Code. Prior to issuing any notice of deficiency or the imposition of requirements or restrictions noted above that are likely to have a significant impact on a functionally regulated subsidiary or a Covered Company's insured depository institution, the FDIC is required to consult with each FSOC member that primarily supervises any such subsidiary, and may consult with any other federal, state, or foreign supervisor as the FDIC considers appropriate.

12. What is a "credible" plan?

The DFA Rule requires that each DFA Plan include a strategic analysis describing a resolution strategy not only for the Covered Company as a whole, but also in the event of a failure or discontinuation of a material entity, core business line, or critical operation.

The DFA Rule also provides that a DFA Plan must be "credible"—a term the FDIC has also employed in the IDI Rule. "Credible" is not defined in the Act or expressly in either Rule, but the preamble to the IDI Rule offers some insight.[24] The FDIC explains:

> A resolution plan is credible if its strategies for resolving the CIDI, and detailed information required by this section, are well-founded and based on information and data related to the CIDI that are observable or otherwise verifiable and employ reasonable projections from current and historical conditions within the broader financial markets.[25]

Notably (and unfortunately), the DFA Rule does not include a comparable provision. In any event, the assessment of credibility of a DFA Plan *should* differ from that of an IDI Plan, given their respective public policies, as described above.

Ultimately, the credibility of any plan is determined by the likelihood that the plan will achieve its intended result. For example, for the DFA Plan, the execution of a credible plan would in fact mitigate risk to counterparties and other financial market participants in the event that the Covered Company cannot continue to conduct its business, either because the failed Covered Company provided a critical service that is not easily replaced or because counterparties choose not to do business with the Covered Company (e.g., by terminating short-term funding contracts), out of concern that the Covered Company would be unable to perform. Thus, a credible plan would be one where the Agencies believe that the resolution strategies will find a substitute for any critical services provided by the Covered Company or remove the uncertainty

[24] Annex II to the FSB paper attached hereto as Annex B discusses "resolvability" and its two components—credibility and feasibility—at some length.
[25] To be codified at 12 C.F.R. § 360.10(b)(4). The IDI Rule specifically requests comment on this definition.

that could cause counterparties to halt or reduce their own financial activities. How the Agencies would arrive at this belief is unclear and, ultimately, a true judgment call.

Part of the decision depends on what the specific risks are—how many counterparties are involved, what lines of business might be most affected, etc.—and for this determination, the credit exposure reports[26] and stress test results will be important. Additionally, a Covered Company should be prepared to explain in detail how, via a bankruptcy proceeding, or other applicable insolvency regime, the right economic results will be achieved.[27] This demonstration will require specialized economic advice and counsel on how a reorganization or liquidation would work.

13. Will the Plans be confidential?

The Plans will be confidential, in part. Both Rules require the Plans to include a public section as well as a confidential section. On the one hand, the Agencies recognize that the Plans will include highly detailed, internal proprietary information, which will be protected both as trade and commercial secrets and as supervisory information under the Freedom of Information Act ("FOIA"), but on the other hand, the requirements in the public section come close to calling for sensitive information.

Parameters of the public section. Preparation of the public section could be problematic. These public sections include the executive summaries of the Plans, which describe the Covered Company or CIDI's business and include other information "to the extent material to an understanding" of the Covered Company or CIDI. The Rules enumerate eight categories of information that may or are likely to be material. These categories involve facts that in all likelihood would have been disclosed in call reports and reports required by the FRB, or in public materials required by the securities laws. In addition to these disclosures, the public sections of the Plans should include descriptions of the corporate governance structure and the processes related to resolution planning (e.g., who is in charge of planning and reporting relationships) and of material management information systems.

The public executive summary must also include, however, a "description, at a high level, of the . . . resolution strategy, covering such items as the range of potential purchasers of the [Covered Company or CIDI], its material entities and core business lines." In order for this description to be meaningful, it would have to identify which entities and material lines might be sold off—a highly sensitive subject even within the Covered Company or the CIDI. In the

[26] The DFA Rule indicates that the Agencies are not at this time finalizing the credit exposure reporting requirement. The Agencies will coordinate development of credit exposure reports in connection with the FRB's separate rulemaking on single counterparty credit exposure limits. In all likelihood, a rule on credit exposure reports will be finalized before the first DFA Plans are due. Even in the absence of a specific reporting requirement, a Covered Company preparing a DFA Plan will have to collect much of the same information that would otherwise have appeared in a credit exposure report. With respect to IDI Plans, the FDIC requires that, shortly after the initial submission of a plan, a CIDI demonstrate its capability to promptly produce information underlying the Plan—a data set likely to encompass information that would be contained in a credit exposure report.

[27] Federal Reserve Governor Tarullo recently suggested that a DFA Plan should include an economic efficiency analysis. See Gov. Tarullo, Industrial Organization and Systemic Risk: An Agenda for Further Research (Sept. 15, 2011), available at http://www.federalreserve.gov/newsevents/speech/tarullo20110915a1.pdf.

preamble to the IDI Rule, the FDIC explains that all details in the public section are or should be publicly available; however, it is not evident what part of a resolution strategy already is, or outside of the confidential resolution plan process should be, publicly available.

At the same time, the DFA Rule makes clear that while the information in the public section of a resolution plan should be sufficiently detailed to allow the public to understand a Covered Company's business, such information can be high level in nature and based on publicly available information. It may be cold comfort to Covered Companies and CIDIs that such strategy description need only be at a high level. In practice, these issues ought to be vetted with the Agencies as part of the process.

FOIA issues. As a general matter, the confidentiality of the Plans and related materials shall be determined in accordance with applicable exemptions under FOIA, the FDIC's Rules Regarding Availability of Information,[28] and the FDIC's Disclosure of Information Rules.[29] Covered Companies must request confidential treatment under the FOIA and the regulations of the Agencies and FSOC dealing with nonpublic information. The protection offered under all of these regimes is conditional. Plans should be entitled to the same protection as examination-related materials, and may also be affected by other provisions of the Act requiring public disclosure. Stress test results under section 165(i) must be made public; these results could allow for some reverse engineering into a Plan.

Disclosures required by the securities laws. Although not specifically addressed in the Rules, securities law disclosure requirements may come into play in the future. At an FDIC Board meeting held on July 6, 2011, the FDIC Board discussed whether a decision that a plan was not "credible" would require the institution involved to disclose that fact in a form 8-K. If the past is any indication, the FDIC Board will not attempt to resolve this issue and will leave each institution to interpret securities law requirements on its own.

*   *   *

[28] 12 C.F.R. part 261.
[29] 12 C.F.R. part 309.

CONCLUSION

How should a Covered Company begin thinking about early-stage resolution planning?

Development of the Plans will be a substantial undertaking. The DFA Rule estimates that, in preparing an initial Plan, a Covered Company will need to devote either 4,500 hours for tailored plans (roughly 3 full-time employees) or 9,200 hours for standard plans (5-6 full-time employees), plus (in either case) 1,000 hours for additional information requests. On top of the DFA Rule requirements, the initial IDI Plan would require 7,200 hours (at least 4 employees) and later updates would require between approximately 200 and 500 hours. The Agencies are required to provide these estimates, and they are notoriously low. Even so, all Covered Companies will need to assign both full-time and part-time staff to the preparation of Plans, and some Covered Companies will be looking at staffs with upwards of ten employees. Anecdotally, we know that some Covered Companies are devoting substantially more personnel to their resolution planning projects.

The resources demanded for the initial Plans suggest that all Covered Companies, even those facing the December 31, 2013 deadline, should begin their planning now, with the general understanding that the DFA Plan is designed to accomplish three objectives:

1. ***Management of external consequences.*** The DFA Plan will explain how the core functions of a Covered Company would continue and how its counterparties could continue their business if the Covered Company were to fail.[30] In this respect, the DFA Plan is concerned solely with the external consequences of failure and is not itself designed to prevent the failure of a Covered Company. (The Act contains several other provisions for this purpose.)

2. ***Critical information source.*** Given their required informational content, the Plans will be a new source of critical information for ongoing supervision by the Agencies. Indeed, on the basis of the DFA Plan and their understanding of the financial system, the Agencies can force changes in operations allowing a Covered Company to survive, including jettisoning certain business lines and forcing restructurings.

3. ***Roadmap.*** The FDIC has indicated that the DFA Plan will serve as a detailed roadmap for a rapid and orderly liquidation of a Covered Company under Title II of Dodd-Frank, a process which the FDIC has been developing since the enactment of the Act.

Coordination of a Covered Company's various compliance obligations is essential and should be arranged at the outset. Successful Plans will depend on three ongoing tasks that are time-consuming and resource-intensive:

1. ***Involving all stakeholders.*** The scope and detail of the Plans will require the participation of virtually all of senior management of a Covered Company from both material operating units and critical corporate and support functions. Ultimately, the board of directors must approve the plan, or in the case of a foreign banking organization, a board-appointed

[30] Enabling the regulators to understand how to manage counterparty relationships in the event of failure is one function of the credit exposure report, a requirement in the Act, which is closely related to the Plan.

delegee. One of the first tasks, then, is to create a robust framework for communications, responsibility, and accountability. Early action is important in order to provide sufficient time for review of the Plans by senior management and the board.

2. ***Explaining the business and collecting data.*** The development of recovery and resolution options and the presentation to the Agencies will require a comprehensive and granular understanding of the entire organization, including: material operating units, specific exposures to particular internal and external risks (including counterparty credit exposures and cross-guarantees), and critical functions that must be continued during resolution. Accordingly, Covered Companies should now begin to identify the specific types of information they will need from each business unit, and upgrade/redesign management information systems to cull relevant information quickly and efficiently.

3. ***Integrating the work with other Dodd-Frank requirements.*** The Plans are just one of a series of tools that Dodd-Frank created for the regulation of systemic risk. The substance of the Plans will overlap with several other requirements. Some obligations will come into play before the Plans are completed, such as stress tests and capital plans, and other requirements.

Because of the timeframe in which Plans must be submitted, including the parallel timeframes set forth by regulators in non-U.S. jurisdictions, each Covered Company should begin the first steps in the process now. At the most fundamental level, Covered Companies should assemble teams whose first tasks involve:

- Establishing clear lines of responsibility and ensuring that all stakeholders in the process are involved, including senior management of all material business units;

- Determining the types of information necessary for the Plan and the business units that will provide the data; and

- Coordinating with others at the institution responsible for compliance with other Dodd-Frank requirements.

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If you are following regulatory developments, you may be interested in FrankNDodd, Morrison & Foerster's online resource that tracks rulemaking pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act. FrankNDodd features a robust search function that allows users to quickly navigate to particular sections of the Act and to find links to related regulatory materials as well as relevant MoFo commentary. Email questions@frankndodd.com for your password. FrankNDodd is a registered trademark of Morrison & Foerster LLP.

Annex A

Federal Reserve Board and Federal Deposit Insurance Corporation Final Rule Requiring Resolution Plans

List of Subjects in 7 CFR Part 984

Marketing agreements, Nuts, Reporting and recordkeeping requirements, Walnuts.

For the reasons set forth in the preamble, 7 CFR part 984 is amended as follows:

PART 984—WALNUTS GROWN IN CALIFORNIA

■ 1. The authority citation for 7 CFR part 984 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 984.347 is revised to read as follows:

§ 984.347 Assessment rate.

On and after September 1, 2011, an assessment rate of $0.0175 per kernelweight pound is established for California merchantable walnuts.

Dated: October 26, 2011.

David R. Shipman,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 2011–28198 Filed 10–31–11; 8:45 am]

BILLING CODE 3410–02–P

FEDERAL RESERVE SYSTEM

12 CFR Part 243

[Regulation QQ; Docket No. R–1414]

RIN 7100–AD73

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 381

RIN 3064 AD 77

Resolution Plans Required

AGENCY: Board of Governors of the Federal Reserve System (Board) and Federal Deposit Insurance Corporation (Corporation).

ACTION: Final rule.

SUMMARY: The Board and the Corporation (together the ''Agencies'') are adopting this final rule to implement the requirement in a section of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the ''Dodd-Frank Act'') regarding resolution plans. The Dodd-Frank Act section requires each nonbank financial company designated by the Financial Stability Oversight Council (the ''Council'') for enhanced supervision by the Board and each bank holding company with assets of $50 billion or more to report periodically to the Board, the Corporation, and the Council the plan of such company for rapid and orderly resolution in the event of material financial distress or failure.

DATES: The rule is effective November 30, 2011.

FOR FURTHER INFORMATION CONTACT:

Board: Barbara J. Bouchard, Senior Associate Director, (202) 452–3072, Michael D. Solomon, Associate Director, (202) 452–3502, or Avery I. Belka, Counsel, (202) 736–5691, Division of Banking Regulation and Supervision; or Ann E. Misback, Associate General Counsel, (202) 452–3788, Dominic A. Labitzky, Senior Attorney, (202) 452–3428, or Bao Nguyen, Attorney, (202) 736–5599, Legal Division; Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551. Users of Telecommunication Device for Deaf (TDD) only, call (202) 263–4869.

Corporation: Joseph Fellerman, Senior Program Analyst, (202) 898–6591, Office of Complex Financial Institutions, Richard T. Aboussie, Associate General Counsel, (703) 562–2452, David N. Wall, Assistant General Counsel, (703) 562–2440, Mark A. Thompson, Counsel, (703) 562–2529, or Mark G. Flanigan, Counsel, (202) 898–7426, Legal Division.

SUPPLEMENTARY INFORMATION:

I. Background

To promote financial stability, section 165(d) of the Dodd-Frank Act requires each nonbank financial company supervised by the Board and each bank holding company with total consolidated assets of $50 billion or more (each a ''covered company'') to periodically submit to the Board, the Corporation, and the Council a plan for such company's rapid and orderly resolution in the event of material financial distress or failure. That section also requires each covered company to report on the nature and extent of credit exposures of such covered company to significant bank holding companies and significant nonbank financial companies and the nature and extent of credit exposures of significant bank holding companies and significant nonbank financial companies to such covered company.[1] This final rule implements the resolution plan requirement set forth in section 165(d)(1) of the Dodd-Frank Act.

Plans filed under section 165(d)(1) will assist covered companies and regulators in conducting advance resolution planning for a covered company. As demonstrated by the Corporation's experience in failed bank resolutions, as well as the Board's and the Corporation's experience in the recent crisis, advance planning improves the efficient resolution of a covered company. Advance planning has long been a component of resiliency and recovery planning by financial companies. The resolution plan required of covered companies under this final rule will support the Corporation's planning for the exercise of its resolution authority under the Dodd-Frank Act and the Federal Deposit Insurance Act (''FDI Act'') by providing the Corporation with an understanding of the covered companies' structure and complexity as well as their resolution strategies and processes. The resolution plan required of covered companies under this final rule will also assist the Board in its supervisory efforts to ensure that covered companies operate in a manner that is both safe and sound and that does not pose risks to financial stability generally. In addition, these plans will enhance the Agencies' understanding of the U.S. operations of foreign banks and improve efforts to develop a comprehensive and coordinated resolution strategy for a cross-border firm.

The final rule requires each covered company to produce a resolution plan, or ''living will,'' that includes information regarding the manner and extent to which any insured depository institution affiliated with the company is adequately protected from risks arising from the activities of nonbank subsidiaries of the company; detailed descriptions of the ownership structure, assets, liabilities, and contractual obligations of the company; identification of the cross-guarantees tied to different securities; identification of major counterparties; a process for determining to whom the collateral of the company is pledged; and other information that the Board and the Corporation jointly require by rule or order.[2] The final rule requires a strategic analysis by the covered company of how it can be resolved under Title 11 of the U.S. Code (the ''Bankruptcy Code'') in a way that would not pose systemic risk to the financial system. In doing so, the company must map its core business lines and critical operations to material legal entities and provide integrated analyses of its corporate structure; credit and other exposures; funding, capital, and cash flows; the domestic and foreign jurisdictions in which it operates; and its supporting information systems for core business lines and critical operations.

[1] *See generally* 12 U.S.C. 5365(d).

[2] *See* 12 U.S.C. 5365(d)(1).

II. Notice of Proposed Rulemaking: Summary of Comments

On April 22, 2011, the Board and the Corporation invited public comment on a Notice of Proposed Rulemaking: Resolution Plans and Credit Exposure Reports Required (the ''proposed rule'' or ''proposal'').[3] The comment period ended on June 10, 2011. The Board and the Corporation collectively received 22 comment letters from a range of individuals and banking organizations, as well as industry and trade groups representing banking, insurance, and the broader financial services industry. In addition, the Board and the Corporation met with industry representatives to discuss issues relating to the proposed rule.

While the commenters generally expressed support for the broader goals of the proposed rule to require covered companies to plan for their orderly liquidation or restructuring in bankruptcy during times of material financial distress, many commenters also expressed concerns about various aspects of the proposed rule. The comments the Board and the Corporation received fit into four broad categories: comments that focused on the resolution planning requirement, including the required informational content, of the proposed rule; comments that addressed the credit exposure reporting requirement; comments regarding the application of the proposed rule to foreign-banking organizations (''FBOs''); and comments concerned with the confidential treatment of information provided as part of a resolution plan or credit exposure report. These comments are summarized below.

i. Substantive Resolution Plan Requirements

With respect to the resolution plan requirement, some commenters suggested that the resolution plan requirement adopt a ''principle-based'' approach with the specific content of each plan developed through the iterative supervisory process, and that the Agencies' review of each plan be tied to the scope and planning decided on between individual firms and the Agencies as part of that process. In contrast, another commenter suggested that the plans be very specific and operationally oriented; further suggesting that such plans should include, among other things, practice exercises to test readiness and detailed descriptions of actions to be taken to facilitate rapid and orderly resolution. Similarly, another commenter suggested that the final rule should provide detailed guidance regarding the strategic analysis, facilitate the creation of a structured data source for requested data, and adopt a submission framework to be used in the creation and review of the resolution plan. Commenters also suggested that the final rule draw a clear distinction between the limited resolution plan required by the Dodd-Frank Act and the broader resolution planning process that may be required as a prudential matter.

A number of commenters argued that insurance companies and other entities that are not subject to the Bankruptcy Code should be exempted from the resolution plan requirement, be allowed to file streamlined plans, or, where such companies are a part of a covered company, be excluded from such covered company's resolution plan. Others questioned how a resolution plan should address such entities. One commenter suggested that managers of money market funds should be excluded from the requirements of the proposed rule. Some commenters specifically requested that (i) The final resolution plan requirement reflect and conform to section 203(e) of the Dodd-Frank Act, which provides that any insurance company that is a covered financial company or a subsidiary thereof will be liquidated or rehabilitated under applicable state law; and (ii) the Agencies accept as a credible resolution plan an insurance company's statement of its intent to submit itself, or its insurance subsidiaries, to applicable state liquidation or rehabilitation regimes.

One commenter suggested that the scope of the final rule should go beyond bankruptcy and should explicitly address questions of legal jurisdiction and conflicting laws. This commenter argued that a resolution plan should be supported by a legal opinion addressing which law would apply to each of the covered company's material entities in the case of the covered company's resolution. On the other hand, another commenter requested that the final rule provide only that the resolution plan analyze how the continuing operations of a covered company's insured depository institutions can be adequately protected in connection with the resolution of the company under the Bankruptcy Code. Still another commenter suggested that resolution under the Bankruptcy Code was inconsistent with the requirement that a covered company's resolution plan adequately protect the company's insured depository institution from the risks arising from the activities of the company's nonbanks because the covered company cannot provide any assurances of what will happen in a bankruptcy proceeding and cannot provide special protection for a particular subsidiary in the bankruptcy process.

A number of comments expressed concern about the timing of the initial submission of a resolution plan. Commenters argued that the requirement to submit initial plans 180 days from the effective date of the final rule is too short. Instead, these commenters suggested that covered companies should have at least 270 days, 360 days, or 18 months after the effective date of the final rule to make their initial submissions. Commenters suggested that submissions of the resolution plan be phased in or staggered to allow firms sufficient time to prepare and collect the extensive information required as part of the plan. Another commenter suggested a pilot program that would apply first to the largest, most complex firms, rolling out the entire process on a staggered basis after experience is gained with the largest firms.

Commenters also criticized the proposed rule for not adjusting the complexity of the reporting requirements to match the differences among bank holding companies subject to the proposed rule. These commenters noted that covered banking organizations range from large, complex, highly interconnected organizations that have substantial nonbank and foreign operations to smaller, less complex organizations that are predominantly composed of one or more insured depository institutions, have few foreign operations, and fewer interconnections with other financial institutions. These commenters suggested that the final rule provide for a tailored resolution plan regime for smaller, less complex domestic bank holding companies.

Several commenters suggested that, given the lack of supervisory and market experience with resolution planning, the final rule should communicate the Board's and the Corporation's expectations for ''first generation'' resolution plans and should provide for meaningful feedback by the Agencies within the 60 day period the Agencies have to review an initial resolution plan. Commenters also noted that annual updates to the plan should not be due at the end of the first calendar quarter when firms have to meet other important reporting requirements. Commenters suggested that the timing of the annual update should be determined by agreement among the

[3] 76 FR 22,648 (April 22, 2011).

Board, the Corporation, and the covered company.

The proposed rule required interim updates to a resolution plan shortly after any material acquisition or similar event. One commenter argued that the requirement was not supported by the Dodd-Frank Act and should be excluded from the final rule. Other commenters suggested that, if the final rule required interim updates, such updates should be triggered by a ''fundamental change'' standard instead of the material change standard described in the proposed rule. Some commenters suggested that the size of events that trigger the update requirement be raised and the time period for filing the update be extended.

The proposal required that, within a reasonable amount of time after submitting its initial resolution plan, a firm demonstrate its capacity to promptly produce the data underlying the key aspects of its resolution plan. Commenters objected to this requirement indicating that it would be better addressed as part of the Board's and Corporation's ongoing review of the resolution-planning process conducted by individual firms, rather than as a regulatory requirement. Similarly, commenters suggested that any requirement related to data production capabilities be omitted from the final rule because such a requirement is better addressed as part of the Agencies' ongoing review of resolution planning by specific companies. Commenters also recommended that data required to be collected through various Dodd-Frank Act initiatives be coordinated to minimize redundant data collections. Other commenters recommended that covered companies' information technology systems be able to integrate and distribute essential structural and operational information on short notice to facilitate such companies' resolutions.

Some commenters objected to the requirement that multiple stress scenarios be addressed as part of the plan as burdensome and unworkable. The commenters suggested that the number of financial distress scenarios to be addressed in a covered company's resolution plan should be limited, with the specific number of scenarios to be agreed to between the covered company and the Agencies prior to the initial submission. Commenters also expressed concern about having to address a systemic stress scenario, which commenters considered more appropriately related to the Orderly Liquidation Authority in Title II of the Dodd-Frank Act.

Some commenters criticized the corporate governance requirement of the proposed rule. These commenters suggested that a covered company's corporate governance with regard to resolution planning, unless determined to be substantially defective in one or more respects, should be deemed to facilitate orderly resolution, as well as to be informationally complete and credible. Another commenter suggested that the corporate governance requirement should include requirements for consistently maintaining accurate asset valuations.

Commenters also noted the burdens nonbank financial companies will face. Where such firms have established an intermediate holding company (''IHC''), commenters asked that the resolution plan requirement apply only to the IHC. These commenters also suggested that nonbank financial firms be permitted to complete any restructuring involved in the establishment of their IHC before commencing resolution planning. Commenters also asserted that the requirement to provide an unconsolidated balance sheet and consolidating schedules was unduly burdensome, costly, and impracticable.

A number of commenters expressed concern about how the Board and the Corporation will determine whether a plan is not credible or deficient and the possible ramifications of such a determination. Some commenters requested clarification of the standards relevant to such a determination, and others suggested that these standards should be developed over time. Several commenters sought clarification of whether a covered company's board of directors (or its delegee in the case of a foreign-based covered company) is required to certify or confirm all the factual information contained in the company's resolution plan. One commenter asked whether an interim update involves the submission of an entire resolution plan or merely involves additional information describing the event triggering the update, any effects the event has on the plan, and the firm's actions to address such effects.

The Board and the Corporation were also asked to clarify the relationship that insolvency regimes other than bankruptcy bear on the preparation and assessment of a resolution plan. Commenters also asked the Agencies to confirm that the rule is not intended to restrain the covered companies from expanding through mergers, acquisitions, or diversification of their business; that the resolution plan is not meant to impose on firms the need to have duplicative capacity; and that the Agencies will take into account the companies' own cost-benefit analysis in connection with whether financial and human resources should be devoted to providing duplicative capacity.

Additionally, commenters noted that some key terms were not defined in the proposed rule. Several commenters suggested that the Agencies should develop the meaning of key terms in the final rule over time and through the supervisory process by issuing guidance, supervisory letters, or revised regulations. Other commenters specifically recommended definitions for certain key terms, including ''credible plan,'' ''rapid and orderly resolution,'' and ''material financial distress.'' Several commenters requested clarification of the term ''extraordinary support,'' and suggested that Federal Reserve Bank advances, Federal Home Loan Bank advances, and the use of the Deposit Insurance Fund not be considered extraordinary support under the regulation.

ii. Substantive Credit Exposure Report Requirements

Several commenters suggested that the provisions requiring credit exposure reports be postponed or re-proposed as part of the Board's forthcoming proposal to implement the single counterparty credit exposure limits established under section 165(e) of the Dodd-Frank Act. Other commenters suggested that the credit exposure reporting requirement be phased-in over a period of time. Commenters raised a variety of questions about the definitions proposed as part of the credit exposure report and about the timing, scope, and detail required by the proposal.

Some commenters noted that most of the information contained in the credit exposure report requirement is currently reported by insurance companies to state insurance commissioners on an annual basis, and suggested that the Board and the Corporation rely on these annual reports instead of requiring a separate credit exposure report from insurance companies.

One commenter indicated that the final rule should require covered companies to be able to report on their supply of liquidity to other firms and their dependence on other firms for liquidity, to estimate and report on the likely effect of their sales on the prices of major classes of assets, and to produce these reports within 24 hours notice, whether as part of the credit exposure report or separately.

iii. Foreign Banking Organizations

With respect to foreign based covered companies, some commenters suggested that the applicability of the resolution plan requirement be determined by

reference to U.S. assets of the foreign firm and not with respect to the consolidated worldwide assets of the foreign firm. Alternatively, these commenters suggested that a foreign banking organization (''FBO'') with less than $50 billion in U.S. total consolidated assets be subject to reduced or streamlined reporting, and that the rule should be tailored to take account of the risk posed by an FBO to U.S. financial stability by focusing on the FBO's U.S. structure and complexity, the size of its U.S. operations, and the extent of its interconnectedness in U.S. financial markets. Commenters requested that the submission deadline be extended for FBOs to allow more time for these organizations to complete a resolution plan.

Commenters suggested that the resolution plan requirement be aligned with other ongoing cross-border initiatives so as to avoid overlapping or inconsistent requirements for internationally active firms. Commenters also advocated for international cooperation in developing information-sharing arrangements, including coordination with or reliance on home-country resolution plans. One comment specifically asked for clarification concerning information sharing with foreign regulators and recommended consultation with a firm's appropriate home-country authority prior to making a credibility determination regarding the resolution plan or imposing sanctions pursuant to the rule. A commenter suggested that, for those firms with an established crisis management group, the resolution plans developed through that process be allowed to satisfy the section 165(d) resolution plan requirement.

Commenters asked the Agencies to clarify that any restrictions or requirements imposed pursuant to the rule would apply only to an FBO's U.S. activities, assets, and operations. In a banking organization with multiple covered companies, commenters sought clarification on whether the organization could submit one resolution plan or whether each covered company within such an organization had to submit a separate individualized resolution plan.

iv. Confidentiality

A frequent comment related to the confidentiality of resolution plans and credit exposure reports. Commenters argued that the information required to be included in resolution plans represented sensitive, confidential business information not otherwise available to the public, and the disclosure of which would significantly harm the competitiveness of reporting firms. Commenters expressed concern that the proposed rule did not provide a sufficient level of assurance that resolution plans and credit exposure reports submitted would be kept confidential, particularly in light of the disclosure requirements of the Freedom of Information Act (''FOIA'').[4] The commenters suggested the proposed rule acknowledge the applicability of certain FOIA exemptions. In particular, commenters expressed the view that information submitted in connection with the resolution plan and credit exposure report requirements should be treated as confidential supervisory information. Moreover, commenters suggested that the Board and the Corporation put in place procedures (either as part of the final rule or in guidance) to minimize the risk of leaks or inadvertent disclosures when information contained in the resolution plan and credit exposure report was shared among the covered company's regulators, including home-country supervisors.

The Board and the Corporation have carefully considered the comments and made appropriate revisions to the final rule as described below.

III. Description of Final Rule

The final rule applies to any bank holding company that has $50 billion or more in total consolidated assets, as determined based on the average of the company's four most recent Consolidated Financial Statements for Bank Holding Companies as reported on the Board's Form FR Y–9C. It also applies to any foreign bank or company that is, or is treated as, a bank holding company under section 8(a) of the International Banking Act of 1978[5] and that has $50 billion or more in total consolidated assets, as determined based on the average of the foreign bank's or company's four most recent quarterly Capital and Asset Reports for Foreign Banking Organizations as reported on the Board's Form FR Y–7Q (or, if applicable, its most recent annual Form Y–7Q). A bank holding company that becomes a ''covered company'' remains a ''covered company'' unless and until it has less than $45 billion in total consolidated assets, as determined based on the most recent annual or, as applicable, the average of the four most recent quarterly reports made to the Board. A covered company that has reduced its total consolidated assets to below $45 billion, as described above, would again become a covered company if it has total consolidated assets of $50 billion or more at a later date, as determined based on the relevant reports. A firm may fall in or out of the definition of a ''covered company'' because of fluctuations in its asset size. This situation necessarily disrupts the continuity of resolution planning and increases regulatory uncertainty and burden for many covered companies. The $45 billion threshold was added to facilitate continuity in resolution planning for covered companies and thereby reduce regulatory uncertainty and its associated cost. In a multi-tiered bank holding company structure, covered company means the top-tier legal entity of the multi-tiered holding company only.

In determining applicability of the final rule to foreign banks, the final rule considers a firm's world-wide consolidated assets, rather than only its U.S. assets. However, as described in more detail below, covered companies (including foreign banks) with relatively small nonbanking operations in the U.S. are permitted to file tailored reports with reduced information requirements. Given the foregoing, the resolution plan of a foreign-based company that has limited assets or operations in the United States would be significantly limited in its scope and complexity. Moreover, the nature and extent of the home country's related crisis management and resolution planning requirements for the foreign-based company also will be considered as part of the Agencies' resolution plan review process.[6]

In addition, the final rule applies to any nonbank financial company that the Council has determined under section 113 of the Dodd-Frank Act[7] must be supervised by the Board and for which such determination is in effect.

Under the proposal, a firm would also have been required to submit a quarterly report on its credit exposure to other ''significant'' bank holding companies and financial firms, as well as their credit exposure to the firm. As noted above, commenters expressed significant concerns about the clarity of key definitions and the scope of the bi-directional and intraday reporting

[4] 5 U.S.C. 552(b).

[5] 12 U.S.C. 3106(a).

[6] The Dodd-Frank Act requires that, in applying the requirements of section 165(d) to any foreign nonbank financial company supervised by the Board or any foreign-based company, the Board give due regard to the principle of national treatment and equality of competitive opportunity, and take into account the extent to which the foreign-based financial company is subject on a consolidated basis to home country standards that are comparable to those applied to financial companies in the United States. 12 U.S.C. 5365(b)(2).

[7] 12 U.S.C. 5323.

requirement of the proposal and suggested that the credit exposure report requirement be considered in conjunction with the proposal to implement the Dodd-Frank Act's single counterparty credit exposure limit.

The Board and the Corporation believe that robust reporting of a covered company's credit exposures to other significant bank holding companies and financial companies is critical to ongoing risk management by covered companies, as well as to the Board's ongoing supervision of covered companies and the Corporation's responsibility to resolve covered companies, as appropriate. However, the Agencies also recognize that these reports would be most useful and complete if developed in conjunction with the Dodd-Frank Act's single counterparty credit exposure limits. Accordingly, the Board and Corporation are not at this time finalizing the credit exposure reporting requirement and will coordinate development of these reports with the single counterparty credit exposure limits.

Section-by-Section Analysis

Definitions. Section ____.2 of the final rule defines certain terms, including "rapid and orderly resolution," "material financial distress," "core business lines," "critical operations," and "material entities," which are key definitions in the final rule.

"Rapid and orderly resolution" means a reorganization or liquidation of the covered company (or, in the case of a covered company that is incorporated or organized in a jurisdiction other than the United States, the subsidiaries and operations of such foreign company that are domiciled in the United States) under the Bankruptcy Code that can be accomplished within a reasonable period of time and in a manner that substantially mitigates the risk that the failure of the covered company would have serious adverse effects on financial stability in the United States.[8] Under the final rule, each resolution plan submitted should provide for the rapid and orderly resolution of the covered company. The final rule does not specifically define or limit this time period in recognition that a reasonable period for resolution will depend on the size, complexity, and structure of the firm.

"Material financial distress" with regard to a covered company means that: (i) The covered company has incurred, or is likely to incur, losses that will deplete all or substantially all of its capital, and there is no reasonable prospect for the company to avoid such depletion; (ii) the assets of the covered company are, or are likely to be, less than its obligations to creditors and others; or (iii) the covered company is, or is likely to be, unable to pay its obligations (other than those subject to a bona fide dispute) in the normal course of business. Under the final rule, each resolution plan should provide for the rapid and orderly resolution of the covered company in the event of material financial distress or failure of the covered company.

"Core business lines" means those business lines, including associated operations, services, functions and support that, in the firm's view, upon failure would result in a material loss of revenue, profit, or franchise value. The resolution plan should address how the resolution of the covered company will affect the core business lines.

"Critical operations" are those operations, including associated services, functions and support the failure or discontinuance of which, in the view of the covered company or as jointly directed by the Board and the Corporation, would pose a threat to the financial stability of the United States. This definition is revised from the proposal to provide greater clarity as to which of a firm's operations would be deemed a "critical operation." Initially defined as operations that, upon failure or discontinuance, "would likely result in a disruption to the U.S. economy or financial markets," the Board and the Corporation revised this definition to more closely reflect the purpose of section 165 of the Dodd-Frank Act, *i.e.,* "to prevent or mitigate risks to the financial stability of the United States."[9] The revised definition clarifies that the threshold of significance for a disruption to U.S. financial stability resulting from the failure or discontinuance of a critical operation must be severe enough to pose a threat to the financial stability of the United States. For example, a critical operation of a covered company would include an operation, such as a clearing, payment, or settlement system, which plays a role in the financial markets for which other firms lack the expertise or capacity to provide a ready substitute. The resolution plan should address and provide for the continuation and funding of critical operations.

"Material entity" means a subsidiary or foreign office of the covered company that is significant to the activities of a critical operation or core business line.

Informational content of a resolution plan. Section ____.4 of the final rule sets forth the general informational content requirements of a resolution plan. A covered company that is domiciled in the United States is required to provide information with regard to both its U.S. operations and its foreign operations. A foreign-based covered company is required to provide information regarding its U.S. operations, an explanation of how resolution planning for its U.S. operations is integrated into the foreign-based covered company's overall contingency planning process, and information regarding the interconnections and interdependencies among its U.S. operations and its foreign-based operations.

Under the final rule, a resolution plan is required to contain an executive summary, a strategic analysis of the plan's components, a description of the covered company's corporate governance structure for resolution planning, information regarding the covered company's overall organizational structure, information regarding the covered company's management information systems, a description of interconnections and interdependencies among the covered company and its material entities, and supervisory and regulatory information.

The executive summary must summarize the key elements of the covered company's strategic plan, material changes from the most recently filed plan, and any actions taken by the covered company to improve the effectiveness of the resolution plan or remediate, or otherwise mitigate, any material weaknesses or impediments to the effective and timely execution of the plan.

Under the final rule, each resolution plan submitted must also describe the firm's strategy for the rapid and orderly resolution of the covered company in the event of material financial distress or failure of the covered company. This strategic analysis should detail how, in practice, the covered company could be resolved under the Bankruptcy Code. The strategic analysis should also include the analytical support for the plan and its key assumptions, including any assumptions made concerning the economic or financial conditions that would be present at the time the covered company sought to implement such plan.

The Board and Corporation recognize the burden associated with developing an initial resolution plan as well as establishing the processes, procedures, and systems necessary to annually, or as otherwise appropriate, update a resolution plan. While an organization's

[8] If a covered company is subject to an insolvency regime other than the Bankruptcy Code, the analysis should be in reference to that regime.

[9] *See* 12 U.S.C. 5365(a)(1).

initial resolution plan must include all informational elements required under this final rule, the Board and Corporation (as noted above) expect the process of submission and review of the initial resolution plan iterations to include an ongoing dialogue with firms. In developing their initial resolution plans, covered companies should therefore focus on the key elements of a resolution plan, including identifying critical and core operations, developing a robust strategic analysis, and identifying and describing the interconnections and interdependencies among material entities. To the extent practicable, covered companies should—with respect to the initial resolution plan—try to leverage off of and incorporate information already reported to the Board or Corporation or already publicly-disclosed, *e.g.,* in securities or other similar filings.

The final rule specifies the minimum content of a resolution plan. The Board and the Corporation recognize that plans will vary by company and, in their evaluation of plans, will take into account variances among companies in their core business lines, critical operations, foreign operations, capital structure, risk, complexity, financial activities (including the financial activities of their subsidiaries), size, and other relevant factors. The resolution plans of more complex covered companies will be more complex and require information that may not be relevant for smaller, less complex covered companies. For example, a less complex covered company that does not engage in a material number or value amount of trades will not be required to address that component of the resolution plan, while a more complex covered company may require an extensive discussion of systems in which it conducts trading operations and how those systems map to material entities, critical operations and core business lines. To the extent an informational element is not applicable or the covered company does not engage in the activity relevant to such informational element to a material extent, then a covered company should indicate such in its resolution plan and is not required to provide other information with regard to that informational element.

Several commenters requested clarification of a provision in the proposal that required that the firm's resolution plan not rely on the provision of extraordinary support of the United States or any other government to the covered company or its subsidiaries to prevent the failure of the covered company. The provision is intended to prohibit the covered company from assuming in its resolution plan that the United States or any other government will provide the covered company funding or capital other than in the ordinary course of business.

A resolution plan must be sensitive to the economic conditions at the time the plan is triggered. To assist in establishing the assumptions for the economic conditions triggering a resolution plan, the Agencies propose referencing conditions developed pursuant to Section 165(i)(1) of the Dodd-Frank Act.[10] Under that section, the Board, in coordination with the appropriate primary financial regulatory agencies and the Federal Insurance Office, will conduct annual stress tests of covered companies. As part of that exercise, the Board expects to provide covered companies with different sets of economic conditions under which the evaluation will be conducted: Baseline, adverse, and severely adverse economic conditions. For its initial resolution plan, a covered company may assume that failure would occur under the baseline economic scenario, or, if a baseline scenario is not then available, a reasonable substitute developed by the covered company. Subsequent iterations of a covered company's resolution plan should assume that the failure of the covered company will occur under the same economic conditions consistent with the Board's final rule implementing Section 165(i)(1).

The strategic analysis should include detailed information as to how, in the event of material financial distress or failure of the covered company, a reorganization or liquidation of the covered company (or, in the case of a covered company that is incorporated or organized in a jurisdiction other than the United States, the subsidiaries and operations of such foreign company that are domiciled in the United States) under the Bankruptcy Code could be accomplished within a reasonable period of time and in a manner that substantially mitigates the risk that the failure of the covered company would have serious adverse effects on financial stability in the United States. The strategic analysis of the covered company's resolution plan must also identify the range of options and specific actions to be taken by the covered company to facilitate a rapid and orderly resolution of the covered company, its material entities, critical operations, and core business lines in the event of its material financial distress or failure.

[10] 12 U.S.C. 5365(i).

Funding, liquidity, support functions, and other resources, including capital resources, should be identified and mapped to the covered company's material entities, critical operations, and core business lines. The covered company's strategy for maintaining and funding the material entities, critical operations, and core business lines in an environment of material financial distress and in the implementation and execution of its resolution plan should be provided and mapped to its material entities. The covered company's strategic analysis should demonstrate how such resources would be utilized to facilitate an orderly resolution in an environment of material financial distress. The covered company should also provide its strategy in the event of a failure or discontinuation of a material entity, critical operation, or core business line and the actions that will be taken by the covered company to prevent or mitigate any adverse effects of such failure or discontinuation on the financial stability of the company and the United States.

The final rule designates a subsidiary that conducts core business lines or critical operations of the covered company as a "material entity." When the covered company utilizes a material entity and that material entity is subject to the Bankruptcy Code, then a resolution plan should assume the failure or discontinuation of such material entity and provide both the covered company's and the material entity's strategy, and the actions that will be taken by the covered company to prevent or mitigate any adverse effects of such failure or discontinuation on the financial stability of the United States.

A number of commenters asked how this discussion of strategy was to be applied when a major subsidiary was not subject to the Bankruptcy Code, but rather to another specialized insolvency regime, such as the FDI Act, state liquidation regimes for state-licensed uninsured branches and agencies of foreign banks, the International Banking Act of 1978 for federally licensed branches and agencies, foreign insolvency regimes, state insolvency regimes for insurance companies, or the Securities Investor Protection Act applicable to broker-dealers. Recognizing many of the challenges that may be posed by such a requirement if a material entity is subject to an insolvency regime other than the Bankruptcy Code, the final rule provides that a covered company may limit its strategic analysis with respect to a material entity that is subject to an insolvency regime other than the

Bankruptcy Code to a material entity that either has $50 billion or more in total assets or conducts a critical operation. Any such analysis should be in reference to that applicable regime. Thus, for example, if a covered company owns a national bank with $50 billion or more in total consolidated assets, the resolution plan of the covered company should assume the resolution of the bank under the FDI Act and the actions that will be taken by the covered company to prevent or mitigate any adverse effects of such failure or discontinuation on the financial stability of the United States.

Under a separate rulemaking, the Corporation is requiring insured depository institutions with total assets of $50 billion or more to develop their own strategies to facilitate a resolution under the FDI Act.[11] The Corporation's rulemaking is intended to complement the final rule and, together with the final rule, provide for comprehensive and coordinated resolution planning for both the insured depository institution and its parent holding company and affiliates in the event that an orderly liquidation is required.

The resolution plan must also describe the covered company's strategy for ensuring that its insured depository institution subsidiary will be adequately protected from risks arising from the activities of any nonbank subsidiaries of the covered company (other than those that are subsidiaries of an insured depository institution). This requirement is a specific statutory requirement and is applicable only to insured depository institutions and is not applicable to other types of regulated subsidiaries.[12]

Under the final rule, the description of the covered company's corporate governance structure for resolution planning should include information regarding how resolution planning is integrated into the corporate governance structure and processes of the covered company. It must also identify the senior management official who is primarily responsible for overseeing the development, maintenance, implementation, and filing of the resolution plan and for the covered company's compliance with the final rule. The requirements in the final rule are minimums and the corporate governance structure is expected to vary based upon the size and complexity of the covered company. For the largest and most complex companies, it may be necessary to establish a central planning function that is headed by a senior management official. Such official could report to the Chief Risk Officer or Chief Executive Officer and periodically report on resolution planning to the covered company's board of directors.

The information regarding the covered company's overall organizational structure and related information should include a hierarchical list of all material entities, with jurisdictional and ownership information. This information should be mapped to core business lines and critical operations. The proposal would have required each covered company to provide its unconsolidated balance sheet and a consolidating schedule for all entities that are subject to consolidation by the covered company. However, in response to commenters' concerns, the Board and Corporation revised the final rule to require only an unconsolidated balance sheet for the covered company, together with a consolidating schedule for all material entities that are subject to consolidation. Amounts attributed to entities that are not material entities may be aggregated on the consolidating schedule.

Under the final rule, the resolution plan should include information regarding material assets, liabilities, derivatives, hedges, capital and funding sources, and major counterparties. Material assets and liabilities should be mapped to material entities along with location information. An analysis of whether the bankruptcy of a major counterparty would likely have an adverse effect on and result in the material financial distress or failure of the covered company should also be included. Trading, payment, clearing, and settlement systems utilized by the covered company should be identified. The covered company would not need to identify trading, payment, clearing, and settlement systems that are immaterial in resolution planning, such as a local check clearing house.

For a U.S.-based covered company with foreign operations, the plan should identify the extent of the risks to the U.S. operations of the firm related to its foreign operations and the covered company's strategy for addressing such risks. These elements of the resolution plan should take into consideration the complications created by differing national laws, regulations, and policies. This analysis should include a mapping of core business lines and critical operations to legal entities operating in or with assets, liabilities, operations, or service providers in foreign jurisdictions. The continued ability to maintain core business lines and critical operations in these foreign jurisdictions during material financial distress and insolvency proceedings should be evaluated and steps identified to address weaknesses or vulnerabilities.

The final rule requires the covered company to provide information regarding the management information systems supporting its core business lines and critical operations, including information regarding the legal ownership of such systems as well as associated software, licenses, or other associated intellectual property. The analysis and practical steps that are identified by the covered company should address the continued availability of the key management information systems that support core business lines and critical operations both within the United States and in foreign jurisdictions.

The final rule requires the resolution plan to include a description of the capabilities of the covered company's management information systems to collect, maintain, and report, in a timely manner to management of the covered company and to the Board, the information and other data underlying the resolution plan. Moreover, the resolution plan must also identify the deficiencies, gaps, or weaknesses in those capabilities of the covered company's management information systems and describe the actions the covered company plans to undertake, including the associated timelines for implementation, to promptly address such deficiencies, gaps, or weaknesses. The Board will use its examination authority to review the demonstrated capabilities of each covered company to satisfy these requirements, and will share with the Corporation information regarding the capabilities of the covered company to collect, maintain, and report in a timely manner information and data underlying the resolution plan.

The final rule also requires the covered company to provide a description of the interconnections and interdependencies among the covered company and its material entities and affiliates, and among the critical operations and core business lines of the covered company that, if disrupted, would materially affect the funding or operations of the covered company, its material entities, its critical operations, or core business lines. As noted above, the continued availability of key services and supporting business operations to core business lines and critical operations in an environment of

[11] *See* Special Reporting, Analysis and Contingent Resolution Plans at Certain Large Insured Depository Institutions, 75 FR 27,464 (May 17, 2010) (to be codified at 12 CFR part 360). On September 13, 2011, the Corporation approved an interim final rule to implement this requirement. The Corporation's rule is available at: *http://fdic.gov/news/news/press/2011/pr11150.html.*

[12] 12 U.S.C. 5365(d)(1)(A).

material financial distress and after insolvency should be a focus of resolution planning. Steps to ensure that service level agreements for such services, whether provided by internal or external service providers, survive insolvency should be demonstrated in the resolution plan.

The plan should identify the covered company's supervisory authorities and regulators, including information identifying any foreign agency or authority with significant supervisory authority over material foreign-based subsidiaries or operations.

Section 165(d) applies to a number of companies that operate predominately through one or more insured depository institutions. As discussed above, several commenters argued that the rule should make allowances for the significant differences in complexity and structure among the various bank holding companies subject to the rule. Commenters recommended that the Board and Corporation modify the final rule to provide for a tailored resolution plan regime for smaller, less complex bank holding companies and foreign banking organizations.

In response to these comments, the Board and Corporation have tailored the resolution plan requirement applicable to smaller, less complex bank holding companies and foreign banking organizations in order to focus the content and analysis of such an organization's resolution plan on the nonbanking operations of the organization, and the interconnections between the nonbanking operations and the insured depository institution operations of the covered company.

For covered companies with less than $100 billion in total nonbank assets that predominately operate through one or more insured depository institutions, *i.e.,* the company's insured depository institution subsidiaries comprise at least 85 percent of its total consolidated assets (or, in the case of a foreign-based covered company, the assets of the U.S. depository institution operations, branches, and agencies of which comprise 85 percent or more of the company's U.S. total consolidated assets), the Board and Corporation have tailored the resolution plan requirements to focus on the nonbank operations of the covered company. Specifically, a firm meeting the above criteria, and not otherwise excluded or directed by the Board and Corporation to submit a standard resolution plan, shall in its resolution plan identify and describe interconnections and interdependencies pursuant to § [—].4(g) and provide the contact information required under § [—].4(i) with respect to the entire organization. Such resolution plan must also include the remaining resolution plan elements, *i.e.,* the strategic analysis, organizational structure, description of management information systems, and the other content specified in § [—].4(c) through § [—].4(f) and § [—].4(h), only with respect to the covered company's nonbanking operations. Importantly, with respect to the information concerning interconnections and interdependencies, the resolution plan must describe in detail, and map to legal entity the interconnections and interdependencies among the nonbanking operations as well as between the nonbanking operations and the insured depository institution operations of the covered company.

Covered companies with more than $100 billion in nonbank assets are not eligible to submit the type of plan described above, regardless of whether their operations satisfy the 85 percent criterion described above. Under the final rule, the Board and Corporation may determine that a firm that would otherwise meet the prerequisites for submitting a tailored plan must nonetheless submit the full resolution plan.

Resolution plans required. Section ____.3 of the proposed rule required each covered company to submit a resolution plan within 180 days of the effective date of the final rule, or within 180 days of such later date as the company becomes a covered company. Several commenters suggested that, given the limited resources of the Board and the Corporation to review resolution plans and the industry's desire for additional time to prepare resolution plans, the timing for submission of plans should be staggered.

Under the final rule, firms will be required to file resolution plans in three groups with a staggered schedule. The first group comprises the largest, most complex covered companies, *i.e.,* any covered company that has $250 billion or more in total nonbank assets (or, in the case of a foreign-based covered company, $250 billion or more in total U.S. nonbank assets). Covered companies in this first group must submit their initial resolution plans no later than July 1, 2012.

Firms in the second group of covered companies must submit their initial resolution plans no later than July 1, 2013. This second group consists of covered companies with $100 billion or more in nonbank assets (or, in the case of a foreign-based covered company, $100 billion or more in total U.S. nonbank assets).

The third and final group consists of the remaining covered companies, *i.e.,* covered companies with less than $100 billion in nonbank assets (or, in the case of a foreign-based covered company, in total U.S. nonbank assets). Covered companies in this third group are required to file their initial resolution plans on or before December 31, 2013. The above phase-in schedule generally applies to any company that is a covered company as of the effective date.

A company that becomes a covered company after the effective date of this final rule, *e.g.,* a company the Council has designated for supervision by the Board or a bank holding company that grows, organically or by merger or acquisition, over the $50 billion threshold, must submit its resolution plan by the next July 1 following the date the company becomes a covered company, provided such date is at least 270 days after the date the company becomes a covered company. The final rule permits the Board and Corporation to jointly determine that a covered company must submit its initial resolution plan earlier or later than provided for in the final rule.

The Agencies have also revised the requirements for updating the resolution plan. After the initial resolution plan is submitted, each covered company is required to submit an updated resolution plan annually on or before the anniversary date of the date for submission of its initial plan.

This annual filing provides a regular opportunity for firms to update their resolution plans to reflect structural changes, acquisitions, and sales. Moreover, the Agencies expect that firms will integrate resolution planning into their business operations. Accordingly, the final rule no longer requires that a resolution plan be updated automatically upon the occurrence of a restructuring, acquisition, or sale. Instead, the final rule requires that a firm update its next annual resolution plan after the occurrence of a material event, such as a restructuring, acquisition, or sale. The final rule also requires the firm to file a simple notice with the Board and the Corporation that such an event has occurred. That notice must be provided within a time period specified by the Board and the Corporation, but no later than 45 days after any event, occurrence, change in conditions or circumstances or other change that results in, or could reasonably be foreseen to have, a material effect on the resolution plan of the covered company. The final rule requires such notice to summarize why the event, occurrence,

or change may require changes to the resolution plan.

The Board and the Corporation jointly may waive a requirement that a covered company file a notice following a material event. The Board and the Corporation jointly may also require an update for any other reason, more frequent submissions or updates, and may extend the time period that a covered company has to submit its resolution plan or notice following a material event.

Like the proposal, the final rule requires that a covered company provide the Board and the Corporation information and access to its personnel necessary for the Board and Corporation to assess the resolution plan during the period for reviewing the resolution plan as provided for under the final rule. The Board and the Corporation must rely to the fullest extent possible on examinations conducted by or on behalf of the appropriate Federal banking agency for the relevant company.

The involvement of a firm's board of directors is critical to adequate resolution planning. Under both the proposed and final rules, the board of directors of the covered company is required to approve the initial resolution plans and each annual resolution plan. In the case of a foreign-based covered company, a delegee of the board of the directors of such organization may approve the initial resolution plan and any updates to a resolution plan. For a U.S. domiciled company, the board of directors must approve the resolution plan in accordance with the procedures applicable to other documents of strategic importance. The rule does not require the board of directors to make an attestation regarding the resolution plan.

Review of resolution plans; resubmission of deficient resolutions plans. Several commenters requested changes in the process and procedures for reviewing resolution plans set forth in the proposed rule. The Board and the Corporation will work closely with covered companies and, as applicable, other authorities, in the development of a firm's resolution plan and are dedicating staff for that purpose. The Board and the Corporation expect the review process to evolve as covered companies gain more experience in preparing their resolution plans. The Board and the Corporation recognize that resolution plans will vary by company and, in their evaluation of plans, will take into account variances among companies in their core business lines, critical operations, domestic and foreign operations, capital structure, risk, complexity, financial activities (including the financial activities of their subsidiaries), size, and other relevant factors. Because each resolution plan is expected to be unique, the Board and the Corporation encourage covered companies to ask questions and, if so desired, to arrange a meeting with the Board and the Corporation. There is no expectation by the Board and the Corporation that the initial resolution plan iterations submitted after this rule takes effect will be found to be deficient, but rather the initial resolution plans will provide the foundation for developing more robust annual resolution plans over the next few years following that initial period.

Section ____ .5 of the final rule sets forth procedures regarding the review of resolution plans. When a covered company submits a resolution plan, the Board and Corporation will preliminarily review a resolution plan for informational completeness within 60 days. If the Board and the Corporation determine that a resolution plan is informationally incomplete or that substantial additional information is necessary to facilitate further review, the Board and the Corporation will inform the covered company in writing of the area(s) in which the resolution plan is informationally incomplete or with respect to which additional information is required. The covered company will be required to resubmit an informationally complete resolution plan, or such additional information as jointly requested to facilitate review of the resolution plan, no later than 30 days after receiving such notice or such other time period as the Board and Corporation may jointly determine.

The Board and Corporation will review each resolution plan for its compliance with the requirements of the final rule. If, following such review, the Board and the Corporation jointly determine that the resolution plan of a covered company submitted under this part is not credible or would not facilitate an orderly resolution of the covered company under the Bankruptcy Code, the Board and Corporation will jointly notify the covered company in writing of such determination. Such notice will identify the aspects of the resolution plan that the Board and Corporation jointly determined to be deficient and request the resubmission of a resolution plan that remedies the deficiencies of the resolution plan.

Within 90 days of receiving such notice of deficiencies, or such shorter or longer period as the Board and Corporation may jointly determine, a covered company will be required to submit a revised resolution plan to the Board and Corporation that addresses the deficiencies jointly identified by the Board and Corporation. The revised resolution plan will be required to discuss in detail: (i) The revisions made by the covered company to address the deficiencies jointly identified by the Board and the Corporation; (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 a timeline for the execution of such planned changes); and (iii) why the covered company believes that the revised resolution plan is credible and would result in an orderly resolution of the covered company under the Bankruptcy Code.

Upon their own initiative or a written request by a covered company, the Board and Corporation may jointly extend any time for review and submission established hereunder. Any extension request should be supported by a written statement of the company describing the basis and justification for the request.

Failure to cure deficiencies on resubmission of a resolution plan. Section ____ .6 of the final rule provides that, if the covered company fails to submit a revised resolution plan or the Board and the Corporation jointly determine that a revised resolution plan submitted does not adequately remedy the deficiencies identified by the Board and the Corporation, then the Board and Corporation may jointly subject a covered company or any subsidiary of a covered company to more stringent capital, leverage, or liquidity requirements or restrictions on growth, activities, or operations. Any such requirements or restrictions would apply to the covered company or subsidiary, respectively, until the Board and the Corporation jointly determine the covered company has submitted a revised resolution plan that adequately remedies the deficiencies identified. In addition, if the covered company fails, within the two-year period beginning on the date on which the determination to impose such requirements or restrictions was made, to submit a revised resolution plan that adequately remedies the deficiencies jointly identified by the Board and the Corporation, then the Board and Corporation, in consultation with the Council, may jointly, by order, direct the covered company to divest such assets or operations as the Board and Corporation jointly determine necessary to facilitate an orderly resolution of the covered company under the Bankruptcy Code in the event the company were to fail.

Consultation. Section ____ .7 of the final rule provides that, prior to issuing any notice of deficiencies, determining to impose requirements or restrictions on a covered company, or issuing a divestiture order with respect to a covered company that is likely to have a significant effect on a functionally regulated subsidiary or a depository institution subsidiary of the covered company, the Board shall consult with each Council member that primarily supervises any such subsidiary and may consult with any other federal, state, or foreign supervisor as the Board considers appropriate.

No limiting effect or private right of action; confidentiality of resolution plans. Section ____ .8 of the final rule provides that a resolution plan submitted shall not have any binding effect on: (i) A court or trustee in a proceeding commenced under the Bankruptcy Code; (ii) a receiver appointed under Title II of the Dodd-Frank Act (12 U.S.C. 5381 *et seq.*); (iii) a bridge financial company chartered pursuant to 12 U.S.C. 5390(h); or (iv) any other authority that is authorized or required to resolve a covered company (including any subsidiary or affiliate thereof) under any other provision of federal, state, or foreign law.

The final rule further provides that nothing in the rule would create or is intended to create a private right of action based on a resolution plan prepared or submitted under this part or based on any action taken by the Board or the Corporation with respect to any resolution plan submitted under this part.

Most commenters requested that the resolution plans be treated as exempt from disclosure under FOIA. The Board and the Corporation are aware of and sensitive to the significant concerns regarding confidentiality of resolution plans. The regulation contemplates and requires the submission of highly detailed, internal proprietary information of covered companies. This is the type of information that covered companies would not customarily make available to the public and that an agency typically would have access to and could review as part of the supervisory process in assessing, for example, the safety and soundness of a regulated institution. Moreover, release of this information would impede the quality and extent of information provided by covered companies and could significantly impact the efforts of the Board and the Corporation to encourage effective and orderly unwinding of the covered companies in a crisis.

Under section 112(d)(5)(A) of the Dodd-Frank Act, the Board and the Corporation "shall maintain the confidentiality of any data, information, and reports submitted under" Title I (which includes section 165(d), the authority this regulation is promulgated under) of the Dodd-Frank Act. The Board and the Corporation will assess the confidentiality of resolution plans and related material in accordance with applicable exemptions under FOIA and the Board's and the Corporation's implementing regulations (12 CFR part 261 (Board); 12 CFR part 309 (Corporation)). The Board and the Corporation certainly expect that large portions of the submissions will contain or consist of "trade secrets and commercial or financial information obtained from a person and privileged or confidential" and information that is "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." This information is subject to withholding under exemptions 4 and 8 of the FOIA, 5 U.S.C. 552(b)(4) and 552(b)(8).

The Board and the Corporation also recognize, however, that the regulation calls for the submission of details regarding covered companies that are publicly available or otherwise are not sensitive and should be made public.

In order to address this, the regulation requires resolution plans to be divided into two portions: a public section and a confidential section. The public section of the resolution plan should consist of an executive summary of the resolution plan that describes the business of the covered company and includes, to the extent material to an understanding of the covered company: (i) The names of material entities; (ii) a description of core business lines; (iii) consolidated or segment financial information regarding assets, liabilities, capital and major funding sources; (iv) a description of derivative activities and hedging activities; (v) a list of memberships in material payment, clearing, and settlement systems; (vi) a description of foreign operations; (vii) the identities of material supervisory authorities; (viii) the identities of the principal officers; (ix) a description of the corporate governance structure and processes related to resolution planning; (x) a description of material management information systems; and (xi) a description, at a high level, of the covered company's resolution strategy, covering such items as the range of potential purchasers of the covered company, its material entities and core business lines. While the information in the public section of a resolution plan should be sufficiently detailed to allow the public to understand the business of the covered company, such information can be high level in nature and based on publicly available information.

The public section will be made available to the public in accordance with the Board's Rules Regarding Availability of Information (12 CFR part 261) and the Corporation's Disclosure of Information Rules (12 CFR part 309).

A covered company should submit a properly substantiated request for confidential treatment of any details in the confidential section that it believes are subject to withholding under exemption 4 of the FOIA. In addition, the Board and the Corporation will make formal exemption and segregability determinations if and when a plan is requested under the FOIA.

Enforcement. Section ____ .9 of the final rule provides that the Board and Corporation may jointly enforce an order jointly issued under section ____ .6(a) or ____ .6(c) of the final rule. Furthermore, the Board, in consultation with the Corporation, may address any violation of the rule by a covered company under section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818).

V. Administrative Law Matters

A. Paperwork Reduction Act Analysis

In accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Board may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget ("OMB") control number. The Board reviewed the final rule under the authority delegated to the Board by OMB. The OMB control number for these information collections will be assigned.

Two commenters expressed concern about the Paperwork Reduction Act analysis published as part of the proposed rule, and noted that the Board and Corporation omitted nonbank financial companies designated by the Council for enhanced supervision by the Board from that analysis. While the final rule applies to any nonbank financial company supervised by the Board, no such covered company exists because the Council has, to date, not designated any such company for enhanced supervision by the Board. However, the Board expects that the amount of burden the final rule would impose on a nonbank financial company designated by the Council to be similar

to the amount of burden estimated for other covered companies.

One commenter stated that the cost-benefit analysis of the proposed rule significantly underestimated the time, effort, and expense associated with compliance. The Board notes that several of the changes described in the Supplementary Information reduce the burden associated with the final rule, particularly for smaller, less complex covered companies. Specifically, the final rule streamlines the resolution plan requirement applicable to covered companies that operate predominately through one or more insured depository institutions (or, in the case of foreign banking organizations subject to the rule, U.S. insured depository institutions, branches, and agencies). The information required under a tailored plan is generally limited to information regarding the nonbanking operations of the company and the interconnections between the bank and nonbank operations of the company, rather than its entire operations.

Title of Information Collection: Resolution Plans Required.

Frequency of Response: Varied—annually, semiannually, and event-generated.

Affected Public: The final rule applies to bank holding companies and foreign banking organizations with total consolidated assets of $50 billion or more, and nonbank financial companies designated by the Council for enhanced supervision by the Board.

Abstract: The information collection requirements of the final rule are found in sections [—].3, [—].4, and [—].5 of the final rule. Specifically, as explained in the Supplemental Information, section [—].3 sets forth a staggered schedule for submission of initial resolution plans by covered companies, and requires covered companies to annually submit an updated resolution plan on the anniversary of the initial submission date. Section [—].3 of the final rule establishes a requirement that a covered company provide notice to the Board and Corporation of material events that have the potential to impact its resolution plan.

Section [—].4 of the final rule describes the required informational content of both a full resolution plan and the tailored resolution plan available to smaller, less complex covered companies. In providing organizational structure information required in section [—].4, a covered company may rely on the information it previously reported to the Board (FR Y–6, Annual Report of Bank Holding Companies; FR Y–7, Annual Report of Foreign Banking Organizations; and FR Y–10, Report of Changes in Organizational Structure; OMB No. 7100–0297).

Under section [—].5 of the final rule, a covered company is required to resubmit an informationally complete resolution plan or additional information as jointly requested by the Board and Corporation to facilitative review of the covered company's resolution plan within 30 days of receiving notice that its resolution plan is deemed incomplete. Section [—].5 of the final rule also requires that, if the Board and Corporation jointly determine that a resolution plan of a covered company is not credible, a covered company must resubmit a revised plan within 90 days of receiving notice that its resolution plan is deemed deficient. A covered company may also submit a written request for an extension of time to resubmit additional information or a revised resolution plan. As noted in the Supplemental Information, the Board and the Corporation will, in a manner consistent with the Dodd-Frank Act, assess the confidentiality of resolution plans and related material in accordance with applicable exemptions under FOIA and the Board's and the Corporation's implementing regulations (12 CFR part 261 (Board); 12 CFR part 309 (Corporation)).

These requirements would implement the resolution plan requirement set forth in section 165(d)(1) of the Dodd-Frank Act. Since the Board supervises all of the respondents, the Board will take the entire paperwork burden associated with this information collection.

Estimated Burden

The burden associated with this collection of information may be summarized as follows:

Number of Respondents: Resolution Plan (Tailored Reporters): 104; Resolution Plan (Full Reporters): 20; Notice of Material Change: 3; Additional Information and Extension Requests: 24.

Estimated Average Hours per Response (Initial Implementation): Resolution Plan (Tailored Reporters): 4,500 hours; Resolution Plan (Full Reporters): 9,200 hours; Additional Information Requests: 1,000 hours.

Estimated Average Hours per Response (Ongoing): Resolution Plan (Tailored Reporters): 1,000 hours; Resolution Plan (Full Reporters): 2,561 hours; Notice of Material Change: 20 hours; Extension Requests: 1 hour.

Total Estimated Annual Burden: 700,000 hours for initial implementation and 155,304 hours on an ongoing basis.

The Agencies have a continuing interest in the public's opinions of collections of information. At any time, comments regarding the burden estimate, or any other aspect of this collection of information, including suggestions for reducing the burden, may be sent to: Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551; and to the Office of Management and Budget, Paperwork Reduction Project (7100–NEW), Washington, DC 20503.

B. Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (''RFA''), requires each Federal agency to prepare a final regulatory flexibility analysis in connection with the promulgation of a final rule, or certify that the final rule will not have a significant economic impact on a substantial number of small entities.[13] Based on the analysis and for the reasons stated below, the Corporation certifies that this final rule will not have a significant economic impact on a substantial number of small entities. The Board believes that the final rule will not have a significant economic impact on a substantial number of small entities, but nonetheless is conducting the Regulatory Flexibility Act Analysis for this final rule.

In accordance with section 165(d) of the Dodd-Frank Act, the Board is adopting the final rule as Regulation QQ and is proposing to add new Part 243 (12 CFR part 243) and the Corporation is proposing to add new Part 381 (12 CFR part 381) to establish the requirements that a covered company periodically submit a resolution plan to the Board and Corporation.[14] The final rule would also establish the procedures joint review of a resolution plan by the Board and Corporation. The reasons and justification for the final rule are described in the Supplementary Information. As further discussed in the Supplementary Information, the procedure, standards, and definitions that would be established by the final rule are relevant to the joint authority of the Board and Corporation to implement the resolution plan.

Under regulations issued by the Small Business Administration (''SBA''), a ''small entity'' includes those firms within the ''Finance and Insurance'' sector with asset sizes that vary from $7 million or less in assets to $175 million

[13] *See* 5 U.S.C. 603, 604 and 605.

[14] *See* 12 U.S.C. 5365(d).

or less in assets.[15] The Board believes that the Finance and Insurance sector constitutes a reasonable universe of firms for these purposes because such firms generally engage in actives that are financial in nature. Consequently, bank holding companies or nonbank financial companies with assets sizes of $175 million or less are small entities for purposes of the RFA.

As discussed in the Supplementary Information, the final rule applies to a ''covered company,'' which includes only bank holding companies and foreign banks that are or are treated as a bank holding company (''foreign banking organization'') with $50 billion or more in total consolidated assets, and nonbank financial companies that the Council has determined under section 113 of the Dodd-Frank Act must be supervised by the Board and for which such determination is in effect. Bank holding companies and foreign banking organizations that are subject to the final rule therefore substantially exceed the $175 million asset threshold at which a banking entity is considered a ''small entity'' under SBA regulations.[16] The final rule would apply to a nonbank financial company supervised by the Board regardless of such a company's asset size. Although the asset size of nonbank financial companies may not be the determinative factor of whether such companies may pose systemic risks and would be designated by the Council for supervision by the Board, it is an important consideration.[17] It is therefore unlikely that a financial firm that is at or below the $175 million asset threshold would be designated by the Council under section 113 of the Dodd-Frank Act because material financial distress at such firms, or the nature, scope, size, scale, concentration, interconnectedness, or mix of it activities, are not likely to pose a threat to the financial stability of the United States.

As noted above, because the final rule is not likely to apply to any company with assets of $175 million or less, the final rule is not expected to apply to any small entity for purposes of the RFA. Moreover, as discussed in the Supplementary Information, the Dodd-Frank Act requires the Board and the Corporation jointly to adopt rules implementing the provisions of section 165(d) of the Dodd-Frank Act. The Board does not believe that the final rule would have a significant economic impact on a substantial number of small entities or that the final rule duplicates, overlaps, or conflicts with any other Federal rules.

[15] 13 CFR 121.201.

[16] The Dodd-Frank Act provides that the Board may, on the recommendation of the Council, increase the $50 billion asset threshold for the application of the resolution plan and credit exposure report requirements. *See* 12 U.S.C. 5365(a)(2)(B). However, neither the Board nor the Council has the authority to lower such threshold.

[17] *See* 76 FR 4555 (January 26, 2011).

C. Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The Board and Corporation invited comment on whether the proposed rule was written plainly and clearly, or whether there were ways the Board and Corporation could make the rule easier to understand. The Board and Corporation received no comments on these matters and believe that the final rule is written plainly and clearly.

Text of the Common Rules

(All Agencies)

PART [ ]—RESOLUTION PLANS

Sec.

____.1 Authority and scope.
____.2 Definitions.
____.3 Resolution plan required.
____.4 Informational content of a resolution plan.
____.5 Review of resolution plans; resubmission of deficient resolution plans.
____.6 Failure to cure deficiencies on resubmission of a resolution plan.
____.7 Consultation.
____.8 No limiting effect or private right of action; confidentiality of resolution plans.
____.9 Enforcement.

§ ____.1 Authority and scope.

(a) *Authority.* This part is issued pursuant to section 165(d)(8) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the *Dodd-Frank Act*) (Pub. L. 111–203, 124 Stat. 1376, 1426–1427), 12 U.S.C. 5365(d)(8), which requires the Board of Governors of the Federal Reserve System (*Board*) and the Federal Deposit Insurance Corporation (*Corporation*) to jointly issue rules implementing the provisions of section 165(d) of the Dodd-Frank Act.

(b) *Scope.* This part applies to each covered company and establishes rules and requirements regarding the submission and content of a resolution plan, as well as procedures for review by the Board and Corporation of a resolution plan.

§ ____.2 Definitions.

For purposes of this part:

(a) *Bankruptcy Code* means Title 11 of the United States Code.

(b) *Company* means a corporation, partnership, limited liability company, depository institution, business trust, special purpose entity, association, or similar organization, but does not include any organization, the majority of the voting securities of which are owned by the United States.

(c) *Control.* A company controls another company when the first company, directly or indirectly, owns, or holds with power to vote, 25 percent or more of any class of the second company's outstanding voting securities.

(d) *Core business lines* means those business lines of the covered company, including associated operations, services, functions and support, that, in the view of the covered company, upon failure would result in a material loss of revenue, profit, or franchise value.

(e) *Council* means the Financial Stability Oversight Council established by section 111 of the Dodd-Frank Act (12 U.S.C. 5321).

(f) *Covered company.* (1) *In general.* A ''covered company'' means:

(i) Any nonbank financial company supervised by the Board;

(ii) Any bank holding company, as that term is defined in section 2 of the Bank Holding Company Act, as amended (12 U.S.C. 1841), and the Board's Regulation Y (12 CFR part 225), that has $50 billion or more in total consolidated assets, as determined based on the average of the company's four most recent Consolidated Financial Statements for Bank Holding Companies as reported on the Federal Reserve's Form FR Y–9C (''FR Y–9C''); and

(iii) Any foreign bank or company that is a bank holding company or is treated as a bank holding company under section 8(a) of the International Banking Act of 1978 (12 U.S.C. 3106(a)), and that has $50 billion or more in total consolidated assets, as determined based on the foreign bank's or company's most recent annual or, as applicable, the average of the four most recent quarterly Capital and Asset Reports for Foreign Banking Organizations as reported on the Federal Reserve's Form FR Y–7Q (''FR Y–7Q'').

(2) Once a covered company meets the requirements described in paragraph (f)(1)(ii) or (iii) of this section, the company shall remain a covered company for purposes of this part unless and until the company has less than $45 billion in total consolidated assets, as determined based on the—

(i) Average total consolidated assets as reported on the company's four most recent FR Y–9Cs, in the case of a covered company described in paragraph (f)(1)(ii) of this section; or

(ii) Total consolidated assets as reported on the company's most recent annual FR Y–7Q, or, as applicable, average total consolidated assets as reported on the company's four most recent quarterly FR Y–7Qs, in the case of a covered company described in paragraph (f)(1)(iii) of this section.

Nothing in this paragraph (f)(2) shall preclude a company from becoming a covered company pursuant to paragraph (f)(1) of this section.

(3) *Multi-tiered holding company.* In a multi-tiered holding company structure, covered company means the top-tier of the multi-tiered holding company only.

(4) *Asset threshold for bank holding companies and foreign banking organizations.* The Board may, pursuant to a recommendation of the Council, raise any asset threshold specified in paragraph (f)(1)(ii) or (iii) of this section.

(5) *Exclusion.* A bridge financial company chartered pursuant to 12 U.S.C. 5390(h) shall not be deemed to be a covered company hereunder.

(g) *Critical operations* means those operations of the covered company, including associated services, functions and support, the failure or discontinuance of which, in the view of the covered company or as jointly directed by the Board and the Corporation, would pose a threat to the financial stability of the United States.

(h) *Depository institution* has the same meaning as in section 3(c)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)(1)) and includes a state-licensed uninsured branch, agency, or commercial lending subsidiary of a foreign bank.

(i) *Foreign banking organization* means—

(1) A foreign bank, as defined in section 1(b)(7) of the International Banking Act of 1978 (12 U.S.C. 3101(7)), that:

(i) Operates a branch, agency, or commercial lending company subsidiary in the United States;

(ii) Controls a bank in the United States; or

(iii) Controls an Edge corporation acquired after March 5, 1987; and

(2) Any company of which the foreign bank is a subsidiary.

(j) *Foreign-based company* means any covered company that is not incorporated or organized under the laws of the United States.

(k) *Functionally regulated subsidiary* has the same meaning as in section 5(c)(5) of the Bank Holding Company Act, as amended (12 U.S.C. 1844(c)(5)).

(l) *Material entity* means a subsidiary or foreign office of the covered company that is significant to the activities of a critical operation or core business line (as defined in this part).

(m) *Material financial distress* with regard to a covered company means that:

(1) The covered company has incurred, or is likely to incur, losses that will deplete all or substantially all of its capital, and there is no reasonable prospect for the company to avoid such depletion;

(2) The assets of the covered company are, or are likely to be, less than its obligations to creditors and others; or

(3) The covered company is, or is likely to be, unable to pay its obligations (other than those subject to a bona fide dispute) in the normal course of business.

(n) *Nonbank financial company supervised by the Board* means a nonbank financial company or other company that the Council has determined under section 113 of the Dodd-Frank Act (12 U.S.C. 5323) shall be supervised by the Board and for which such determination is still in effect.

(o) *Rapid and orderly resolution* means a reorganization or liquidation of the covered company (or, in the case of a covered company that is incorporated or organized in a jurisdiction other than the United States, the subsidiaries and operations of such foreign company that are domiciled in the United States) under the Bankruptcy Code that can be accomplished within a reasonable period of time and in a manner that substantially mitigates the risk that the failure of the covered company would have serious adverse effects on financial stability in the United States.

(p) *Subsidiary* means a company that is controlled by another company, and an indirect subsidiary is a company that is controlled by a subsidiary of a company.

(q) *United States* means the United States and includes any state of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, and the Virgin Islands.

§ ____.3 Resolution plan required.

(a) *Initial and annual resolution plans required.*—(1) Each covered company shall submit its initial resolution plan to the Board and the Corporation on or before the date set forth below (''Initial Submission Date''):

(i) July 1, 2012, with respect to any covered company that, as of the effective date of this part, had $250 billion or more in total nonbank assets (or, in the case of a covered company that is a foreign-based company, in total U.S. nonbank assets);

(ii) July 1, 2013, with respect to any covered company that is not described in paragraph (a)(1)(i) of this section, and that, as of the effective date of this part had $100 billion or more in total nonbank assets (or, in the case of a covered company that is a foreign-based company, in total U.S. nonbank assets); and

(iii) December 31, 2013, with respect to any other covered company that is a covered company as of the effective date of this part but that is not described in paragraph (a)(1)(i) or (ii) of this section.

(2) A company that becomes a covered company after the effective date of this part shall submit its initial resolution plan no later than the next July 1 following the date the company becomes a covered company, provided such date occurs no earlier than 270 days after the date on which the company became a covered company.

(3) After filing its initial resolution plan pursuant to paragraph (a)(1) or (2) of this section, each covered company shall annually submit a resolution plan to the Board and the Corporation on or before each anniversary date of its Initial Submission Date.

(4) Notwithstanding anything to the contrary in this paragraph (a), the Board and Corporation may jointly determine that a covered company shall file its initial or annual resolution plan by a date other than as provided in this paragraph (a). The Board and the Corporation shall provide a covered company with written notice of a determination under this paragraph (a)(4) no later than 180 days prior to the date on which the Board and Corporation jointly determined to require the covered company to submit its resolution plan.

(b) *Authority to require interim updates and notice of material events.*—(1) *In general.* The Board and the Corporation may jointly require that a covered company file an update to a resolution plan submitted under paragraph (a) of this section, within a reasonable amount of time, as jointly determined by the Board and Corporation. The Board and the Corporation shall make a request pursuant to this paragraph (b)(1) in writing, and shall specify the portions or aspects of the resolution plan the covered company shall update.

(2) *Notice of material events.* Each covered company shall provide the Board and the Corporation with a notice no later than 45 days after any event, occurrence, change in conditions or circumstances, or other change that results in, or could reasonably be foreseen to have, a material effect on the resolution plan of the covered company.

Such notice should describe the event, occurrence or change and explain why the event, occurrence or change may require changes to the resolution plan. The covered company shall address any event, occurrence or change with respect to which it has provided notice pursuant to this paragraph (b)(2) in the following resolution plan submitted by the covered company.

(3) *Exception.* A covered company shall not be required to file a notice under paragraph (b)(2) of this section if the date on which the covered company would be required to submit the notice under paragraph (b)(2) would be within 90 days prior to the date on which the covered company is required to file an annual resolution plan under paragraph (a) of this section.

(c) *Authority to require more frequent submissions or extend time period.*—The Board and Corporation may jointly:

(1) Require that a covered company submit a resolution plan more frequently than required pursuant to paragraph (a) of this section; and

(2) Extend the time period that a covered company has to submit a resolution plan or a notice following material events under paragraphs (a) and (b) of this section.

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

(e) *Board of directors approval of resolution plan.*—Prior to submission of a resolution plan under paragraph (a) of this section, the resolution plan of a covered company shall be approved by:

(1) The board of directors of the covered company and noted in the minutes; or

(2) In the case of a foreign-based covered company only, a delegee acting under the express authority of the board of directors of the covered company to approve the resolution plan.

(f) *Resolution plans provided to the Council.*—The Board shall make the resolution plans and updates submitted by the covered company pursuant to this section available to the Council upon request.

§ ____.4 Informational content of a resolution plan.

(a) *In general.*—(1) *Domestic covered companies.* Except as otherwise provided in paragraph (a)(3) of this section, the resolution plan of a covered company that is organized or incorporated in the United States shall include the information specified in paragraphs (b) through (i) of this section with respect to the subsidiaries and operations that are domiciled in the United States as well as the foreign subsidiaries, offices, and operations of the covered company.

(2) *Foreign-based covered companies.*—Except as otherwise provided in paragraph (a)(3) of the section, the resolution plan of a covered company that is organized or incorporated in a jurisdiction other than the United States (other than a bank holding company) or that is a foreign banking organization shall include:

(i) The information specified in paragraphs (b) through (i) of this section with respect to the subsidiaries, branches and agencies, and critical operations and core business lines, as applicable, that are domiciled in the United States or conducted in whole or material part in the United States. With respect to the information specified in paragraph (g) of this section, the resolution plan of a foreign-based covered company shall also identify, describe in detail, and map to legal entity the interconnections and interdependencies among the U.S. subsidiaries, branches and agencies, and critical operations and core business lines of the foreign-based covered company and any foreign-based affiliate; and

(ii) A detailed explanation of how resolution planning for the subsidiaries, branches and agencies, and critical operations and core business lines of the foreign-based covered company that are domiciled in the United States or conducted in whole or material part in the United States is integrated into the foreign-based covered company's overall resolution or other contingency planning process.

(3) *Tailored resolution plan.* (i) *Eligible covered company.*—Paragraph (a)(3)(ii) of this section applies to any covered company that as of December 31 of the calendar year prior to the date its resolution plan is required to be submitted under this part—

(A) Has less than $100 billion in total nonbank assets (or, in the case of a covered company that is a foreign-based company, in total U.S. nonbank assets); and

(B) The total insured depository institution assets of which comprise 85 percent or more of the covered company's total consolidated assets (or, in the case of a covered company that is a foreign-based company, the assets of the U.S. insured depository institution operations, branches, and agencies of which comprise 85 percent or more of such covered company's U.S. total consolidated assets).

(ii) *Tailored resolution plan elements.* A covered company described in paragraph (a)(3)(i) of this section may file a resolution plan that is limited to the following items—

(A) An executive summary, as specified in paragraph (b) of this section;

(B) The information specified in paragraphs (c) through (f) and paragraph (h) of this section, but only with respect to the covered company and its nonbanking material entities and operations;

(C) The information specified in paragraphs (g) and (i) of this section with respect to the covered company and all of its insured depository institutions (or, in the case of a covered company that is a foreign-based company, the U.S. insured depository institutions, branches, and agencies) and nonbank material entities and operations. The interconnections and interdependencies identified pursuant to (g) of this section shall be included in the analysis provided pursuant to paragraph (c) of this section.

(iii) *Notice.*—A covered company that meets the requirements of paragraph (a)(3)(i) of this section and that intends to submit a resolution plan pursuant to this paragraph (a)(3), shall provide the Board and Corporation with written notice of such intent and its eligibility under paragraph (a)(3)(i) no later than 270 days prior to the date on which the covered company is required to submit its resolution plan. Within 90 of receiving such notice, the Board and Corporation may jointly determine that the covered company must submit a resolution plan that meets some or all of the requirements as set forth in paragraph (a)(1) or (2) of this section, as applicable.

(4) *Required and prohibited assumptions.*—In preparing its plan for rapid and orderly resolution in the event of material financial distress or failure required by this part, a covered company shall:

(i) Take into account that such material financial distress or failure of the covered company may occur under the baseline, adverse and severely adverse economic conditions provided to the covered company by the Board pursuant to 12 U.S.C. 5365(i)(1)(B); provided, however, a covered company

may submit its initial resolution plan assuming the baseline conditions only, or, if a baseline scenario is not then available, a reasonable substitute developed by the covered company; and

(ii) Not rely on the provision of extraordinary support by the United States or any other government to the covered company or its subsidiaries to prevent the failure of the covered company.

(b) *Executive summary.*—Each resolution plan of a covered company shall include an executive summary describing:

(1) The key elements of the covered company's strategic plan for rapid and orderly resolution in the event of material financial distress at or failure of the covered company.

(2) Material changes to the covered company's resolution plan from the company's most recently filed resolution plan (including any notices following a material event or updates to the resolution plan).

(3) Any actions taken by the covered company since filing of the previous resolution plan to improve the effectiveness of the covered company's resolution plan or remediate or otherwise mitigate any material weaknesses or impediments to effective and timely execution of the resolution plan.

(c) *Strategic analysis.*—Each resolution plan shall include a strategic analysis describing the covered company's plan for rapid and orderly resolution in the event of material financial distress or failure of the covered company. Such analysis shall—

(1) Include detailed descriptions of the—

(i) Key assumptions and supporting analysis underlying the covered company's resolution plan, including any assumptions made concerning the economic or financial conditions that would be present at the time the covered company sought to implement such plan;

(ii) Range of specific actions to be taken by the covered company to facilitate a rapid and orderly resolution of the covered company, its material entities, and its critical operations and core business lines in the event of material financial distress or failure of the covered company;

(iii) Funding, liquidity and capital needs of, and resources available to, the covered company and its material entities, which shall be mapped to its critical operations and core business lines, in the ordinary course of business and in the event of material financial distress at or failure of the covered company;

(iv) Covered company's strategy for maintaining operations of, and funding for, the covered company and its material entities, which shall be mapped to its critical operations and core business lines;

(v) Covered company's strategy in the event of a failure or discontinuation of a material entity, core business line or critical operation, and the actions that will be taken by the covered company to prevent or mitigate any adverse effects of such failure or discontinuation on the financial stability of the United States; provided, however, if any such material entity is subject to an insolvency regime other than the Bankruptcy Code, a covered company may exclude that entity from its strategic analysis unless that entity either has $50 billion or more in total assets or conducts a critical operation; and

(vi) Covered company's strategy for ensuring that any insured depository institution subsidiary of the covered company will be adequately protected from risks arising from the activities of any nonbank subsidiaries of the covered company (other than those that are subsidiaries of an insured depository institution);

(2) Identify the time period(s) the covered company expects would be needed for the covered company to successfully execute each material aspect and step of the covered company's plan;

(3) Identify and describe any potential material weaknesses or impediments to effective and timely execution of the covered company's plan;

(4) Discuss the actions and steps the covered company has taken or proposes to take to remediate or otherwise mitigate the weaknesses or impediments identified by the covered company, including a timeline for the remedial or other mitigatory action; and

(5) Provide a detailed description of the processes the covered company employs for:

(i) Determining the current market values and marketability of the core business lines, critical operations, and material asset holdings of the covered company;

(ii) Assessing the feasibility of the covered company's plans (including timeframes) for executing any sales, divestitures, restructurings, recapitalizations, or other similar actions contemplated in the covered company's resolution plan; and

(iii) Assessing the impact of any sales, divestitures, restructurings, recapitalizations, or other similar actions on the value, funding, and operations of the covered company, its material entities, critical operations and core business lines.

(d) *Corporate governance relating to resolution planning.*—Each resolution plan shall:

(1) Include a detailed description of:

(i) How resolution planning is integrated into the corporate governance structure and processes of the covered company;

(ii) The covered company's policies, procedures, and internal controls governing preparation and approval of the covered company's resolution plan;

(iii) The identity and position of the senior management official(s) of the covered company that is primarily responsible for overseeing the development, maintenance, implementation, and filing of the covered company's resolution plan and for the covered company's compliance with this part; and

(iv) The nature, extent, and frequency of reporting to senior executive officers and the board of directors of the covered company regarding the development, maintenance, and implementation of the covered company's resolution plan;

(2) Describe the nature, extent, and results of any contingency planning or similar exercise conducted by the covered company since the date of the covered company's most recently filed resolution plan to assess the viability of or improve the resolution plan of the covered company; and

(3) Identify and describe the relevant risk measures used by the covered company to report credit risk exposures both internally to its senior management and board of directors, as well as any relevant risk measures reported externally to investors or to the covered company's appropriate Federal regulator.

(e) *Organizational structure and related information.*—Each resolution plan shall—

(1) Provide a detailed description of the covered company's organizational structure, including:

(i) A hierarchical list of all material entities within the covered company's organization (including legal entities that directly or indirectly hold such material entities) that:

(A) Identifies the direct holder and the percentage of voting and nonvoting equity of each legal entity and foreign office listed; and

(B) The location, jurisdiction of incorporation, licensing, and key management associated with each material legal entity and foreign office identified;

(ii) A mapping of the covered company's critical operations and core business lines, including material asset

holdings and liabilities related to such critical operations and core business lines, to material entities;

(2) Provide an unconsolidated balance sheet for the covered company and a consolidating schedule for all material entities that are subject to consolidation by the covered company;

(3) Include a description of the material components of the liabilities of the covered company, its material entities, critical operations and core business lines that, at a minimum, separately identifies types and amounts of the short-term and long-term liabilities, the secured and unsecured liabilities, and subordinated liabilities;

(4) Identify and describe the processes used by the covered company to:

(i) Determine to whom the covered company has pledged collateral;

(ii) Identify the person or entity that holds such collateral; and

(iii) Identify the jurisdiction in which the collateral is located, and, if different, the jurisdiction in which the security interest in the collateral is enforceable against the covered company;

(5) Describe any material off-balance sheet exposures (including guarantees and contractual obligations) of the covered company and its material entities, including a mapping to its critical operations and core business lines;

(6) Describe the practices of the covered company, its material entities and its core business lines related to the booking of trading and derivatives activities;

(7) Identify material hedges of the covered company, its material entities, and its core business lines related to trading and derivative activities, including a mapping to legal entity;

(8) Describe the hedging strategies of the covered company;

(9) Describe the process undertaken by the covered company to establish exposure limits;

(10) Identify the major counterparties of the covered company and describe the interconnections, interdependencies and relationships with such major counterparties;

(11) Analyze whether the failure of each major counterparty would likely have an adverse impact on or result in the material financial distress or failure of the covered company; and

(12) Identify each trading, payment, clearing, or settlement system of which the covered company, directly or indirectly, is a member and on which the covered company conducts a material number or value amount of trades or transactions. Map membership in each such system to the covered company's material entities, critical operations and core business lines.

(f) *Management information systems.*—(1) Each resolution plan shall include—

(i) A detailed inventory and description of the key management information systems and applications, including systems and applications for risk management, accounting, and financial and regulatory reporting, used by the covered company and its material entities. The description of each system or application provided shall identify the legal owner or licensor, the use or function of the system or application, service level agreements related thereto, any software and system licenses, and any intellectual property associated therewith;

(ii) A mapping of the key management information systems and applications to the material entities, critical operations and core business lines of the covered company that use or rely on such systems and applications;

(iii) An identification of the scope, content, and frequency of the key internal reports that senior management of the covered company, its material entities, critical operations and core business lines use to monitor the financial health, risks, and operation of the covered company, its material entities, critical operations and core business lines; and

(iv) A description of the process for the appropriate supervisory or regulatory agencies to access the management information systems and applications identified in paragraph (f) of this section; and

(v) A description and analysis of—

(A) The capabilities of the covered company's management information systems to collect, maintain, and report, in a timely manner to management of the covered company, and to the Board, the information and data underlying the resolution plan; and

(B) Any deficiencies, gaps or weaknesses in such capabilities, and a description of the actions the covered company intends to take to promptly address such deficiencies, gaps, or weaknesses, and the time frame for implementing such actions.

(2) The Board will use its examination authority to review the demonstrated capabilities of each covered company to satisfy the requirements of paragraph (f)(1)(v) of this section. The Board will share with the Corporation information regarding the capabilities of the covered company to collect, maintain, and report in a timely manner information and data underlying the resolution plan.

(g) *Interconnections and interdependencies.* To the extent not elsewhere provided, identify and map to the material entities the interconnections and interdependencies among the covered company and its material entities, and among the critical operations and core business lines of the covered company that, if disrupted, would materially affect the funding or operations of the covered company, its material entities, or its critical operations or core business lines. Such interconnections and interdependencies may include:

(1) Common or shared personnel, facilities, or systems (including information technology platforms, management information systems, risk management systems, and accounting and recordkeeping systems);

(2) Capital, funding, or liquidity arrangements;

(3) Existing or contingent credit exposures;

(4) Cross-guarantee arrangements, cross-collateral arrangements, cross-default provisions, and cross-affiliate netting agreements;

(5) Risk transfers; and

(6) Service level agreements.

(h) *Supervisory and regulatory information.* Each resolution plan shall—

(1) Identify any:

(i) Federal, state, or foreign agency or authority (other than a Federal banking agency) with supervisory authority or responsibility for ensuring the safety and soundness of the covered company, its material entities, critical operations and core business lines; and

(ii) Other Federal, state, or foreign agency or authority (other than a Federal banking agency) with significant supervisory or regulatory authority over the covered company, and its material entities and critical operations and core business lines.

(2) Identify any foreign agency or authority responsible for resolving a foreign-based material entity and critical operations or core business lines of the covered company; and

(3) Include contact information for each agency identified in paragraphs (h)(1) and (2) of this section.

(i) *Contact information.* Each resolution plan shall identify a senior management official at the covered company responsible for serving as a point of contact regarding the resolution plan of the covered company, and include contact information (including phone number, email address, and physical address) for a senior management official of the material entities of the covered company.

(j) *Inclusion of previously submitted resolution plan informational elements by reference.* An annual submission of

or update to a resolution plan submitted by a covered company may include by reference informational elements (but not strategic analysis or executive summary elements) from a resolution plan previously submitted by the covered company to the Board and the Corporation, provided that:

(1) The resolution plan seeking to include informational elements by reference clearly indicates:

(i) The informational element the covered company is including by reference; and

(ii) Which of the covered company's previously submitted resolution plan(s) originally contained the information the covered company is including by reference; and

(2) The covered company certifies that the information the covered company is including by reference remains accurate.

(k) *Exemptions.* The Board and the Corporation may jointly exempt a covered company from one or more of the requirements of this section.

§ ____.5 Review of resolution plans; resubmission of deficient resolution plans.

(a) *Acceptance of submission and review.* (1) The Board and Corporation shall review a resolution plan submitted under section this subpart within 60 days.

(2) If the Board and Corporation jointly determine within the time described in paragraph (a)(1) of this section that a resolution plan is informationally incomplete or that substantial additional information is necessary to facilitate review of the resolution plan:

(i) The Board and Corporation shall jointly inform the covered company in writing of the area(s) in which the resolution plan is informationally incomplete or with respect to which additional information is required; and

(ii) The covered company shall resubmit an informationally complete resolution plan or such additional information as jointly requested to facilitate review of the resolution plan no later than 30 days after receiving the notice described in paragraph (a)(2)(i) of this section, or such other time period as the Board and Corporation may jointly determine.

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

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

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

(2) Any changes to the covered company's business operations and corporate structure that the covered company proposes to undertake to facilitate implementation of the revised resolution plan (including a timeline for the execution of such planned changes); and

(3) Why the covered company believes that the revised resolution plan is credible and would result in an orderly resolution of the covered company under the Bankruptcy Code.

(d) *Extensions of time.* Upon their own initiative or a written request by a covered company, the Board and Corporation may jointly extend any time period under this section. Each extension request shall be supported by a written statement of the covered company describing the basis and justification for the request.

§ ____.6 Failure to cure deficiencies on resubmission of a resolution plan.

(a) *In general.* The Board and Corporation may jointly determine that a covered company or any subsidiary of a covered company shall be subject to more stringent capital, leverage, or liquidity requirements, or restrictions on the growth, activities, or operations of the covered company or the subsidiary if:

(1) The covered company fails to submit a revised resolution plan under § ____.5(c) within the required time period; or

(2) The Board and the Corporation jointly determine that a revised resolution plan submitted under § ____.5(c) does not adequately remedy the deficiencies jointly identified by the Board and the Corporation under § ____.5(b).

(b) *Duration of requirements or restrictions.*—Any requirements or restrictions imposed on a covered company or a subsidiary thereof pursuant to paragraph (a) of this section shall cease to apply to the covered company or subsidiary, respectively, on the date that the Board and the Corporation jointly determine the covered company has submitted a revised resolution plan that adequately remedies the deficiencies jointly identified by the Board and the Corporation under § ____.5(b).

(c) *Divestiture.* The Board and Corporation, in consultation with the Council, may jointly, by order, direct the covered company to divest such assets or operations as are jointly identified by the Board and Corporation if:

(1) The Board and Corporation have jointly determined that the covered company or a subsidiary thereof shall be subject to requirements or restrictions pursuant to paragraph (a) of this section; and

(2) The covered company has failed, within the 2-year period beginning on the date on which the determination to impose such requirements or restrictions under paragraph (a) of this section was made, to submit a revised resolution plan that adequately remedies the deficiencies jointly identified by the Board and the Corporation under § ____.5(b); and

(3) The Board and Corporation jointly determine that the divestiture of such assets or operations is necessary to facilitate an orderly resolution of the covered company under the Bankruptcy Code in the event the company was to fail.

§ ____.7 Consultation.

Prior to issuing any notice of deficiencies under § ____.5(b), determining to impose requirements or restrictions under § ____.6(a), or issuing a divestiture order pursuant to § ____.6(c) with respect to a covered company that is likely to have a significant impact on a functionally regulated subsidiary or a depository institution subsidiary of the covered company, the Board—

(a) Shall consult with each Council member that primarily supervises any such subsidiary; and

(b) May consult with any other Federal, state, or foreign supervisor as the Board considers appropriate.

§ ____.8 No limiting effect or private right of action; confidentiality of resolution plans.

(a) *No limiting effect on bankruptcy or other resolution proceedings.*—A resolution plan submitted pursuant to this part shall not have any binding effect on:

(1) A court or trustee in a proceeding commenced under the Bankruptcy Code;

(2) A receiver appointed under Title II of the Dodd-Frank Act (12 U.S.C. 5381 *et seq.*);

(3) A bridge financial company chartered pursuant to 12 U.S.C. 5390(h); or

(4) Any other authority that is authorized or required to resolve a covered company (including any subsidiary or affiliate thereof) under any other provision of Federal, state, or foreign law.

(b) *No private right of action.*— Nothing in this part creates or is intended to create a private right of action based on a resolution plan prepared or submitted under this part or based on any action taken by the Board or the Corporation with respect to any resolution plan submitted under this part.

(c) *Form of resolution plans.* Each resolution plan of a covered company shall be divided into a public section and a confidential section. Each covered company shall segregate and separately identify the public section from the confidential section. The public section shall consist of an executive summary of the resolution plan that describes the business of the covered company and includes, to the extent material to an understanding of the covered company:

(1) The names of material entities;

(2) A description of core business lines;

(3) Consolidated or segment financial information regarding assets, liabilities, capital and major funding sources;

(4) A description of derivative activities and hedging activities;

(5) A list of memberships in material payment, clearing and settlement systems;

(6) A description of foreign operations;

(7) The identities of material supervisory authorities;

(8) The identities of the principal officers;

(9) A description of the corporate governance structure and processes related to resolution planning;

(10) A description of material management information systems; and

(11) A description, at a high level, of the covered company's resolution strategy, covering such items as the range of potential purchasers of the covered company, its material entities and core business lines.

(d) *Confidential treatment of resolution plans.* (1) The confidentiality of resolution plans and related materials shall be determined in accordance with applicable exemptions under the Freedom of Information Act (5 U.S.C. 552(b)) and the Board's Rules Regarding Availability of Information (12 CFR part 261), and the Corporation's Disclosure of Information Rules (12 CFR part 309).

(2) Any covered company submitting a resolution plan or related materials pursuant to this part that desires confidential treatment of the information under 5 U.S.C. 552(b)(4), the Board's Rules Regarding Availability of Information (12 CFR part 261), and the Corporation's Disclosure of Information Rules (12 CFR part 309) may file a request for confidential treatment in accordance with those rules.

(3) To the extent permitted by law, information comprising the Confidential Section of a resolution plan will be treated as confidential.

(4) To the extent permitted by law, the submission of any nonpublic data or information under this part shall not constitute a waiver of, or otherwise affect, any privilege arising under Federal or state law (including the rules of any Federal or state court) to which the data or information is otherwise subject. Privileges that apply to resolution plans and related materials are protected pursuant to Section 18(x) of the FDI Act, 12 U.S.C. 1828(x).

§ ____.9 Enforcement.

The Board and Corporation may jointly enforce an order jointly issued by the Board and Corporation under § ____.6(a) or ____.6(c) of this part. The Board, in consultation with the Corporation, may take any action to address any violation of this part by a covered company under section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818).

[End of Common Text]

List of Subjects

12 CFR Part 243

Administrative practice and procedure, Banks, Banking, Federal Reserve System, Holding companies, Reporting and recordkeeping requirements, Securities.

12 CFR Part 381

Administrative practice and procedure, Banks, Banking, Holding companies, Reporting and recordkeeping requirements, Resolution plans and credit exposure reports.

Adoption of Common Rule

The adoption of the common rules by the agencies, as modified by agency-specific text, is set forth below:

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

12 CFR Chapter II

Authority and Issuance

For the reasons stated in the Supplementary Information, the Board of Governors of the Federal Reserve System adds the text of the common rule, as set forth at the end of the Supplementary Information, as Part 243 to Chapter II of Title 12, modified as follows:

PART 243—RESOLUTION PLANS (REGULATION QQ)

■ 1. The authority citation for part 243 reads as follows:

Authority: 12 U.S.C. 5365.

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Chapter III

Authority and Issuance

For the reasons set forth in the Supplementary Information, the Federal Deposit Insurance Corporation to adds the text of the common rule, as set forth at the end of the Supplementary Information, as Part 381 to Chapter III of Title 12, Code of Federal Regulations, modified as follows:

PART 381—RESOLUTION PLANS

■ 1. The authority citation for part 381 reads as follows:

Authority: 12 U.S.C. 5365(d).

By order of the Board of Governors of the Federal Reserve System, October 14, 2011.

Jennifer J. Johnson,

Secretary of the Board.

Dated at Washington, DC, this 13th day of September 2011.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2011–27377 Filed 10–31–11; 8:45 am]

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Annex B

Financial Stability Board Consultative Document, July 19, 2011

FSB FINANCIAL STABILITY BOARD

Consultative Document

Effective Resolution of Systemically Important Financial Institutions

Recommendations and Timelines

19 July 2011

19 July 2011

Effective Resolution of Systemically Important Financial Institutions

The Financial Stability Board (FSB) is seeking comments on its Consultative Document on Effective Resolution of Systemically Important Financial Institutions. This Consultative Document contains a comprehensive package of proposed policy measures to improve the capacity of authorities to resolve systemically important financial institutions (SIFIs) without systemic disruption and without exposing the taxpayer to the risk of loss, and a time line for their implementation. The Consultative Document consists of a cover note and eight closely interrelated annexes. Annexes 1-6 comprise proposed recommendations as set out below, while Annexes 7-8 comprise discussion notes reflecting preliminary FSB views:

Resolution powers and tools

1. **Key Attributes of Effective Resolution Regimes.** This sets out the powers and tools that all jurisdictions' regimes for resolution of financial institutions should have to be effective, including for resolution of cross-border SIFIs.
2. **Bail-in within Resolution.** This sets out proposed essential elements of a bail-in regime to enable creditor-financed recapitalisation of financial institutions.

Cross-border arrangements

3. **Institution-specific Cross-border Cooperation Agreements.** This sets out proposed minimum common elements of institution-specific cooperation agreements amongst relevant resolution authorities to facilitate resolution of a cross-border firm.

Planning for resolution

4. **Resolvability Assessments.** This sets out a proposed framework to be used for assessing the resolvability of a SIFI, taking into account the structure of the firm and the resolution regimes of the jurisdictions within which it operates, and which will inform Recovery and Resolution Plans.
5. **Recovery and Resolution Plans (RRPs).** This sets out a proposed framework and contents of RRPs, which will be mandatory for global SIFIs (G-SIFIs).

Removing obstacles to resolvability

6. **Measures to Improve Resolvability.** This seeks comment on actions to remove obstacles to resolution arising from complex firm structures and business practices, in particular obstacles that arise from fragmented information systems, intra-group transactions, reliance on service providers and global payment operations.

Discussion notes

To help inform its final recommendations, the FSB is also seeking comment on the two following notes for discussion. These two notes reflect the preliminary views of the FSB and are being published as part of the Consultative Document to facilitate public discussion of the issues:

7. **Creditor hierarchy, depositor preference and depositor protection in resolution.** This sets out the policy issues surrounding whether or not greater convergence across jurisdictions in the ranking of creditors' claims, in particular in the treatment of deposit claims, is desirable.

8. **Conditions for imposing temporary stays**. This note discusses the possible conditions under which a temporary suspension of contractual early termination rights should apply to support implementation of certain resolution tools.

The FSB invites comment on all above documents and the questions raised in the Consultative Document by Friday, 2 September 2011. Responses should be sent to the following e-mail address: fsb@bis.org. Responses will be published on the FSB's website unless respondents expressly request otherwise.

The FSB will revise the documents, including taking into account comments received, and will submit them, as part of its overall recommendations to address moral hazard posed by SIFIs, to the G20 Leaders Summit in Cannes on 3-4 November 2011.

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Overview

The disorderly collapse of Lehman Brothers in September 2008 provided a sharp and painful lesson of the costs to the financial system and the global economy of the absence of powers and tools for dealing with the failure of a SIFI. Lehman Brothers was the last SIFI allowed to fail during the last financial crisis. All other SIFIs at risk were supported by public capital injections, asset or liability guarantees, or exceptional liquidity measures undertaken by central banks. While this was necessary for economic and financial stability reasons, public bail-outs placed taxpayer funds at unacceptable risks and has increased moral hazard in a very significant way. A recent stock-take undertaken by the Basel Committee on Banking Supervision (BCBS) of progress in implementing its Recommendations on Cross-border Bank Resolution of March 2010 [1] shows that while some jurisdictions have enacted or are considering legislative changes, many jurisdictions continue to lack important resolution tools. The report underlines the need to accelerate reforms of domestic resolution regimes and tools and of frameworks for cross-border enforcement of resolution actions.

At their Summits in Pittsburgh, Toronto and Seoul, the G20 Leaders asked the FSB to set out more effective arrangements for resolution of SIFIs. The Annexes to this document set out the proposed policy recommendations, which are described in the following pages. They comprise four key building blocks:

- **Strengthened national resolution regimes** that give a designated resolution authority a broad range of powers and tools to resolve a financial institution that is no longer viable and there is no reasonable prospect of it becoming so.
- **Cross-border cooperation arrangements** in the form of bilateral or multilateral institution-specific cooperation agreements, underpinned by national law, that will enable resolution authorities to act collectively to resolve cross-border firms in a more orderly, less costly way.
- **Improved resolution planning by firms and authorities** based on *ex ante* resolvability assessments that should inform the preparation of RRPs and that may, if necessary, require changes to individual firm structures and business practices to make them more effectively resolvable.
- **Measures to remove obstacles to resolution** arising from fragmented information systems, intra-group transactions, reliance on service providers and the provision of global payment services.

Legislation or regulatory changes will be required in many jurisdictions to implement these recommended measures. Moreover, ensuring that financial institutions are resolvable under the current resolution regimes will require a reorientation of the supervision of SIFIs.

The FSB is also publishing two discussion notes for public comment on the pros and cons of greater convergence in creditors' hierarchy, depositor preference and depositor protection in

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1 Basel Committee on Banking Supervision, *Resolution policies and frameworks – progress so far*, July 2011, available at http://www.bis.org/publ/bcbs200.htm.

resolution and on the possible introduction of a brief stay on contractual early termination rights upon entry into resolution to support the implementation of resolution measures.

The measures to improve resolution regimes and tools set out in this consultative document represent a "bookend" to the FSB's policy framework[2] for addressing the systemic and moral hazard risks associated with SIFIs that are "too-big, too-complex and too-interconnected-to-fail". The other "bookend" of the FSB's policy framework is a requirement that global SIFIs (G-SIFIs) hold additional loss absorption capacity, as set out for banks in a separate consultative document from the BCBS released today. The framework also comprises requirements for more intensive and effective supervisory oversight of SIFIs, as set out in the FSB's November 2010 report[3], and improvements to financial market infrastructures (FMIs) both to strengthen their robustness and reduce counterparty exposures, so as to reduce systemic contagion from a SIFI failure[4].

Many countries entered this crisis without a proper resolution regime, and no country had a regime that could cope with failing SIFIs. Where effective resolution tools existed, these did not address the cross border dimension or obstacles stemming from within firms themselves. This meant that proper market discipline was not in place in the years preceding the crisis and made the handling of the crisis more difficult. The G20 called on the FSB to propose actions to address these challenges. These proposed policy recommendation are offered for public consultation ahead of finalising the recommendations for the G20 Leaders in November. Their effective implementation would entail changes in laws and regulation, supervisory practice and cross-border cooperation as well as within firms.

I. Proposed policy recommendations

Effective resolution regimes

A national resolution regime should provide the authorities with the tools to intervene safely and quickly to ensure the continued performance of the firm's systemically important functions. It should ensure prompt payout or transfer of insured deposits and prompt access to transactions accounts as well as to segregated client funds, wherever they are located. It should enable the transfer or sale of viable portions of the firm while apportioning losses, including to unsecured and uninsured creditors, in a manner that is fair and predictable and so avoids panic or destabilisation of financial markets.

Need for a special national resolution regime for financial institutions

Corporate liquidation procedures are not well suited to deal with the failure of major banks and other financial institutions. Such procedures freeze an institution's balance sheet,

2 *Reducing the moral hazard posed by systemically important financial institutions*, 20 October 2010, available at http://www.financialstabilityboard.org/publications/r_101111a.pdf.

3 *Intensity and effectiveness of SIFI supervision*, 2 November 2010, available at http://www.financialstabilityboard.org/publications/r_101101.pdf.

4 The Committee on Payment and Settlement Systems and the International Organization of Securities Commissions published in March 2011 a consultative report on *Principles for financial market infrastructures*, containing new and more demanding international standards for payment, clearing and settlement systems.

typically in multiple jurisdictions, preventing access to the funds needed to manage its positions and to the assets and funds to which counterparties have claims. This rapidly destroys the value of the SIFI's balance sheet assets, including from fire sales, the tying up of liquidity and multiple, prolonged legal proceedings. A resolution regime is therefore needed that is better tailored to the problems posed by the balance sheets and activities of major financial institutions than are corporate liquidation procedures.

An effective national resolution regime should provide a broad range of options to resolve a financial institution that is no longer viable. It needs a designated administrative authority with a statutory mandate to promote financial stability in the exercise of its resolution powers. This resolution authority should have the expertise, resources, capacity and operational independence consistent with their statutory responsibilities to exercise those powers, including for large and complex institutions such as SIFIs. And just as is the case for supervisors, the law should provide for legal protection against lawsuits for actions or omission made while discharging their duties in good faith.[5]

It should be able to act with the necessary speed. In those jurisdictions where a court order is required, it should consider any possible delay in its resolution planning process. If more than one authority has responsibilities in the domestic resolution process, their respective powers and cooperation mechanism should be clear, and a lead authority should be identified to coordinate the resolution process of a group with multiple entities in the jurisdiction.

Statutory financial stability objectives

A resolution authority should have the powers and tools to meet the following key objectives:

- to preserve those of the SIFI's operations that provide vital services to the financial system and the wider economy, which would cause system-wide damage if lost;
- to avoid unnecessary loss in value of financial assets and contagion (direct and indirect) to other parts of the financial system; and
- to ensure that losses are borne by those with whom the risks properly reside – first shareholders, and unsecured and uninsured creditors - rather than taxpayers.

A resolution regime needs to credibly be able to achieve these objectives if financial stability is to be protected and market discipline and incentives are to operate effectively. Any resolution involves the distribution of losses but these losses are generally much smaller under orderly resolution than under disorderly liquidation.

Resolution tools

Resolution tools to preserve the viability of a firm's systemically important functions basically fall into three types:

- sale of the entire firm (or at least of all its viable activities) as an ongoing business to a new owner;
- separation and eventual sale of functions that are systemically important or have franchise value as a separate operation while the residual parts of the firm are wound

[5] Basel Core Principle 1 (5).

down (or alternatively carving out and transferring the bad assets to a separate asset management vehicle);

- recapitalisation of the firm by restructuring its liabilities.

Resolving a firm in a sustainable way is likely to take time, particularly given the complexities of the businesses of SIFIs. An interim solution, such as a 'bridge bank' (or a 'bridge company' more generally for non-banks)[6], may therefore be needed to maintain systemically important operations, including the funding for them, while a more permanent resolution is being sought. Meanwhile, the bad assets in the financial institution's balance sheet will need to be run down, while avoiding a destructive fire sale.

Any mechanism for addressing a firm's assets and the associated allocation of losses while it is resolved will need to:

- allow authorities to take control of the firm within resolution, replacing management and directors if necessary;
- facilitate the continuity of essential financial functions by allowing for their transfer of the underlying financial contracts that support them to a sound third party or a bridge company;
- give the resolution authority all powers necessary to operate and resolve the firm, including powers to terminate contracts, continue or assign contracts, purchase or sell assets, and take other actions necessary to restructure or wind down the firm's operations; and
- respect the hierarchy of claims that would apply in a liquidation, and ensure that no creditors are worse off than they would be in liquidation, so as to preserve creditors' legal rights.

Legal capacity to enable cross-border coordination of resolution

Cross-border resolution is impeded by major differences in national resolution regimes, absence of mutual recognition to give effect to resolution measures across borders, and lack of planning for handling stress and resolution. The complexity and integrated nature of many firms' group structures and operations, with multiple legal entities spanning national borders and business lines, make rapid and orderly resolutions of these institutions under current regimes virtually impossible. Legislative changes are likely to be needed in many jurisdictions to ensure that resolution authorities have resolution powers with regard to all financial institutions operating in their jurisdictions, including the local branch operations of foreign institutions. Cross-border cooperation and effective pre-planning of resolution will be difficult if not impossible if the authority over failed institutions, including foreign bank branches, resides with the courts. As part of its statutory objectives, the resolution authority should duly consider the potential impact of its resolution actions on financial stability in other jurisdictions. It should have the legal capacity to cooperate and coordinate effectively with foreign resolution authorities, to exchange information in normal times and in crisis, and to draw up and implement RRPs and cooperation agreements on an institution-specific basis.

6 'Bridge bank' or 'bridge company" is a term used for a temporary institution that is established to take over and continue certain critical and viable operations of a failed firm during the resolution process.

An international standard for effective resolution regimes

The ***Key Attributes of Effective Resolution Regimes*** are intended to address these failings. They set out the features that all resolution regimes should have in order adequately to mitigate the disruption from the failure of a financial institution and reduce moral hazard. These include the features necessary for cross-border cooperation and the requirements to improve authorities' and firms' readiness for resolution.

In the FSB's view, in order to raise the effectiveness of resolution around the world in a consistent way, the ***Key Attributes*** should form an international standard. This will entail that jurisdictions' implementation of the ***Key Attributes*** standard will be subject to assessments under the IMF/WB Financial Sector Assessment Program. Any further sector-specific operational guidance by individual standard-setting bodies should be consistent with this overall framework.

Scope of application

The objectives set out in the Preamble of the ***Key Attributes***, as well as many of the attributes themselves, apply to financial institutions of all sizes that could be systemically significant or critical in particular circumstances; any ailing financial institution that can cause contagion and disruptive effects on financial markets therefore should be subject to the type of resolution regime set out here. Yet, the crisis response needs to be tailored to the specific nature of the firm's activities and to sectoral differences. It is important that resolution regimes provide a wide range of tools and the flexibility to apply them on a case-by-case basis to achieve an effective resolution. Not all resolution powers set out in the ***Key Attributes*** are suitable for all sectors and all circumstances. For example, to the extent that insurers conduct activities which are bank-like, the application of banking sector resolution tools to such activities rather than to the insurer as a whole or to its core traditional insurance business may be appropriate. The FSB will be working with the CPSS, IAIS, and IOSCO to develop sector-specific guidance for the application of its framework to non-bank SIFIs, including insurance companies, financial infrastructures and other financial institutions.

Questions for public consultation

1. *Comment is invited on whether* ***Annex 1: Key Attributes of Effective Resolution Regimes*** *appropriately covers the attributes that all jurisdictions' resolution regimes and the tools available under those regimes should have.*
2. *Is the overarching framework provided by* ***Annex 1: Key Attributes of Effective Resolution*** *specific enough, yet flexible enough to cover the differing circumstances of different types of jurisdictions and financial institutions?*

Bail-in powers

The paper on ***Bail-in within Resolution*** sets out the essential elements of statutory powers within a special resolution procedure and possible contractual provisions to achieve a creditor-financed recapitalisation of systemically vital functions of an ailing financial institution. Such powers enable the resolution authority to write-down or convert into equity

unsecured and uninsured claims, with a view to maintaining continuity of systemically vital functions, by either recapitalising the entity providing these functions, or, alternatively, capitalising a newly established entity or bridge institution to which these vital functions have been transferred following closure of the residual firm. Resolution authorities should have bail-in powers within resolution to implement at least one of the above mechanisms.

The existence of statutory bail-in within resolution tools does not prevent firms from issuing instruments that write-off or convert contractually, nor do they prevent national authorities from requiring them. It may create incentives for firm to issue such contractual instruments which might reinforce the capacity of firms to recover from distress without going into resolution. Where, at the point of entry into resolution, an institution has contractual instruments with write-off or conversion features outstanding, a contractual instrument that had not been previously written-off or converted will be written-off or converted according to the contractual terms and conditions of the instrument upon entry into resolution but before the application of bail-in within resolution or other powers by the resolution authority. A contractual instrument that, prior to entry into resolution, has already been written-off or converted upon activation of a contractual trigger would be subject to a subsequent application of bail-in powers upon entry into resolution.

The objective of bail-in is to reduce the loss of value and the economic disruption associated with insolvency proceedings for financial institutions, yet ensure that the costs of resolution are borne by the financial institutions' shareholders and unsecured creditors.

The FSB proposes that authorities put in place statutory bail-in powers within their resolution regimes as a complement to other resolution tools. Bail-in powers could be activated alone but most likely would be used in combination with other resolution tools. The capacity to bail-in creditors would enhance resolution options and foster market discipline by countering the expectation that public funds will be used to support failing financial institutions. Resolution authorities should have the statutory power, but not the obligation, to apply a bail-in within resolution.

The legislation giving the resolution authority statutory bail-in powers should provide clarity and certainty as regards the authority triggering entry into resolution; the process and the threshold conditions under which bail-in, and other resolution tools, could be used; the relevant consequences for capital providers and creditors; and the scope of liabilities covered by the bail-in powers. It is desirable that divergence is limited across countries.

In acting quickly and seeking to ensure sufficient resources for either restoration to viability, or orderly resolution, authorities may impose haircuts or write-downs that turn out to be greater than needed. To address these situations, authorities therefore should have in place mechanisms for compensating the holders of bailed-in claims, or written-off equity when the amount of actual losses is finally determined, e.g., by the issuance of warrants.

As a general principle, bail-in within resolution should be initiated by the home authority with respect to debt issued by the parent firm in resolution (and/or subsidiaries in resolution in the jurisdiction of the parent). Where subsidiaries issue bail-in instruments, host authorities should be able to exercise bail-in at the subsidiary level. Recognizing that the exercise of bail-in powers could result in a change of the ownership structure, host authorities should consult with the home authorities and, to the extent possible, in the CMG, and satisfy themselves that the subsidiary is not viable, that support from the group is not available and that no alternative

group-wide solution would achieve a more favourable outcome from a domestic and cross-border financial stability perspective.

Authorities should regularly monitor whether firms' balance sheets contain a sufficient quantum of liabilities covered by bail-in powers within resolution to facilitate orderly resolution.

Questions for public consultation

3. *Are the elements identified in* ***Annex 2: Bail-in within Resolution: Elements for inclusion in the Key Attributes*** *sufficiently specific to ensure that a bail-in regime is comprehensive, transparent and effective, while sufficiently general to be adaptable to the specific needs and legal frameworks of different jurisdictions?*
4. *Is it desirable that the scope of liabilities covered by statutory bail-in powers is as broad as possible, and that this scope is largely similarly defined across countries?*
5. *What classes of debt or liabilities should be within the scope of statutory bail-in powers?*
6. *What classes of debt or liabilities should be outside the scope of statutory bail-in powers?*
7. *Will it be necessary that authorities monitor whether firms' balance sheet contain at all times a sufficient amount of liabilities covered by bail-in powers and that, if that is not the case, they consider requiring minimum level of bail-in debt ? If so, how should the minimum amount be calibrated and what form should such a requirement take, e.g.,:*

   (i) a certain percentage of risk-weighted assets in bail-inable liabilities, or

   (ii) a limit on the degree of asset encumbrance (e.g., through use as collateral)?
8. *What consequences for banks' funding and credit supply to the economy would you expect from the introduction of any such required minimum amount of bail-inable liabilities?*

Cross-border cooperation

The recent crisis was made considerably worse by obstacles to the ability of home and host authorities to cooperate in the resolution of SIFIs. Some of these obstacles are legal barriers, and a legally binding international treaty would be a comprehensive means of addressing this for the global good. Although an internationally agreed model law exists that addresses cross-border cooperation in corporate insolvencies[7], there is no immediate prospect of an equivalently formal multilateral agreement addressing the set of issues raised in the resolution of financial institutions. In its absence, bilateral or multilateral cooperation agreements are

7 The United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency, available at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html.

needed, setting out how those jurisdictions most affected will cooperate over the resolution of individual firms, both in the planning phase and during a crisis itself.

Lack of adequate tools for cross-border resolution

Resolution regimes and tools need to be able to cope with the international reach of SIFIs' operations, and of their assets and liabilities, and to set out how resolution authorities in home and host jurisdictions interact with each other. Resolution measures in a home jurisdiction, such as for instance the transfer of assets or liabilities to a bridge bank, will not have automatic effect in host jurisdictions unless there is an internationally binding arrangement to this effect. Although there are some existing legal mechanisms under which foreign jurisdictions might give effect to transfers to a bridge bank or to a private sector purchaser, most of these involve court proceedings that may not be sufficiently predictable or timely to contribute to effective resolution. They often rely on doctrines applicable to insolvencies generally, do not adequately take into account considerations of financial stability, and may not provide authorities with the necessary powers to implement the transfer unless the consent of the relevant counterparties is obtained.

The cross-border effectiveness of resolution measures would be improved if both home and host authorities had the requisite powers and regimes, applying not only to domestically-incorporated banks but to domestic branches of foreign banks, and to assets, liabilities and contracts of foreign banks located within a jurisdiction. These should empower authorities to cooperate in the application of a range of special resolution tools to local operations, including the power to transfer assets, liabilities and contracts of the bank to a foreign bridge bank or private sector purchaser without the consent of the counterparties.

Statutory mandates to foster cross-border cooperation

Cooperation and trust among resolution authorities should be built up. The mandates of resolution authorities should be framed so that they have to duly consider the potential impact of their resolution actions on financial stability in other jurisdictions. In applying resolution powers to individual components of a financial group, the resolution authority should have to take into account the overall impact on the group as a whole and the impact on financial stability in other jurisdictions concerned and undertake best efforts to avoid taking actions that could reasonably be expected to trigger instability elsewhere in the group or in the financial system.

There should be a strong encouragement of cross-border cooperation supported by robust abilities to cooperate. However, the statutory framework for cross-border cooperation would not be so prescriptive as to deprive jurisdictions of the flexibility to act when necessary to achieve domestic stability in the absence of effective cross-border cooperation and information sharing,[8] or in the event of inaction or inappropriate action by the home authority.

Provisions that hamper fair cross-border resolution need to be removed. More specifically, jurisdictions should ensure that no legal, regulatory or policy impediments exist that hinder the appropriate exchange of information, including firm-specific information, between

8 This should not apply where jurisdictions are subject to a binding obligation to respect resolution of financial institutions under the authority of the home jurisdiction (e.g., the EU Winding up and Reorganisation Directives).

supervisory authorities, central banks, resolution authorities, finance ministries and the public authorities responsible for insurance guarantee schemes.

The sharing of all information relevant for recovery and resolution planning and in resolution should be possible in normal times and in crisis at a domestic and a cross-border level. The modalities for the sharing of information relating to a G-SIFI should be set out in institution-specific cooperation agreements. They should, in particular, provide for holding at least annual meetings including top officials of the home and relevant host authorities to ensure that they are effectively involved in and informed of status of the work on recovery and resolution plans and that they provide the needed leadership to the process. Where appropriate and necessary to respect the sensitive nature of information, information sharing may be restricted, but should be possible among the top officials of the relevant home and host authorities.

National laws and regulations should not discriminate against creditors based on nationality or location of their claim, or the jurisdiction where it is payable. Where any such provisions exist, they should be transparent and properly disclosed.

Institution-specific cooperation agreements

Home and host authorities need to consult and cooperate on actions that may affect each other's jurisdiction. A policy framework for cross-border cooperation between resolution authorities is needed to enable advance planning and to avoid dealing with cross-border issues through the courts. In the near term, it may be easiest and most flexible for authorities to reach cross-border cooperation agreements on resolution on an institution-specific basis. The FSB report on *Reducing the moral hazard posed by systemically important financial institutions* endorsed by the G20 in November 2010 (SIFI Recommendations) called for institution-specific cooperation agreements for all G-SIFIs.

The document on ***Essential elements of institution-specific cooperation agreements*** proposes essential elements that such agreements between home and host authorities should have, covering both crisis planning and actions during resolution, with an emphasis on the latter. Cooperation agreements should build upon the principles the Financial Stability Forum set out in April 2009.[9] The agreements should cover institution-specific crisis management planning and cooperation amongst relevant authorities in the event of the institution's resolution. The agreements should contain provisions that authorities wished had been in place to facilitate cooperation with respect to failing firms during the most recent crisis. They should provide an appropriate level of detail with regard to the cooperation procedures in place both in the "pre-crisis" (i.e. recovery and resolution planning) phase as well as "in crisis". To do so they will need to be firm-specific and also lay out how national legal regimes interact. They should also set out the framework under which the home and key host authorities cooperate in the elaboration of RRPs and the conduct of resolvability assessments.

Firm-specific agreements are needed among all members of a firm's Crisis Management Group (CMG), which should include the home and all key host jurisdictions. Bi-national agreements between authorities of the home and a host jurisdiction, and firm-specific

9 FSF Principles for Cross-Border Cooperation on Crisis Management, 2 April 2009, available at http://www.financialstabilityboard.org/publications/r_0904c.pdf

multinational agreements among authorities of the home and all key host jurisdictions may complement each other.

> ***Questions for public consultation***
>
> 9. *How should a statutory duty to cooperate with home and host authorities be framed? What criteria should be relevant to the duty to cooperate?*
> 10. *Does* **Annex 3: Institution-specific Cross-border Cooperation Agreements** *cover all the critical elements of institution-specific cross-border agreements and, if implemented, will the proposed agreements be sufficiently reliable to ensure effective cross-border cooperation? How can their effectiveness be enhanced?*
> 11. *Who (i.e., which authorities) will need to be parties to these agreements for them to be most effective?*

Resolvability assessments

At present, few if any SIFIs could be effectively resolved in an orderly and speedy fashion, given the existing powers available to authorities, the lack of legal capacity for national authorities to cooperate, and the complex structures and activities of the firms. To identify the changes needed to regimes, legal powers and individual firms, resolvability assessments need to be made at the level of each individual SIFI. ***Annex 4: Resolvability Assessments*** proposes in detail the process and elements of such an assessment. Authorities need to make a candid assessment of the current resolvability of SIFIs, and the obstacles that exist, in order to determine what changes authorities and firms need to make. A separate assessment is needed for each individual SIFI, as firms differ greatly in their corporate structure and mix of activities, and each presents its own technical complexities to be addressed in the event of crisis.

Annex 4 also defines a framework for assessing the feasibility of existing resolution tools and regimes and the credibility of resolution strategies in the light of the systemic impact of their application to a SIFI. These assessments will help focus authorities and firms on the implications of the current status quo, and the steps that need to be taken, by firms, by national regimes and globally, to reduce the current systemic threat from the lack of adequate resolution procedures.

> ***Questions for public consultation***
>
> 12. *Does* **Annex 4*: Resolvability*** **Assessments** *appropriately cover the determinants of a firm's resolvability? Are there any additional factors to be considered in determining the resolvability of a firm?*
> 13. *Does* **Annex 4** *identify the appropriate process to be followed by home and host authorities?*

Recovery and resolution plans

During the recent crisis, efforts to cope with the failure of Lehman Brothers were greatly complicated by a lack of preparation. Basic information was missing about organisational structures and relationships between subsidiaries. This made it difficult to act quickly, to anticipate the effects of different actions in different jurisdictions, and to resolve conflicts between subsidiaries and jurisdictions. Much economic value was lost as a result. When a firm falls into distress, the authorities and the firm need detailed contingency plans to implement rapid, well-planned measures to ensure that the firm can continue to perform critical functions, or wind them down if necessary, without spillovers that damage the wider system. An adequate, credible RRP should be required for any firm which is assessed by its home authority to have a potential impact on financial stability, in the event of liquidation of that firm. The SIFI Recommendations call for RRPs to be put in place for all G-SIFIs.

Authorities and SIFIs are currently working together to create RRPs for each firm. RRPs should set out in advance the measures, in the event of a crisis, that a firm could take to recover as a going concern or else that the authorities could take to resolve it in an orderly way. RRPs and resolvability assessment complement each other: RRPs should use as a base the conclusions of the resolvability assessments discussed above; indeed, an important benefit of the process of developing a plan is to identify actions that firms need to take to make themselves resolvable.

RRPs of G-SIFIs will be reviewed, subject to adequate confidentiality agreements, within the institution's CMG at least annually. To ensure the involvement of the key decision makers and keep them informed, the adequacy of RRPs of G-SIFIs should also be the subject of a formal review, at least on annual basis, by top officials of home and relevant host supervisory and resolution authorities, where appropriate, with the firm's CEO.

Questions for public consultation

14. *Does* ***Annex 5: Recovery and Resolution Plans*** *cover all critical elements of a recovery and resolution plan? What additional elements should be included? Are there elements that should not be included?*
15. *Does* ***Annex 5*** *appropriately cover the conditions under which RRPs should be prepared at subsidiary level?*

Improving resolvability

Complex organisational structures and business models, with economic functions and business lines spanning multiple legal entities with a web of intra-group exposures, make resolution more difficult. The FSB has focused in detail on some particular areas arising from the complexities of SIFIs' operations that can create practical obstacles to resolution:

- the need for *information systems* that can provide rapid, comprehensive data on the position of each of the firm's legal entities when a crisis hits;

- *the reliance on service providers*, which may help firms capitalise on economies of scale and increase efficiency in normal times, but may pose obstacles to effective resolution and threaten the continued performance of *systemically important operations*;
- *intra-group transactions*, which may be a source of strength for a firm in normal times but can impede actions to deal separately with individual business units of a group during a crisis; and
- challenges in recovery and resolution of the essential services that a firm's *global payment operations* provide to customers.

Proposals to help address these issues, including for the powers of supervisory and resolution authorities to require firms to reduce unnecessary organisational complexities and intra-group exposures, are included in ***Annex 6: Measures to improve resolvability.***

Questions for public consultation

16. *Are there other major potential business obstacles to effective resolution that need to be addressed that are not covered in **Annex 6**?*
17. *Are the proposed steps to address the obstacles to effective resolution appropriate? What other alternative actions could be taken?*
18. *What are the alternatives to existing guarantee / internal risk-transfer structures?*
19. *How should the proposals set out in **Annex 6**in these areas best be incorporated within the overall policy framework? What would be required to put those in place?*

Timelines for implementation of G-SIFI related recommendations

The gap between the arrangements necessary for effective resolution of firms and the arrangements that are currently in place is wide. The proposals in this paper need much detailed follow-up work, including on planning for individual firms and on bilateral and multilateral cooperation between authorities. Authorities need to be accountable to each other and to the public for taking the steps needed to achieve the objectives of the proposals.

The SIFI Recommendations call for RRPs and firm-specific cooperation agreements to be put in place for all G-SIFIs. In this respect, the time line and key milestones that authorities should work towards in their immediate tasks of developing RRPs and conducting resolvability assessments for G-SIFIs; and enhancing cross-border cooperation among home and key host authorities of G-SIFIs are set out below.

Cross-border Cooperation Agreements

- Before the end of 2011, home authorities of G-SIFIs should have begun engaging with key host authorities as regards institution-specific cooperation agreements.
- By June 2012, the modalities for information sharing within the CMGs and the first drafts of the cooperation agreements should be completed.

- By December 2012, home authorities of G-SIFIs should have entered into cooperation agreements with the key host authorities.

Recovery and Resolution Plans

- By December 2011, the first drafts of the recovery plans should be completed.
- By June 2012, the first drafts of the resolution plans should be completed.
- By December 2012, both the recovery plans and the resolution plans should be completed.

Resolvability Assessments

- By June 2012, home authorities of G-SIFIs should have entered into discussions with firms and members of their respective CMGs as regards the preliminary assessment of the firms' resolvability.
- By December 2012, the first resolvability assessments should be completed.

CMG Outreach

- By June 2012, CMGs should have identified the jurisdictions where the respective firms have a systemically important presence, but are not represented in the CMGs.
- By December 2012, the modalities for cooperation and information sharing between the home authorities and the host authorities of jurisdictions not represented in the CMG where the G-SIFIs have a systemically important presence, should be established.

Questions for public consultation

20. Comment is invited on the proposed milestones for G-SIFIs.

II. Discussion notes

The FSB is exploring the policy issues surrounding two specific additional measures to strengthen effective resolution. In particular, the FSB is assessing the pros and cons of greater convergence in creditors' hierarchy, depositor preference and depositor protection in resolution and of the possible introduction of a brief stay on contractual early termination rights upon entry into resolution in order to facilitate the implementation of resolution measures.

1. Discussion note on creditor hierarchy, depositor preference and depositor protection in resolution (Annex 7)

An important feature of effective resolution regimes is to "*make it possible for shareholders and unsecured and uninsured creditors to absorb losses in their order of seniority.*" [10] This should be achieved in an equitable manner and in a manner that keeps the risk of contagion to a minimum and obviates the need for bail-outs. Clarity and predictability as regards the order of seniority or statutory ranking of claims in insolvency is a necessary prerequisite for effective resolution. It determines the allocation of losses. It shapes the incentives of market participants and pricing of risk. It affects the ease with which certain resolution measures can be applied. Differences in ranking can complicate cross-border resolutions.

Effective protection of local depositors and assurance of financial stability will be crucial considerations in the determination by the host authorities of whether to cooperate. The FSB is seeking public comment on the issue of whether or not existing differences in statutory credit ranking represent an impediment to effective cross-border resolution and greater convergence in particular in, the treatment of deposit claims, could be pursued further at the international level.

Questions for public consultation

21. *Does the existence of differences in statutory creditor rankings impede effective cross-border resolutions? If so, which differences, in particular, impede effective cross-border resolutions?*

22. *Is a greater convergence of the statutory ranking of creditors across jurisdictions desirable and feasible? Should convergence be in the direction of depositor preference or should it be in the direction of an elimination of preferences? Is a harmonised definition of deposits and insured deposits desirable and feasible?*

23. *Is there a risk of arbitrage in giving a preference to all depositors or should a possible preference be restricted to certain categories of depositors, e.g., retail deposits? What should be the treatment of (a) deposits from large corporates; (b) deposits from other financial firms, including banks, assets managers and hedge banks, insurers and pension funds; (c) the (subrogated) claims of the deposit guarantee schemes*

10 See recommendation 12 of the SIFI recommendations.

(especially in jurisdictions where these schemes are financed by the banking industry)?

24. *What are the costs and benefits that emerge from the depositor preference? Do the benefits outweigh the costs? Or are risks and costs greater?*
25. *What other measures could be contemplated to mitigate the impediments to effective cross-border resolution if such impediments arise from differences in ranking across jurisdictions? How could the transparency and predictability of the treatment of creditor claims in a cross-border context be improved?*

2. Discussion note on conditions for a temporary stay on early termination rights (Annex 8)

Under standard market documentation for financial contracts, contractual acceleration, termination and other close-out rights (collectively, "early termination rights") in financial contracts may be triggered when the resolution authorities initiate resolution proceedings or take certain related resolution actions with respect to a financial institution. In the case of a SIFI, the termination of large volumes of financial contracts upon entry into resolution could result in a disorderly rush for the exits and frustrate the implementation of resolution measures, such as the transfer of critical operations to a bridge bank, or the implementation of bail-in within resolution, which are aimed at achieving continuity of critical financial functions and of the financial contracts that support them. The FSB is seeking public comments on the introduction of a possible statutory provision that would allow for a brief suspension of early termination rights pending the use of resolution tools, as well as the length and scope of such a stay, possible exemptions and its cross-border application.

Questions for public consultation

26. *Please give your views on the suggested stay on early termination rights. What could be the potential adverse outcomes on the failing firm and its counterparties of such a short stay? What measures could be implemented to mitigate these adverse outcomes? How is this affected by the length of the stay?*
27. *What specific event would be an appropriate starting point for the period of suspension? Should the stay apply automatically upon entry into resolution? Or should resolution authorities have the discretionary right to impose a stay?*
28. *What specific provisions in financial contracts should the suspension apply to? Are there any early terminations rights that the suspension should not apply to?*
29. *What should be an appropriate period of time during which the authorities could delay the immediate operation of contractual early termination rights?*
30. *What should be the scope of the temporary stay? Should it apply to all counterparties or should certain counterparties, e.g., Central Counterparties (CCPs) and FMIs, be exempted?*

31. *Do you agree with the proposed conditions for a stay on early termination rights? What additional safeguards or assurances would be necessary, if any?*
32. *With respect to the cross-border issues for the stay and transfer, what are the most appropriate mechanisms for ensuring cross-border effectiveness?*
33. *In relation to the contractual approach to cross-border issues, are there additional or alternative considerations other than those described above that should be covered by the contractual provision in order to ensure its effectiveness?*
34. *Where there is no physical presence of a financial institution in question in a jurisdiction but there are contracts that are subject to the law of that jurisdiction as the governing law, what kind of mechanism could be considered to give effect to the stay?*

Annex 1

Key attributes of effective resolution regimes for financial institutions

At Seoul in November 2010, the G20 Leaders asked the FSB to set out *Key Attributes of Effective Resolution Regimes*, comprising frameworks and tools for the effective resolution of financial groups to help mitigate the systemic disruption of financial institution failures and reduce moral hazard.

The following *Key Attributes* set out the essential features that should be part of the resolution regimes of all jurisdictions. In many cases, legislation will be needed to put these features in place. Not all resolution powers set out in the *Key Attributes* are suitable for all sectors and all circumstances. Further sector-specific guidance would be provided as necessary for the application of this framework to insurance companies, financial market infrastructures (FMIs) and other financial institutions, including non-bank systemically important financial institutions (SIFIs).

Preamble

The objective of an effective resolution regime is to make feasible the resolution of any financial institution without severe systemic disruption and without exposing taxpayers to loss while protecting vital economic functions through mechanisms which make it possible for shareholders and unsecured and uninsured creditors to absorb losses in their order of seniority.

An effective resolution regime should:

- ensure continuity of systemically critical financial services and functions;
- protect insured depositors and insurance policy holders and ensure the rapid return of segregated client assets;
- allocate losses on firm owners (shareholders) and unsecured and uninsured creditors in their order of seniority;
- not rely on public solvency support and not create an *ex ante* expectation that such support will be available;
- avoid unnecessary destruction of value, and therefore minimise the overall costs of resolution in home and host jurisdictions;
- provide for speed and transparency and as much predictability as possible through legal and procedural clarity and advanced planning for orderly resolution;
- provide a mandate in law for cooperation, information exchange and co-ordination domestically and among relevant foreign resolution authorities before and during a resolution;
- ensure that non-viable financial institutions can exit the market in an orderly way; and
- be credible and thereby provide incentives for market-based solutions.

Jurisdictions should have in place a special resolution regime that provides the resolution authority with a broad range of powers and options to resolve a financial institution that is no longer viable and there is no reasonable prospect of it becoming so. The resolution regime should include:

- stabilisation options, which achieve continuity of systemically important functions by way of a sale or transfer of the shares in the firm or all or parts of the firm's business to a third party, either directly or through a bridge institution, and/or an officially mandated creditor-financed recapitalisation of the entity that continues providing the critical functions; and
- liquidation options, which provide for the orderly closure and wind-down of all or parts of the firm's business in a manner that protects insured depositors, policy holders and other retail customers.

1. Scope

1.1 The resolution framework should apply to any financial institution that could be systemically significant or critical in particular circumstances. It should extend to:

- holding companies;
- significant non-regulated operational entities within a financial group or conglomerate; and
- branches of foreign financial institutions (see Section 8.4 below)

The resolution regime should be clear and transparent as to the institutions within its scope.

2. Resolution authority

2.1 Each jurisdiction should have a designated administrative authority responsible for exercising the resolution powers over financial institutions within the scope of the resolution regime ("resolution authority"). Where there are multiple resolution authorities within a jurisdiction their respective mandates, roles and responsibilities should be clearly defined and coordinated.

2.2 Where different resolution authorities are in charge of resolving entities of the same group within a single jurisdiction the resolution regime of that jurisdiction should identify a lead authority ("group resolution authority") that coordinates the resolution of the legal entities within that jurisdiction.

2.3 As part of the statutory objectives, the resolution authority should pursue financial stability and the protection of insured depositors, policy holders and other retail customers, and duly consider the potential impact of its resolution actions on financial stability in other jurisdictions.

2.4 The resolution authority should have the authority to enter into agreements with resolution authorities of other jurisdictions.

2.5 The resolution authority should have operational independence consistent with their statutory responsibilities, transparent processes, sound governance and adequate resources and be subject to rigorous evaluation and accountability mechanisms to assess the effectiveness of any resolution measures. It should have the expertise, resources and the operational capacity to implement resolution measures with respect to large and complex financial institutions.

2.6 The resolution authority and its staff should be protected against law suits for actions taken and/or omissions made while discharging their duties in the exercise of resolution powers in good faith, including actions in support of foreign resolution proceedings.

2.7 The resolution authority should have unimpeded access to firms as necessary for purposes of resolution planning, and the preparation and implementation of resolution measures.

3. Entry into resolution

3.1 The resolution regime should provide for timely and early entry into resolution before a financial institution is balance-sheet insolvent, with clear standards for suitable indicators or threshold conditions for entry into resolution. Resolution should be initiated when a firm is no longer viable or likely to be no longer viable and other measures have proved insufficient to prevent failure.

4. Resolution powers

4.1 Resolution authorities should have specific legal powers that apply as appropriate across the complex structures of SIFIs, and also the operational capacity to implement orderly resolutions. These include powers to:

(i) Remove and replace the senior management, remove directors, and recover monies from responsible parties;

(ii) Appoint an administrator and take control of the affected firm with powers to actively manage the firm;

(iii) Operate and resolve the firm, including powers to terminate contracts, continue or assign contracts, purchase or sell assets, write down debt and take other actions necessary to restructure or wind down the firm's operations;

(iv) In the case of insurance firms, require portfolio transfers to a protection fund; run-off insurance business; hold underlying assets for derivatives;

(v) Require other companies in the same group to continue to provide essential services to the entity being resolved; and procure necessary services from unaffiliated third parties;

(vi) Override rights of shareholders of the firm subject to resolution, including the requirement for approval by shareholders, in order to permit a merger, acquisitions, sale of substantial business operations, recapitalisation or other measures to restructure and dispose of the firm's business and/or its liabilities and assets;

(vii) Transfer or sell assets and liabilities, legal rights and obligations, including deposit liabilities and ownership in shares, to a solvent third party, notwithstanding any otherwise applicable consent or novation requirements;

(viii) Establish a temporary bridge institution to take over and continue operating certain critical functions and viable operations of a failed firm;

(ix) Establish a separate asset management vehicle in order to run down bad assets and transfer non-performing loans or difficult to value assets to the vehicle (that asset management vehicle can take the form of a subsidiary of the distressed firm, a separate bank complete with separate charter, or a trust or asset management company);

(x) Carry out bail-in within resolution by either recapitalising the entity hitherto providing systemically important functions that is no longer viable, or, alternatively, capitalising a newly established entity or bridge institution to which these vital functions have been transferred following closure of the residual firm, by way of a write-down or conversion of unsecured and uninsured debt of the firm in resolution (see Annex 2, *"Bail-in within resolution"*);

(xi) Effect the closure and orderly liquidation of the whole or part of a failing firm that is not viable, with payout or transfer of insured deposits and prompt (e.g., within seven days) access to transactions accounts as well as to segregated client funds;

(xii) Impose a moratorium and suspend, for a short period of time, payments to unsecured creditors and customers (except for payments to central counterparties and those entered into the payment systems) and stay creditor actions to attach assets or otherwise collect money or property from the failing firm; and

(xiii) Impose a brief (e.g., two business days) stay on the exercise of contractual early termination and acceleration rights for financial market contracts in order to complete a transfer of such contracts to a performing third party (i.e., private sector purchaser or bridge institution), subject to adequate safeguards (see Annex 8, "*Conditions for a temporary stay on early termination rights*").

4.2 Resolution authorities should have the power to apply one or a combination of resolution powers, with resolution actions being either combined or applied sequentially.

4.3 Resolution authorities should be able to apply different types of resolution powers to different parts of the firm's business (e.g., retail and commercial banking, trading operations, insurance) and be able to initiate a wind-down for those operations that, in the particular circumstances, are judged by the authorities to be not critical to the economy.

4.4 In applying resolution powers to individual components of a financial group located in its jurisdiction, the resolution authority should have to take into account the overall impact on the group as a whole and the impact on financial stability in other jurisdictions concerned and undertake best efforts to avoid taking actions that could reasonably be expected to trigger instability elsewhere in the group or in the financial system.

5. Netting, collateralisation and segregation

5.1 The legal framework governing netting and collateralisation and the segregation of client positions should be clear, transparent and enforceable during a crisis or resolution of financial institutions, and should not hamper the effective implementation of resolution measures.

6. Funding of firms in resolution

6.1 Jurisdictions should have statutory or other policies in place so that authorities are not constrained to rely on public ownership or bail-out funds as a means of resolving financial institutions.

6.2 Where temporary sources of funding to maintain essential functions are needed to accomplish orderly resolution, the resolution authority or authority extending the temporary funding should make provisions to recover any losses incurred from shareholders and unsecured creditors subject to minimum recovery rights or, if necessary, the financial system more widely.

6.3 Jurisdictions should have in place privately-financed deposit insurance or resolution funds or a funding mechanism for *ex post* recovery from the industry of the costs of providing bridge financing to facilitate the resolution of the firm.

6.4 Any provision of temporary funding should be subject to strict conditions that minimize moral hazard risk, and should include the following:

(i) A determination that the provision of temporary funding is necessary to foster financial stability and will permit implementation of a resolution option that is best able to achieve the objectives of an orderly resolution, and that private sources have been exhausted or cannot achieve these objectives; and

(ii) The allocation of losses to equity holders and residual costs, as appropriate, to

unsecured and uninsured creditors and the industry through ex-post assessments, insurance premium or other mechanisms.

6.5 Where resolution reconstitutes parts of a firm as a going concern, it may be eligible to have access to a central bank's liquidity facilities, at the discretion of the central bank.

6.6 As a last resort and for the overarching purpose of maintaining financial stability, some countries may decide to have a power to place the firm under temporary public ownership and control in order to continue critical operations, while seeking to arrange a permanent solution, such as a sale or merger with a commercial private sector purchaser. Where countries do equip themselves with such powers, they should make provision to recover any losses incurred by the state from unsecured creditors or, if necessary, the financial system more widely.

7. Speed, flexibility and adequate safeguards

7.1 Resolution authorities should have the ability to act in a coordinated manner and with the necessary speed, flexibility and legal certainty subject to adequate safeguards. Adequate safeguards include the assurance that creditors have a minimum recovery right or the right to compensation equal to what they would have received in an ordinary liquidation (bankruptcy) process.

7.2 Directors and officers of the firm in resolution should be protected in law (e.g., from suits by shareholders or creditors) for actions taken when complying with decisions of the resolution authority.

7.3 The resolution authority should have the capacity to exercise the resolution tools with the necessary speed. In those jurisdictions, where a court order is required to apply resolution measures, resolution authorities should take this into account in the resolution planning process so as to ensure that court proceedings will not affect the effective implementation of resolution actions.

7.4 Judicial review should be *ex post*, and not result in the reversal of measures taken by resolution authorities acting within their legal powers where doing so would affect financial stability and reduce value for creditors. Instead, redress may be provided by awarding compensation if justified.

7.5 In order to preserve market confidence, jurisdictions should provide for flexibility to allow temporary exemptions from disclosure requirements or a postponement of disclosures required, e.g., under market reporting; takeover provisions and listing rules etc. where the disclosure could affect the successful implementation of resolution measures.

8. Legal framework conditions for cross-border cooperation

8.1 In order to facilitate the coordinated resolution of financial institutions active in multiple countries, jurisdictions should seek convergence of their resolution regimes through the legislative changes needed to incorporate the tools and powers set out in these *Key Attributes* into their national regimes.

8.2 The statutory mandate of a resolution authority should empower and strongly encourage the authority wherever possible to act to achieve a cooperative solution with foreign resolution authorities.

8.3 National laws and regulations should not contain provisions that trigger automatic action in the domestic jurisdiction as a result of official intervention and/or the initiation of resolution or insolvency proceedings in another jurisdiction, while reserving the right of discretionary national action if necessary to achieve domestic stability in the absence of effective international cooperation and information sharing.

8.4 The resolution authority should have resolution powers over local branches of foreign financial institutions and the capacity to use their powers to either support a resolution carried out by a foreign home authority (e.g., by ordering a transfer of property to a bridge institution established by the foreign home authority) or, in exceptional cases, to take measures on their own initiative where the home jurisdiction is not taking action or acts in a manner that does not take sufficient account of the need to preserve the local jurisdiction's financial stability.[11]

8.5 National laws and regulations should not discriminate against creditors based on nationality or location of their claim, or the jurisdiction where it is payable. Where any such provisions exist, they should be transparent and properly disclosed.

8.6 Jurisdictions should provide for transparent and expedited processes to enable a foreign resolution authority to gain rapid control over assets (located in their jurisdiction) of a financial firm being resolved in the foreign jurisdiction, provided that doing so does not prejudice the local creditors and that they are treated equitably in the foreign resolution proceeding.

8.7 The resolution authority should have the capacity in law to share information, including Recovery and Resolution Plans (RRPs), pertaining to the group as a whole or to individual subsidiaries or branches, with foreign resolution authorities, where sharing is necessary for recovery and resolution planning or for implementing a coordinated resolution, subject to adequate confidentiality requirements and protections for sensitive data.

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11 This should not apply where jurisdictions are subject to a binding obligation to respect resolution of financial institutions under the authority of the home jurisdiction (e.g., the EU Winding up and Reorganisation Directives).

8.8 Jurisdictions should provide for confidentiality requirements and statutory safeguards for the protection of information received from foreign authorities.

9. Institution-specific cross-border cooperation agreements

9.1 For all global SIFIs (G-SIFIs), at a minimum, institution-specific cooperation agreements should be in place between the home and relevant host authorities that need to be involved in the pre-planning and crisis resolution stages. These agreements should, inter alia, :

(i) establish the objectives and processes for cooperation through Crisis Management Groups (CMGs);

(ii) define the roles and responsibilities of the authorities pre-crisis (i.e., in the recovery and resolution planning phases) and in a crisis;

(iii) set out the legal bases in the respective national laws and the process for information sharing pre-crisis and in crisis, including sharing with any host authorities that are not represented in the CMG;

(iv) set out the processes for coordination in the elaboration of the RRPs for the firm, including parent or holding company and significant subsidiaries, branches and affiliates that are within the scope of the agreement and engagement with the firm as part of this process;

(v) set out the processes for coordination in the conduct of resolvability assessments;

(vi) include agreed modalities for the home authority to inform and consult host authorities in a timely manner when there are material adverse developments affecting the firm and before taking any significant action or crisis measures;

(vii) provide an appropriate level of detail with regard to the cross-border implementation of specific resolution measures; and

(viii) provide for holding at least annual meetings including top officials of the home and relevant host authorities to assess the robustness of the G-SIFIs' RRPs (see Annex 5, "*Recovery and Resolution Plans*").

9.2 The agreements, at least their broad structure, should be made public.

10. Cross-border Crisis Management Groups

10.1 Home and key host authorities of all G-SIFIs should form CMGs with the objective to enhance preparedness for and facilitate the management and resolution of a cross-border financial crisis affecting the firm in line with *the FSF Principles on cross-border crisis management of April 2009*. CMGs should comprise the supervisory authorities, central banks, resolution authorities, finance ministries and the public authorities responsible for insurance guarantee schemes of jurisdictions that are home or host to entities of the group that are material to its resolution, and should

cooperate closely with authorities in other jurisdictions where firms have a systemic presence.

10.2 CMGs should keep under active review, and report to the FSB on, the adequacy of institution-specific cross-border cooperation agreements for G-SIFIs and the recovery and resolution planning process under these agreements (see Annex 3, "*Essential Elements of institution-specific cross-border cooperation agreements*").

11. Recovery and resolution planning

11.1 Jurisdictions should put in place an ongoing recovery and resolution planning process, covering at a minimum the locally-incorporated financial institutions, to promote the resolvability of financial institutions as part of the overall supervisory process.

11.2 Jurisdictions should require that robust and credible RRPs, containing all elements set out in the paper on *Recovery and Resolution Plans* are in place for all G-SIFIs and for any other firm assessed by its home authority to have a potential impact on financial stability in the event of liquidation of that firm. The RRP should take account of the specific circumstances of the firm and reflect the nature, complexity, interconnectedness, level of substitutability and size of the financial institution. For G-SIFIs, the RRP should be informed by an assessment of the financial institution's resolvability (see Annex 4, *"Resolvability Assessment"*).

11.3 Supervisory and resolution authorities should ensure that the firms subject to a RRP requirement maintain a recovery plan that identifies options to recover financial strength and viability when a firm comes under severe stress. Recovery plans should include:

(i) credible options to cope with a range of scenarios including both idiosyncratic and market wide stress;

(ii) scenarios that address capital shortfalls and liquidity pressures; and

(iii) processes to ensure timely implementation of recovery options in a range of stress situations.

11.4 The resolution plan is intended to facilitate the effective use of the resolution authority's resolution powers with the aim to make the resolution of any financial institution feasible without severe systemic disruption and without exposing taxpayers to loss while protecting systemically important functions. It should, in particular, identify:

(i) financial and economic functions for which continuity is critical;

(ii) suitable resolution options to preserve them or wind them down in an orderly manner;

(iii) data requirements on the firm's business operations, structures, and

systemically important functions;

(iv) potential barriers to effective resolution and actions to mitigate these; and

(v) actions to protect insured depositors and insurance policy holders and ensure the rapid return of segregated client assets.

11.5 Firms should be required to ensure that key Service Level Agreements (SLAs) can be maintained in crisis situations and in resolution and that the underlying contracts include provisions that prevent termination triggered by recovery or resolution events and facilitate transferability to a bridge-institution or a third party acquirer.

11.6 For G-SIFIs, the home resolution authority should lead the development of the group resolution plan in coordination with all members of the financial institution's CMG. Where they deem the group resolution plan insufficient, or otherwise with the agreement of the home authority, host resolution authorities may maintain their own, detailed resolution plans for parts of the firm that are active in their jurisdictions.

11.7 Supervisory and resolution authorities should be satisfied that senior management has taken responsibility for the preparation of the recovery and relevant components of the resolution plan.

11.8 Supervisory and resolution authorities should ensure that RRPs are updated regularly, at least annually or when there are material changes to a firm's business and/or structure, and subject to regular stress-tests and reviews within the financial institution's CMG, subject to adequate confidentiality agreements.

11.9 The adequacy of RRPs of G-SIFIs should be the subject of a formal review by top officials of home and relevant host supervisory and resolution authorities at least annually, where appropriate with the firm's CEO.

11.10 If a firm's resolution plan is unsatisfactory to the resolution authorities, the authorities should require appropriate measures to address the deficiencies. Relevant home and host authorities should provide for prior consultation on the actions contemplated.

11.11 To improve a firm's resolvability, supervisory authorities or resolution authorities should have powers to require, where necessary and appropriate, the adoption of measures, such as changes to a firm's business practices, structure or organisation, to reduce the complexity and costliness of resolution, duly taking into account the effect on the soundness and stability of ongoing business. To enable the continued operations of systemically important functions authorities should evaluate whether to require that these functions be lodged in legally and operationally independent entities that are shielded from group problems.

11.12 In order to restore market discipline and promote the efficient operation of financial

markets, the resolution authorities should incorporate into their planning, clear options or principles for the exit from public intervention in a firm.

12. Access to information and information sharing

12.1 Jurisdictions should ensure that no legal, regulatory or policy impediments exist that hinder the appropriate exchange of information, including firm-specific information, between supervisory authorities, central banks, resolution authorities, finance ministries and the public authorities responsible for insurance guarantee schemes,. In particular:

(i) The sharing of all information relevant for recovery and resolution planning, and in resolution should be possible in normal times and in crisis at a domestic and a cross-border level;

(ii) The modalities for the sharing of information relating to a G-SIFI should be set out in institution-specific cooperation agreements (see Annex 3, "*Essential Elements of institution-specific cross-border cooperation agreements*"); and

(iii) Where appropriate and necessary to respect the sensitive nature of information, information sharing may be restricted, but should be possible among the top officials of the relevant home and host authorities.

12.2 Jurisdictions should require firms to have in place Management Information Systems (MIS) able to produce on a timely basis, in normal times for recovery and resolution planning as well as in resolution and under a separation scenario, information required at both the group and legal entity levels. Firms should be required to maintain a detailed inventory, including description and location of the key MIS used in their material legal entities, mapped to their essential and systemically important functions.

12.3 To facilitate the unwinding and/or transfers of intra-group guarantees and back-to-back trades when necessary, jurisdictions should require firms to maintain at the legal entity level, information on intra-group guarantees and intra-group trades booked on a back-to-back basis.

Annex 2

Bail-in within resolution:
Elements for inclusion in the *Key Attributes*

The FSB SIFI Recommendations called on national authorities to consider "restructuring mechanisms to allow recapitalisation of a financial institution as a going concern by way of contractual and/or statutory (i.e., within-resolution) debt-equity conversion and write-down tools, as appropriate to their legal frameworks and market capacity." The FSB has examined the legal and operational aspects of bail-in based on contractual bail-in instruments as well as on statutory bail-in mechanisms.

The FSB has included statutory bail-in powers as a resolution tool in the *Key Attributes of Effective Resolution Regimes* (see Annex 1), which sets out a recommended statutory framework for resolution. Bail-in within resolution constitutes an additional resolution option that could be used in conjunction with other resolution tools. It should be part of a robust resolution regime that satisfies the *Key Attributes*. Resolution authorities should have the statutory power, but not the obligation, to apply a bail-in within resolution.

Statutory bail-in within resolution tools do not prevent firms from issuing instruments that write-down or convert contractually, nor do they prevent national authorities from requiring them. Where, at the point of entry into resolution, an institution has contractual instruments with write-off or conversion features outstanding, a contractual instrument that had not been previously written-off or converted will be written-off or converted according to the contractual terms and conditions of the instrument upon entry into resolution but before the application, within the resolution, of bail-in or other powers by the resolution authority. A contractual instrument that, prior to entry into resolution, has already been written-off or converted upon activation of a contractual trigger would be subject to a subsequent application of bail-in powers upon entry into resolution.

This notes focuses on the elements and legal framework conditions that jurisdictions need to incorporate in a manner consistent with their resolution regime for bail-in within resolution to be effective. The FSB is consulting on the details of how to apply bail-in as a resolution tool.

1. Objectives

1.1 Like other resolution tools, the objective of bail-in within resolution is to ensure that the costs of resolution are borne by the firm's owners (shareholders) and other unsecured and uninsured creditors, rather than by taxpayers, so as to reduce moral hazard and enhance market discipline while minimizing the losses of value and economic disruption associated with insolvency proceedings.

1.2 Bail-in within resolution refers to the exercise of statutory powers within a special resolution procedure. Bail-in within resolution will achieve or help achieve continuity of systemically important functions by either recapitalising the entity

hitherto providing these functions that is no longer viable, or, alternatively, capitalising a newly established entity or bridge institution to which these systemically important functions have been transferred following closure of the residual firm. Resolution authorities should have the statutory power to apply bail-in powers via at least one of the above mechanisms.

1.3 Under both alternatives, capitalisation, complemented by other recapitalisation measures, where appropriate, should be to levels of capital deemed adequate to preserve financial stability and restore market confidence.

2. Statutory framework

2.1 Bail-in powers need to be embedded in an effective statutory resolution regime that meets the FSB *Key Attributes of Effective Resolution Regimes*.

2.2 The resolution regime and legal framework for bail-in should provide clarity and certainty as regards:

(i) the authority triggering entry into resolution;

(ii) the conditions under which bail-in, and other resolution tools, could be used and the authority with responsibility for exercising the power;

(iii) the scope of the bail-in power in terms of the range of liabilities covered and hierarchy according to which bail-in powers may be applied;

(iv) the process for triggering bail-in (e.g., publication of a decree or instrument pursuant to which the write-down takes effect); and

(v) the consequences for owners (shareholders) and creditors upon their activation and available legal remedies and compensation mechanisms.

2.3 Where necessary, the authorities may require firms to include specified bail-in terms in certain debt contracts in order to help ensure application of statutory bail-in to debt issued outside the home country of firm being resolved and to help ensure enforceability of the authorities' statutory bail-in actions more generally.

3. Bail-in powers

3.1 Bail-in powers within resolution should enable resolution authorities to do all of the following as necessary to absorb losses and either recapitalise the vital or viable parts of the business of the firm, or capitalise a newly formed entity to which the vital and viable parts of the business have been transferred:

(i) undertake write-off of equity or other instruments of ownership of the firm;

(ii) write-off up to all of subordinated claims;

(iii) write-off up to all of the subordinated or senior unsecured and uninsured

creditor claims against the firm; and

(iv) convert into equity or other instruments of ownership of the institution under resolution (or any successor in resolution or the parent company), all or parts of subordinated or senior unsecured and uninsured creditor claims (including any contractual bail-in instruments, on a post-write-down/conversion basis, see Section 5.3 below) .

3.2 To give effect to the bail-in and conversion into newly issued shares, the resolution regime should provide for the requisite authority, as necessary and consistent with their legal framework, to:

(i) issue new shares on an expedited basis without the need for shareholder consent;

(ii) override pre-emption rights of existing shareholders of the firm being resolved;

(iii) issue warrants to otherwise fully-written-off equity or subordinated debt holders (so as to adjust the distribution of shares based on a further valuation at a later stage);

(iv) cancel share capital (unrepresented by available assets); and

(v) make provision for the suspension of shares and other relevant securities from listing and trading and prohibit dealings in the shares for a temporary period as necessary to support the effective implementation of the bail-in.

3.3 The resolution authority should have the power to apply the bail-in tools in combination with other resolution tools and regulatory measures as necessary to restore confidence and facilitate resolution, such as the power to remove boards and management.

3.4 The resolution authority should have the capacity to exercise bail-in powers with the necessary speed. In those jurisdictions where a court order is required to apply bail-in, resolution authorities should take this into account in the resolution planning process to ensure that court proceedings will not affect the effective implementation of the bail-in.

3.5 Bail-in powers should be available for firms of any legal form of incorporation.

4. Triggers

4.1 Bail-in powers within the context of a resolution regime should be available for use by authorities where they determine that the firm has met the conditions to enter the resolution regime.

5. Scope

5.1 The scope of a statutory bail-in regime, in terms of the range of liabilities covered, should be as wide as possible.

5.2 Write-off/conversion powers should, as far as possible, be applied in a manner consistent with the hierarchy of the capital structure of the institution, and respect the rights of secured creditors and the statutory ranking of senior creditors that would apply in a liquidation.

5.3 Where an institution has instruments outstanding on entry into resolution that as a matter of contract could be written-down or converted into equity, then that write-down and/or conversion shall be triggered. Bail-in within resolution shall then apply to the instruments resulting from that contractual write-down and/or conversion, *pari passu* with instruments of the same type. This means that:

(i) A contractual bail-in instrument that has not been previously written-off or converted will be written-off or converted according to the contractual terms and conditions of the instrument upon entry into resolution, but before the application, within the resolution, of bail-in or other powers by the resolution authority; and

(ii) A contractual instrument that, prior to entry into resolution, has already been written-off or converted upon activation of a contractual trigger may be subject to a subsequent application of bail-in powers upon entry into resolution. As a result, an equity instrument that was created, either prior to or upon entry into resolution, from the conversion of a contractual bail-in instrument would absorb losses, alongside other equity, prior to write-down and/or conversion into equity of other senior debt through the application of statutory bail-in within resolution by the resolution authority.

6. Respect for statutory order of priorities

6.1 The exercise of statutory write-off or conversion powers within resolution should respect the *pari passu* treatment of creditors and the statutory ranking and order of priorities of the affected debt that would otherwise exist in insolvency, except to the extent necessary to achieve the objectives of the resolution regime as set out in statute. Any exception should be clearly stipulated in law or regulations and respect the principle of "no creditor worse-off than in liquidation." This principle need not be observed in the case of those instruments where investors have agreed to contractual write-off or conversion terms *ex ante* at the time of their initial investment.

7. Safeguards and judicial review

7.1 Adequate safeguards (see Section 7 of the *Key Attributes*) and the principle of non-discrimination between creditors along national lines should apply in the same manner as in the case of application of other statutory resolution tools.

7.2 Authorities should apply a consistent approach to the treatment of creditors and compensation rights across bail-in within resolution and the application of other resolution tools and respect any statutory priority or subordination of holders of contractual bail-in instruments where resolution measures other than bail-in powers are employed.

7.3 In acting quickly and seeking to ensure sufficient resources for either restoration to viability, or orderly resolution, authorities may impose haircuts or write-downs that turn out to be greater than needed. To address these situations, authorities therefore should have in place mechanisms for compensating the holders of bailed-in claims, or written-off equity when the amount of actual losses is finally determined, e.g., by the issuance of warrants.

7.4 Judicial review should be *ex post* and not result in the reversal of the bail-in measures taken by resolution authorities acting within their legal powers. Instead, redress may be provided by awarding compensation (see Section 7.4 of the *Key Attributes*).

8. Impact on financial contracts

8.1 As with other resolution tools, such as transfers of contracts to a newly established entity or bridge bank, the exercise of bail-in powers within resolution should not constitute an event of default that permits the exercise of early termination and close-out rights in respect of financial contracts, or a brief stay on the exercise of early termination and close-out rights should be imposed.

9. Group and cross-border issues

9.1 As a general principle, bail-in within resolution should be initiated by the home authority with respect to debt issued by the parent firm in resolution (and/or subsidiaries in resolution in the jurisdiction of the parent).

9.2 Where host authorities have bail-in within resolution powers embedded in their resolution framework, they should be able to exercise these powers at subsidiary level, which could lead to a transfer of ownership to new shareholders. Prior to exercising these powers host authorities should have satisfied themselves following consultation with the home authority and, to the extent possible, with the Crisis Management Group (CMG) that (i) the subsidiary is not viable and should enter into resolution and that (ii) the group would not support the subsidiary and no alternative group-wide solution would achieve a more favourable outcome from a host country perspective and from a cross-border financial stability perspective.

9.3 As part of their recovery and resolution planning work within CMGs, home and host authorities should discuss and agree in advance on processes to coordinate resolution actions that involve bail-in measures within resolution.

9.4 To help ensure that bail-in powers within resolution are effective in a cross-border context, home authorities should require that institutions incorporated in their jurisdiction include in debt contracts provisions whereby the creditor recognizes the home authority's bail-in powers to write-down creditor claims or convert them into equity claims whether or not the contract itself is governed by the law of the home jurisdiction or of a host jurisdiction.

10. Quantum of bail-in debt

10.1 Authorities should regularly monitor whether firms' balance sheets contain a sufficient quantum of liabilities covered by bail-in powers within resolution.

11. Liquidity needs

11.1 As with other resolution tools that seek to promote continuity, the liquidity needs of a bailed-in entity will need to be met to provide confidence to counterparties and the markets. Giving super-senior status to funds provided to an institution in resolution may help ensure access to funding, though the effects of altering the creditor hierarchy in this way would need to be carefully considered.

12. Transitional period

12.1 Bail-in powers within resolution should be applicable to the relevant liabilities to all existing and new non-exempted liabilities as from the time the powers are enacted, in the same manner as the enactment of other resolution powers and subject to the appropriate safeguards. Jurisdictions may consider the introduction of an appropriate transitional period before bail-in powers are exercisable in order to ensure that firms can adequately adjust to the statutory bail-in regime.

Annex 3

Essential elements of institution-specific cross-border cooperation agreements

The SIFI Recommendations called for institution-specific cooperation agreements for all global systemically important financial institutions (G-SIFIs).

Cross-border cooperation agreements should help facilitate institution-specific crisis management planning and cooperation amongst relevant authorities, with a presumption in favour of cooperation in the event of the institution's resolution and build upon the FSF's *Principles for cross-border cooperation in crisis management* as endorsed by the G20 Leaders Summit in London in April 2009. They should support the preparation of Recovery and Resolution Plans (RRPs) and the effective implementation of resolution measures in a crisis by providing a framework for possible solutions to legal or other impediments that may exist. This will require firm-specific agreements among all members of a firm's cross-border Crisis Management Group (CMG), including the relevant authorities from the home and all key host jurisdictions. Bi-national agreements, i.e., agreement between the relevant authorities of the home and a host jurisdiction that set out how national legal and resolution regimes would interact given a firm's business, and firm-specific multinational agreements among home and all key host jurisdictions, may complement each other.

The effectiveness of institution-specific cooperation agreements hinges on the home and host authorities having the necessary resolution powers in relation to the firm's operations, including the branch operation of a foreign financial institution (see Annex 1*, "Key Attributes of Effective Resolution Regimes",* Section 8.4).

The institution-specific cooperation agreement establishes a framework for the development of RRPs, based on the conduct of pre-crisis resolvability assessments, and for cooperation and coordination in crisis in line with the agreed RRPs. Both RRPs and cooperation agreements are expected to be regularly updated and evolve over time. Institution-specific cross-border cooperation agreements should, at a minimum, include the following elements.

1. Objectives, nature and scope of the agreement

1.1 A declarative statement of its objectives and scope (e.g., "we, as home and host authorities for the [firm], have signed this cooperation agreement setting out how we will work together with a view to facilitating institution-specific crisis management planning and cooperation amongst relevant authorities, with an emphasis on cooperation in the event of the [firm's] resolution....The objective is to minimise the impact of the failure of the [firm] in each of the jurisdictions represented by the Parties to the Agreements").

1.2 The home and host authorities that sign the agreement ("the Parties").

1.3 Description of the firm, parent or holding company and significant subsidiaries, branches and affiliates that are within the scope of the agreement.

1.4 The legal nature of agreement (i.e., whether and to what extent the agreement is binding).

1.5 Rules on public disclosure (e.g., whether and to what extent its content or its existence should be disclosed to the public).

2. General framework for cooperation

2.1 The roles, responsibilities and powers of the Parties "pre-crisis" (i.e., in the recovery and resolution planning process) and "in crisis" with respect to the firm, including the parent or holding company and significant subsidiaries, branches and affiliates that are within the scope of the agreement.

2.2 Reference to the Parties' relevant elements of the RRP for the firm, parent or holding company and significant subsidiaries, branches and affiliates that relate to the preparation and execution of resolution measures in a cross-border context (recognising that the plan is regularly reviewed and updated).

3. Commitments to cooperate

3.1 The Parties' agreement that the FSF's *Principles set out in April 2009*, and the *Key Attributes of Effective Resolution Regimes* should guide their actions in any crisis management and resolution measures adopted in respect of the firm.

3.2 The Parties' commitments to implement resolution options that are aimed at pursuing financial stability, the protection of insured depositors, policy holders and other retail customers, and duly considering the potential impact of their resolution actions on financial stability of other jurisdictions.

3.3 The Parties' commitments to coordinate in the recovery and resolution planning process and share all relevant information, including RRPs pertaining to the group as a whole or to individual subsidiaries, where plans of subsidiaries exist in order to ensure that the plans are consistent and help prepare for a coordinated resolution of the whole firm.

3.4 The Parties' commitment, through the CMG process, to engage in periodic table top or other scenario analyses or simulation exercises in order to ensure that the plans are viable and to help prepare for a coordinated resolution.

3.5 The Parties' commitment to conduct an assessment of the financial institution's resolvability, using the note *on Resolvability Assessments* set out in Annex 4,

including the financial institution's demonstrated ability, as part of the recovery and resolution planning process, to produce the essential information needed to implement such plans in a timely fashion in a crisis; to share the results of the assessment and use them to inform the resolution planning process with respect to the implementation of cross-border resolution measures.

3.6 The agreed frequency of review and sharing of full RRPs (at least annually).

3.7 The Parties' commitment to inform and consult each other in a timely manner when taking any crisis management or resolution measures (with precise definition of crisis management or resolution measures).

3.8 The Parties' commitment to promptly inform each other of material changes to their crisis management and resolution frameworks.

3.9 The Parties' commitment to share information at both senior and technical levels as appropriate, subject to appropriate confidentiality arrangements (see Section 6.6 below). Where appropriate and necessary to respect the sensitive nature of information, information sharing may be restricted, but should be possible among the top officials of the relevant home and host authorities.

4. Home authority's commitments

4.1 The home (resolution or supervisory) authority's commitment to:

(i) Coordinate in the CMG, with the benefit of the active participation of the other Parties, the assessment of the firm's resolvability in line with the *Resolvability Assessments* and identification of actions that home or host authorities or the firm may need to take to ensure its resolvability;

(ii) Facilitate and chair meetings of the CMG and lead the review of the firm's RRP within the CMG, with the active participation of the other Parties and in line with the key elements of *Recovery and Resolution Plans* (see Annex 5);

(iii) Alert other Parties without delay, so as to allow practical cooperation, if the firm encounters difficulties or if it becomes apparent that it is likely to enter the home authority's resolution regime;

(iv) Take into account the overall effect on the group as a whole and on financial stability in other jurisdictions concerned and undertake best efforts to avoid taking actions that could reasonably be expected to trigger instability elsewhere in the group or in the financial system; and

(v) Where possible and feasible, coordinate a resolution of the firm as a whole, with the aim of maintaining financial stability, protecting depositors, policy holders, and other retail customers in all relevant jurisdictions.

5. Host authorities' commitments

5.1 The host authorities' commitment to:

(i) Alert other Parties without delay if a local branch or locally-incorporated part of the firm encounters difficulties or if it becomes apparent that it is likely to enter the host authority's resolution regime;

(ii) Work with the other Parties towards the coordinated resolution of the firm as a whole, with the aim of maintaining financial stability and protecting depositors, insurance policy holders, and retail investors in all relevant jurisdictions;

(iii) Not to pre-empt resolution actions by home authorities while reserving the right to act on their own initiative if necessary to achieve domestic stability in the absence of effective cooperation and information sharing; and

(iv) Participate at the level of top officials in the formal annual review of the firm's RRP, and to contribute through representation on the CMG at an appropriately senior level to the development and maintenance of the firm's group-wide resolution plan. The adequacy of RRPs of G-SIFIs should be the subject of a formal review by top officials of home and relevant host supervisory and resolution authorities at least annually, where appropriate with the firm's CEO.

6. Cooperation mechanisms and information sharing framework

6.1 Modalities of regular meetings amongst Parties to the Agreement (e.g., number of meetings per year; level of participants, ad hoc meetings in emergency situations and meetings upon request by parties to the Agreement), including the relationship with existing cooperative structures (CMG, supervisory college).

6.2 The statutory and contractual bases for prompt information sharing, including sharing with any host authorities that are not represented in the CMG, existing constraints and how these could be addressed.

6.3 The level of detail in regard to information sharing; whether and how it would change "pre-crisis and "in crisis".

6.4 Modalities for information sharing at both senior and technical levels, tools of information exchange (e.g., use of secured website).

6.5 Commitment to maintain up to date contact lists with contact details for key senior and working-level staff, that cover multiple means of communication.

6.6 Commitment to maintain confidentiality of shared information and measures to

ensure confidentiality (e.g., limiting the personnel to access the data; confidentiality agreement signed by each personnel; procedure and responsibility were confidentiality to be breached).

7. Cross-border implementation of resolution measures

7.1 Process for the evaluation of the application of available resolution options and processes to the firm, including the parent or holding company and significant subsidiaries, branches and affiliates that are within the scope of the agreement.

7.2 Commitments to address the legal and operational impediments to cross-border implementation and specification of particular framework conditions for resolution strategies and necessary processes and host country requirements for implementation. For example:

(i) Procedural requirements and conditions for recognition, including any applicable court procedures, of the transfer of (a) assets and liabilities from the failing financial institution to a bridge bank or third party purchaser with respect to branches in the host jurisdiction, and (b) shares of majority or wholly owned subsidiaries in the host jurisdiction to a bridge or third party purchaser;

(ii) Identification of types of financial contracts and assets that cannot be transferred with legal certainty (e.g., contracts governed by the law of a third jurisdiction where the firm does not have a physical presence) and implications for the successful implementation of the resolution tool;

(iii) Availability of funding arrangements in home and host jurisdictions to support the implementation of the resolution measure and restore market confidence; and

(iv) Application of insurance schemes (for depositors, policy holders, other retail customers) and of applicable segregation and customer asset protection rules.

Annex 4

Resolvability assessments

1. Defining resolvability

A systemically important financial institution (SIFI) is "resolvable" if it is feasible and credible for the resolution authorities to resolve it without severe systemic disruption and without taxpayer exposure to loss, while protecting systemically important functions. For resolution to be feasible, the authorities should have the necessary legal powers - and the practical capacity to apply them - to ensure the continuity of functions critical to the economy. For resolution to be credible, the application of those resolution tools should not itself give rise to unacceptably adverse broader consequences for the financial system and the real economy.

2. Objectives of resolvability assessments

The objectives of resolvability assessments are to:

(i) make authorities and financial institutions more aware of the implications of resolution for systemic risk both nationally and globally;

(ii) identify factors and conditions affecting the effective implementation of resolution actions, both endogenous (firm structure) and exogenous (resolution regime and cross-border cooperation framework), in relation to subject financial institutions, and the degree of contingency preparedness (adequacy of Recovery and Resolution Plans (RRPs); and

(iii) help determine the specific actions necessary to achieve greater resolvability without severe systemic disruption and without taxpayer exposure to loss from solvency support, while protecting systemically important functions.

3. Process for assessing resolvability

Resolvability assessments are necessarily qualitative and are not binary. Resolvability assessments should be led by the home authority and coordinated with key host authorities according to the process established in institution-specific cross-border cooperation agreements (see Annex 3, "*Essential Elements of Institution Specific Cross-border Co-operation Agreements"*) and in line with the "*Recovery and Resolution Plans"* (see Annex 5). The results of the resolvability assessment should inform the recovery and resolution planning process.

The process for assessing resolvability consists of three stages:

Stage 1 - Feasibility of resolution strategies: Identify the set of resolution strategies which would be feasible, given the current resolution tools available, including RRPs, and the authorities' capacity to apply them at short notice to the specific SIFI in question.

Stage 2 - Systemic impact assessment: Determine the credibility of all feasible resolution strategies by capturing the likely impact of the SIFI's failure and resolution on global and national financial systems and real economies.

Stage 3 - Actions to improve resolvability: Conclude whether resolution is likely to be both feasible and credible and identify any changes necessary. Timelines for completing the requisite changes should be established. Progress should also be monitored.

Resolvability assessments, and the actions flowing from them, form a key part of the resolution planning process and are a **continuous** process consisting of:

(i) qualitative assessment by national authorities of the extent to which a firm is resolvable given the firm's structure and under the resolution regimes its operates;

(ii) assessment co-ordinated by the home authority within the firm's Crisis Management Group (CMG) drawing on shared national assessments, and identification of the issues to be addressed by the firm and / or by specific authorities(s);

(iii) presentation of issues to be addressed to the firm (or relevant regulatory authorities); and

(iv) remediation by the firm or relevant regulatory authorities, and re-assessment of resolvability co-ordinated by the home authority.

4. Assessing the feasibility of resolution strategies

Set out below are some of the questions that, at a minimum, would need to be explored in order to assess the feasibility of resolution strategies. In order to address these questions authorities should have collected, processed and verified the necessary information from the firm (see Section 5 of "*Recovery and Resolution Plans*").

Firm structure and operations

4.1 Firm's essential functions and systemically important functions. Based on the firm's strategic analysis, what are the principal businesses and what are the services that are core to the firm's franchise value? What critical financial and economic functions does it perform for the global and national financial systems and the real economies?

4.2 Mapping of essential functions and systemically important functions and corporate structures. How do legal and corporate structures relate to principal business lines and critical and core functions?

4.3 **Intra-group exposures.** What is the extent of the use of intra-group guarantees, booking practices and cross-default clauses? Are intra-group transactions well documented? How strong is the relevant risk management? To what extent are these transactions conducted at arm's length? Could back-to-back trades be unwound (e.g., to facilitate a partial sale), if necessary? Do intra-group transactions result in material imbalances of value across legal entities?

4.4 **Continuity of Service Level Agreements.** What is the extent to which key operational functions such as payment operations, trade settlements and custody are outsourced to other group entities or third party service providers? How robust are the existing Service Level Agreements in ensuring that the key operational functions will continue to be provided to a bridge bank or surviving parts of a resolved firm when necessary?

4.5 **Assessment.** What are the obstacles to separating systemically important functions from the rest of the firm in a resolution and for ensuring their continuity, given the issues explored in 4.1 to 4.4 above?

Management information systems (MIS)

4.6 **Adequacy of MIS.** To what extent do the firm's MIS capabilities permit it to construct a complete and accurate view of its aggregate risk profile under rapidly changing conditions? Can the firm provide key information such as risk exposures, liquidity positions, interbank deposits and short-term exposures to/from major counterparties (including Central Counterparties (CCPs)) on a daily basis? Can the firm ensure the continuity of MIS for both the remaining and resulting entities if the firm or one or more component legal entities have entered into resolution or insolvency? Are the necessary MIS available at the legal entity level, including on intra-group transactions and collateral?

4.7 **Prompt provision of necessary information to relevant authorities.** How quickly could information (e.g., financial, credit exposure, legal entity specific and regulatory) be provided to the home supervisor, to functional supervisors, to resolution authorities and to host supervisors, as appropriate? What types of legal impediments preclude information sharing among authorities? Does the institution have processes and tools to provide authorities with the information necessary to allow the rapid identification of depositors and amounts protected by a deposit insurance scheme?

4.8 **Assessment.** In the authorities' view, to what extent is it likely that the firm could deliver sufficiently detailed, accurate and timely information to support an effective resolution?

Coordination of national resolution regimes and tools

4.9 **Domestic powers and tools to maintain continuity of systemically important functions.** Do the resolution regimes in the jurisdictions where the SIFI performs systemically important functions (or has subsidiaries which provide crucial services to those functions) provide for the resolution powers and tools set out in Section 4 of the *Key Attributes*?

4.10 **Cross-border resolution powers.** Do home and host country authorities have the requisite powers to act in a manner that supports implementation of a coordinated resolution, as set out in Section 8 of the *Key Attributes*? For example:

- What are the mechanisms in place to coordinate with a host authority the cross border operation/recognition of a bridge institution when the home authority has decided to use such a tool as part of a resolution procedure?
- Do resolution regimes provide for a differential treatment of creditor claims on the basis of the location of the claim, or the jurisdiction where it is payable?
- How would domestic actions triggered by resolution in foreign jurisdictions affect the resolution process? Is there a risk that they could automatically trigger action in other jurisdictions?

4.11 **Information sharing between home and host authorities.** Are there any legal impediments to information sharing? How willing and able are home and host authorities to share the information necessary to effect a co-ordinated resolution?

4.12 **Practical cross-border coordination.** Do existing cross-border cooperation agreements reflect the requirements set out in Section 9 of the *Key Attributes* and give authorities confidence that they have the practical, operational and legal capacity to coordinate effectively with their foreign counterparts?

4.13 **Assessment.** Are the authorities confident that they have the necessary legal tools and operational capacity to achieve an internationally co-ordinated resolution of the SIFI?

5. Assessing the systemic impact

A significant consideration in addressing the need to resolve one or more SIFIs is the set of expected adverse consequences for the financial system and the overall economy resulting from the failure. In the past, if these consequences were deemed too great, governments have felt pressed to provide public solvency support. A major goal of resolution planning is to identify and develop measures that mitigate the systemic impact of the firm's failure.

The ***residual*** systemic impact of the firm's failure reflects three sets of factors: (i) the inherent systemic risks in the firm's business profile; (ii) mitigating actions taken by the firm through sound business structures, governance, management practices and well-articulated resolution

planning; and (iii) the robustness of the identified institution-specific resolution strategies. The criteria for evaluating the systemic impact of a firm's failure are still at a nascent stage and therefore the evaluation process is largely qualitative and judgemental. The core of the analysis, however, is assessing the residual systemic risks as they relate to the principal channels of systemic spillovers. Below are some suggested qualitative criteria to aid authorities' judgement of a given resolution strategy. The criteria should be assessed individually for each jurisdiction involved, and collectively for the firm as a whole.

5.1 **Impact on markets.** To what extent is the firm's resolution likely to cause disorder in domestic or international financial markets, for example because of lack of confidence or uncertainty effects?

5.2 **Impact on infrastructure.** What possible problems could the firm's resolution cause for or through financial market infrastructures (FMIs)? For example, could it lead to the triggering of default arrangements in FMIs, or leave other financial institutions without access to FMIs?

5.3 **Impact on funding conditions.** What are the likely impacts of the firm's resolution on other (similarly situated) financial firms in rolling over/raising funds?

5.4 **Impact on capital.** To what extent could the exposure of systemically important counterparties to the firm in resolution result in their capital, individually or in aggregate, falling to a dangerously low level?

5.5 **Impact on the economy.** To what extent could the firm's resolution and its consequences impact the economy and through which channels? Is there a potential for credit and capital flows to constrict? Are there important wealth effects?

Annex 5

Recovery and resolution plans

The FSB *Key Attributes of Effective Resolution Regimes* call on authorities to put in place an ongoing recovery and resolution planning process to promote resolvability as part of the overall supervisory process (*Key Attributes 11.1)*. An adequate, credible Recovery and Resolution Plan (RRP) is required for any firm which is assessed by its home authority to have a potential impact on financial stability, in the event of liquidation of that firm and payout under the deposit insurance scheme to that firm's insured depositors. This would include, at a minimum, all global systemically important financial institutions (G-SIFI) (*Key Attributes 11.2)*.

1. Objectives and governance of the RRP process

Recovery plan

1.1 The recovery plan (RCP) serves as a guide to the recovery of a distressed firm. In the recovery phase, the firm has not entered the resolution regime and therefore remains in principle under the control of its management, although the authorities may be able to order or enforce the implementation of recovery measures through ordinary supervisory powers. The RCP includes measures to decrease the risk profile of a firm and conserve capital, as well as strategic options such as the divestiture of business lines and restructuring of liabilities.

Resolution plan

1.2 The resolution plan (RSP) is intended to facilitate the effective use of the resolution authority's resolution powers with the aim to make feasible the resolution of any financial institution without severe systemic disruption and without exposing taxpayers to loss while protecting systemically important functions. It serves as a guide to the authorities for achieving an orderly resolution, in the event that recovery measures are not feasible or have proven ineffective.

Underlying assumptions

1.3 RRPs should be based on the specific characteristics of the firm and the tools available under the existing resolution regime. Stress scenarios should be sufficiently severe. Both firm-specific and system-wide stress scenarios should be considered taking into account the potential impact of cross-border contagion in crisis scenarios, as well as simultaneous stress situations in several significant markets. The options for recovery and resolution measures should be concrete and practical.

1.4 The RRP should make no assumption of exposures of taxpayers' funds to loss.

Responsibility for recovery plan

1.5 The responsibility for developing and maintaining, and where necessary, executing the RCP lies with the firm and, more specifically, the firm's senior management. Authorities should review the RCP, assessing its credibility and ability to be effectively implemented as part of the overall supervisory process.

1.6 Firms should update the RCP at regular intervals, and upon the occurrence of events that materially change the firm's structure or operations, its strategy or aggregated risk exposure. Firms should regularly review the exogenous and firm-specific assumptions an RRP is based upon and assess on an ongoing basis the relevance and applicability of the plans. If necessary, firms should adapt their RRPs accordingly and provide all relevant information to the authorities in a timely manner.

1.7 Firms should have in place a robust governance structure in support of the recovery and resolution planning process. This includes clear responsibilities of business units, senior managers, up to and including board members and identifying a senior level executive responsible for ensuring the firm is and remains in compliance with RRP requirements, and for ensuring that recovery and resolution planning is integrated into the firm's overall governance processes. The firm will need to ensure that sufficient resources are available to fulfil its responsibilities in connection with both the recovery and resolution phases of the RRP.

1.8 Firms should have in place systems to generate the information required to support the recovery and resolution planning process (see below Section 5), to enable both the firm and the authorities effectively to carry out recovery and resolution planning, and where necessary, implement the RRP.

1.9 Firms should upon request, engage in periodic table top or other scenario exercises with home and host regulatory authorities in order to ensure that the plans produced through the RRP process are viable.

Responsibility for resolution plan

1.10 The responsibility for developing and maintaining, and where necessary, executing the resolution strategies set out in RSPs lies with the authorities. However, firms are responsible for providing the authorities with the data and information, including strategy and scenario analysis, required for purposes of resolution planning on a timely basis.

1.11 Authorities should identify the specific information requirements and supervise that the firm has the capacity to provide them on a timely basis.

1.12 Authorities should establish a robust governance structure for the oversight of the recovery and resolution planning processes, including the ongoing review and updating of RRPs. Responsibilities for the development, review, approval and maintenance of RRPs should be clearly assigned. In those jurisdictions, where a court order is required to apply resolution measures, resolution authorities should take this into account in the resolution planning process, so as to ensure that court proceedings will not affect the effective implementation of resolution actions.

1.13 Recovery and resolution planning should become an integral part of authorities' ongoing supervision. They should ensure that sufficient resources and expertise are available to support the preparation and assessment of RRPs. Sufficient resources should also be dedicated to monitor the viability of RRPs on an ongoing basis, and define and communicate a clear process for interaction with the firms in recovery and resolution planning. This includes setting out a clear procedure, expectations placed on the firm and escalation process.

1.14 Authorities may discuss RSPs with the firms to the extent they believe is useful, and confidentiality is not necessary to preserve the effectiveness of the resolution plan or other public policy considerations. Authorities may decide not to disclose the RSP or parts of it to the firms.

Review

1.15 Authorities should put in place arrangements to monitor and where necessary direct the updating of RRPs on an ongoing basis, to take into account any changes in circumstances facing the firm or the financial system. There should be processes to review any changes in the underlying assumptions of the firm's RRP, and to incorporate any new information into the RRPs.

1.16 Authorities should review, and where necessary, direct changes to the stress scenarios underlying a firm's RRP. The stress scenarios should adequately consider all relevant endogenous and exogenous risk exposure that the firm faces, taking into account the firm's specific situation, strategy and positions. Authorities should seek to achieve a certain degree of consistency in the severity of stress scenarios used by different firms. However, the stress scenarios used need not be the same for each firm and they do not necessarily need to be highly specific.

1.17 Authorities should also assess the willingness of the bank's management to implement corrective measures, and where necessary, enforce the implementation of recovery measures. Authorities should be mindful that in situations of systemic crises, the effectiveness of certain measures may be undermined if those measures were implemented by several firms at the same time.

1.18 The top officials in the home and key host jurisdictions within supervisory colleges and CMGs should satisfy themselves that the RRPs are viable, taking into

consideration the underlying scenarios, time frame needed to implement the measures and any challenge posed by cross-border operations.

Coordination among authorities at national level

1.19 At the national level, all relevant authorities involved in supervision, implementation of corrective actions as well as resolution should participate in the RRP process.

Cross-border coordination

1.20 On a national and cross-border level, relevant authorities should engage in periodic table top or other scenario exercises in order to ensure that the plans produced through the RRP process are viable, and to help prepare for a co-ordinated resolution. These exercises may include the subject firm. The outcomes of the exercises, including weaknesses noted and mitigating actions should be reported to the top officials of relevant host authorities.

1.21 As set out in the *Key Attributes* (Section 11.6), for G-SIFIs, the home resolution authority should lead the development of the group resolution plan in coordination with all members of the institution's CMG. Meetings involving top officials of the home and relevant host authorities to assess the robustness of the RRPs of G-SIFIs should be held at least on an annual basis, where appropriate with the CEO.

1.22 For all G-SIFIs, the home authorities should have a process to ascertain which jurisdictions not included in the CMG judge the local operations of the firm as systemically important to the local financial system, including the reasons for its importance. The home authorities should also establish a process for maintaining contact with such non-CMG jurisdictions.

2. General outline of RRPs

Structure of RRPs

2.1 To support rapid execution both recovery and resolution plans should include

(i) an executive summary;

(ii) a strategic analysis;

(iii) intervention conditions describing necessary and sufficient prerequisites for triggering the implementation of recovery or resolution actions;

(iv) concrete and practical options for recovery and resolution measures;

(v) preparation actions to ensure that the measures can be implemented effectively and in due time; and

(vi) responsibilities for executing preparatory actions, triggering the

implementation of the plan and the actual measures.

Executive summary

2.2 RRPs should have a high-level executive summary, which includes an overview of key elements of the firm's strategy for recovery or resolution, an organisational chart of the firm's major operations, a description of the most important measures involved in implementing each phase of the RRP, potential impediments to their successful implementation and any material changes or actions taken since the firm's last RRP submission.

Strategic analysis

2.3 A key component of RRPs is a strategic analysis that identifies the firm's essential functions and systemically important functions and sets out the key steps to maintain them in recovery as well as in resolution scenarios. Elements of such analysis should include:

(i) identification of essential, as well as systemically important functions, mapped to the legal entities under which they are conducted;

(ii) actions necessary for maintaining operations of, and funding for, these essential, as well as systemically important functions;

(iii) assessment of the viability of any business lines and legal entities which may be subject to separation in a recovery or resolution scenario, as well as the impact of such separation on the remaining group structure and its viability;

(iv) likely effectiveness and potential risks of each material aspect of the recovery and resolution actions, including impact on customers, counterparties and other market participants;

(v) estimate of the sequencing and the time needed to implement each material aspect of the plan;

(vi) underlying assumptions for the preparation of the RRPs;

(vii) potential material impediments to effective and timely execution of the plan; and

(viii) processes for determining the value and marketability of the material business lines, operations, and assets.

3. Essential elements of a recovery plan

3.1 In their recovery plan, firms should define clear backstops and escalation procedures, identifying the criteria (ideally both quantitative and qualitative) which would trigger the implementation of an RCP. Given that the firm is still in principle under the control of the management, the decision to trigger the implementation is the

responsibility of the management, in consultation with the authorities. Such triggers should prevent undue delays in the implementation of recovery measures.

3.2 Firms should identify the necessary actions to strengthen their capital situation, e.g., recapitalisations after extraordinary losses, capital conservation measures such as suspension of dividend), and capital raising measures together with the necessary steps to implement them and the time horizon needed for their implementation.

3.3 Firms should identify possible restructuring of their business operations and liabilities structure, e.g., firms should assess: (i) possible sales of subsidiaries and spin-offs of business units, together with the pre-conditions and necessary steps to implement such a restructuring, and the associated risks (e.g., impact on market confidence); and (ii) a possible restructuring of liabilities through debt-for equity swaps.

3.4 Firms should assess their resilience to liquidity stress scenarios by identifying measures to secure sufficient funding, ensuring sufficient diversification of funding sources and adequate availability of collateral in terms of volume, location and quality. Proper consideration should also be given to possible transfers of liquidity and assets within the group.

3.5 Firms should ensure an organisational and operational set-up (e.g., functioning of internal processes, IT systems, uninterrupted access to clearing and settlement facilities, exchanges and trading platforms) is in place to enable them to continue to function in a recovery phase by assessing the potential impact of any change to the business operations.

3.6 Firms should develop a proper communication strategy with financial markets and other stakeholders, so as to limit doubts about their viability. They should also promptly provide home and host supervisors with the necessary data and information.

3.7 Firms should ensure effective preparation of the above measures by indicating the concrete steps they have implemented or will implement in due time if necessary in the light of the foreseen recovery measure, including the implementation of adequate governance and crisis management processes.

4. Essential elements of a resolution plan

4.1 Authorities should establish the regulatory and legal conditions that provide grounds for the initiation of official actions (e.g., early intervention thresholds, thresholds under national insolvency laws) and scope for authorities' discretion (e.g., the extent to which authorities can refrain from taking actions or not avoid acting under certain conditions).

4.2 Authorities should identify potential resolution strategies and the necessary preconditions that facilitate the implementation of the resolution strategies, using the tools set out in Section 4 of the *Key Attributes* and with regard to arrangements for cross-border co-ordination. The inclusion of a resolution strategy in a resolution plan does not in any way imply that the authorities would be obliged to implement it, or be prevented from implementing a different strategy in the event that the firm needs to be resolved.

4.3 For each resolution strategy, based on information and analysis from firms authorities should identify:

(i) the critical interdependencies and the impact of resolution actions on other business lines/legal entities (would other entities be able to continue to operate?); financial contracts (do authorities have powers to prevent, limit and/or delay termination / close-out rights?); markets and other firms with similar business lines; and include a comparative estimate of losses to be borne by creditors and any premium associated with various resolution strategies;

(ii) the range of sources available for resolution funding and the processes for ensuring effective operations by deposit insurance funds (e.g., by identifying insured and uninsured depositors);

(iii) the processes for preserving uninterrupted access to clearing and settlement facilities, exchanges and trading platforms;

(iv) the processes for ensuring (limited) continuity of internal process and market presence;

(v) modalities to implement proper communication strategies and ensure cross-border cooperation.

5. Information requirements for recovery and resolution planning

Firms should have the capacity to provide the essential information needed to implement the RRPs on a timely basis for purposes of recovery and resolution planning, as well as in crisis situations, including information on the following:

5.1 Intra-group inter-linkages, e.g., core business operations and interconnectedness by business and by legal entity/jurisdictional lines and information on intra-group exposures through intra-group guarantees and loans as well as trades booked on a back-to-back basis; dependencies of the firm's legal entities on other group entities for liquidity or capital support or other (e.g., operational) support.

5.2 Operational data, e.g., the extent of asset encumbrance, amount of liquid assets, off-balance sheet activities, etc.

5.3 Operational set-up that supports the execution of recovery and resolution measures, e.g., information on dealing room operations, including trade booking practices,

hedging strategies, custody of assets etc; information on payment, clearing and settlement systems; and inventory of the key management information systems (MIS, including accounting, position keeping and risk systems) and applications used by the firm.

5.4 Key crisis-management roles and responsibilities, e.g., contact information, communication facilities for in-crisis communication, and modalities for accessing and sharing information with relevant home and host authorities, both in normal times and in-crisis.

5.5 Legal and regulatory framework in which the firm operates, e.g., the relevant home and host authorities and their roles, functions and responsibilities in financial crisis management; resolution regimes, including the key aspects of applicable corporate, commercial, insolvency, and securities laws and insolvency regimes affecting major portions of the group; liquidity sources, including both private and central bank sources.

Annex 6

Measures to improve resolvability

Complex organisational structures and business models, with economic functions and business lines spanning multiple legal entities with a web of intra-group exposures, complicate resolution. The FSB has identified four key areas arising from the complexities of systemically important financial institutions' (SIFIs') operations that may pose obstacles to resolution: (i) fragmented information systems; (ii) reliance on service providers; (iii) intra-group transactions; and (iv) global payment operations. Set out below are proposed recommendations for financial institutions aimed at improving their resolvability by overcoming the obstacles to resolution arising from the four identified areas. Although these proposals are aimed at improving resolvability, they should be designed to also enhance the effectiveness of firms' daily operations and risk management. As part of the consultation, the FSB seeks comments on the implications of the proposals on firms' operations and risk management in normal times.

1. Information systems

Timely and comprehensive information on a firm's risk and financial positions should be available to firms and regulatory authorities both in normal times and crisis situations.

In a resolution, the focus will naturally be more on individual legal entities. Firms therefore require legal entity-specific information to assess the extent of interconnectedness of the individual entities within a group, as well as impediments to separability. Regulatory authorities need such information to effectively plan for and implement a resolution.

In a resolution which involves transfers of some or all operations of, or the ownership of individual legal entities as a whole, to one or more bridge entities or third-party purchasers, management information systems (MIS) should continue to be available to the remaining group entities, to the new owners in the case of transferred entities, and to service providers supporting critical functions.

Legal entity-specific information on intra-group transactions is critical in the resolution process, e.g., for identifying and assessing the extent of inter-affiliate claims. The impact of complex booking practices may also be mitigated by MIS with the ability to track trades across multiple entities and facilitate positions and hedge adjustments. Comprehensive management information also helps reduce the ambiguity over the valuations and risk positions of individual entities (with each other and with third parties).

The lack of MIS with capabilities to provide both aggregated and legal entity-specific information, in both normal times as well as in crisis situations and resolution, would pose obstacles to resolution. The FSB has developed the following recommendations to address the above obstacles.

1.1 MIS should provide firms and regulatory authorities with comprehensive, pertinent information on a timely basis at both aggregate and legal entity level.

(i) Firms should maintain a detailed inventory, including description and location of the key MIS used in its material legal entities, mapped to their core services and critical functions;

(ii) Firms should identify and address exogenous legal constraints on the exchange of management information among the firms' constituent entities; and

(iii) Firms should demonstrate, as part of the recovery and resolution planning process, that they are able to produce the essential information needed to implement such plans within a short period of time (e.g., 24-hour).

2. Service level agreements (SLA)

In many firms, for reasons of efficiency and economies of scale, operational functions such as trade settlements, custody of securities, payment operations and information technology are outsourced. The service provider could be either a specialised unit, usually a separate legal entity within the firm, or a third-party. While outsourcing arrangements could bring about benefits in normal times, they may unnecessarily complicate resolution if the preconditions are not put in place to ensure continuity of the services in a resolution. To ensure that essential functions would continue in a resolution, e.g., for the parts of a firm transferred to a bridge-bank or surviving parts of a resolved firm, the FSB has developed the following recommendations.

2.1 Key service level agreements (SLAs) should be legally enforceable in crisis situations and in resolution.

(i) Firms should enter with the relevant parties into SLAs, as necessary, that are critical to the continuity of the firm as a whole and to its individual legal entities.

(ii) Firms should include provisions that prevent termination of SLAs triggered by recovery or resolution events and facilitate transferability to a bridge-bank or a third party acquirer.

3. Organisational complexity and intra-group transactions and exposures

Complexity in organisation structures, e.g., conduct of business through a complex web of separate legal entities makes resolution challenging. In normal times, these intra-group transactions and exposures may allow individual subsidiaries to benefit from the consolidated strength of the group, for example, through providing comfort to counterparties and creditors at the subsidiary level, and enabling economies of scale in risk management. The existence of intra-group transactions and exposures, including the use of intra-group guarantees (IGGs), back-to-back booking practices (BPs) and intra-group loan exposures and other funding

increases interconnectedness and may impede separability of firms' transactions and legal entities.

In a resolution, the ability to quickly transfer assets from one entity to another is necessary for preserving the value of the good assets and the franchise value of the group as a whole. The existence of IGGs makes it challenging for a firm to transfer positions or portfolios from guaranteed entities to third parties as client consent would be required to not only transfer the trade but also to release the firm from the guarantee. Obtaining the release from the guarantee can add time and cost, e.g., price concessions or alternative credit support.

The use of IGGs also increases the likelihood that financially sound entities are caused to fail due to contagion. The insolvency of a guarantor, especially a parent, may hasten the insolvency of any guaranteed subsidiaries, thereby increasing the potential disruption to financial stability.

The use of back-to-back BPs can result in imbalances of value across legal entities, which may not be consequential in normal times, but can be problematic in a resolution. The individual legs of a trade can be caught in separate legal entities subject to different resolution regimes, making it very difficult to unwind or transfer the overall position. Any ring-fencing by local authorities can also trap value in one legal entity to the detriment of stakeholders of other legal entities, e.g., when collateral received is not passed through to the entity where the risk exposure resides. The FSB has developed the following recommendations to address the aforementioned challenges.

3.1 Intra-group transactions conducted at arm's length.

In structuring internal transactions, firms should adhere to the customary practices and requirements prescribed for dealing with external counterparties, such as standard documentation, netting and close-out arrangements, collateralisation, and margin maintenance on derivatives trades.

3.2 Ability to re-constitute, within a specified time, all separate legs of a transaction booked in separate intra-group entities.

Firms should:

(i) put in place preconditions that enable separate legs of a trade booked in different legal vehicles to be quickly collapsed, and re-constituted within a specified time in a single legal entity; and

(ii) limit imbalances between parent company and legal entities so as to avoid that the stability and the capital adequacy of the same legal entities is undermined when a crisis of the parent emerges.

3.3 Reducing unnecessary complexity in group structures, intra-group transactions and exposures.

Firms should:

(i) identify areas in their existing organisational structure where there is unnecessary complexity that creates difficulties in consolidated risk

management and aggregation of the firm's overall risk positions, thus impeding resolution, and take measures to reduce those complexities; and

(ii) identify existing IGGs, transactions and exposures that unnecessarily complicate resolution, and take measures to reduce those transactions and exposures.

3.4 Reducing inter-connectedness caused by terms of financial contracts

Firms should:

(i) consider eliminating or seek alternatives to cross-default clauses in Master agreements and other contractual rights counterparties have that can give rise to intra-group contagion in the event of distress or failure of a legal within a group; and

(ii) explore standardised valuation methodologies under ISDA for closing out derivatives contracts.

4. Global payment operations

The ability to continue operations of critical payment functions and carry out an orderly transfer of clients and business lines to a bridge institution or a private purchaser which is important for an orderly resolution in turn hinges on the firm's ability to ensure continuity of access to financial market infrastructures (FMIs).

However, the existing entry and exit procedures (e.g., repercussions on membership due to credit rating downgrades) and modus operandi (e.g., requirements for higher collateral for weakened firm) of FMIs may pose obstacles to an orderly resolution as a firm's access to FMIs may be impeded in a crisis. These issues are being addressed by the CPSS and IOSCO.

At the same time, it is important that firms develop and put in place contingency measures to ensure that they have continued access to FMIs to facilitate an orderly resolution when necessary. The challenges in transferring clients and business lines could also be mitigated if pertinent information that facilitates such transfers is readily available.

The FSB has developed the following recommendations to address these challenges in relation to global payment operations.

4.1 Contingency planning in respect of access to FMIs

Firms should:

(i) assess the additional requirements that they may potentially be subject to during crisis situations in order to maintain their FMI membership (e.g., pre-funding or collateralizing its positions); and

(ii) develop a range of options for addressing the additional requirements (e.g., plan for the sourcing of additional collateral, and assess potential constraints on the firm's total payment flows).

4.2 Documentation and record-keeping requirements

Firms should:

(i) establish a centralised repository for all their FMI membership agreements to facilitate orderly transfers when necessary;

(ii) standardise documentation for payment services, covering issues including notice periods, termination provisions and continuing obligations, to facilitate orderly exits;

(iii) develop a draft Transitional Services Agreement as part of RRPs that, if needed, will allow the firm to continue to provide payments operations without a break (including access to FMIs) on behalf of the new purchaser, by using existing staff and infrastructure; and

(iv) develop a "purchaser's pack" that includes key information on the payment operations, credit exposures, lists of key staff, etc, to facilitate transfers of payments operations functions to a surviving entity, bridge institution or purchaser.

4.3 Alternative access to payments infrastructure for 2nd tier FMI members and clients

(i) Firms who are not direct FMI participants should have contingency arrangements to access the FMIs via more than one firm so that they can quickly switch if one direct participant fails; and

(ii) Firms providing FMI access for 2nd tier or lower firms should review their arrangements to ensure they are able to facilitate the switching of this access in the event of direct participant failure.

Annex 7

Discussion note on creditor hierarchy, depositor preference and depositor protection in resolution

1. An important feature of effective resolution regimes is to "*make it possible for shareholders and unsecured and uninsured creditors to absorb losses in their order of seniority.*" [12] This should be achieved in a manner that the risk of contagion is kept to a minimum and the need for bail-outs is absent. Clarity and predictability as regards the order of seniority or statutory ranking of claims in insolvency is a necessary prerequisite for effective resolution. It determines the allocation of losses. It shapes the incentives of market participants and pricing of risk. It affects the ease with which certain resolution measures can be applied. Differences in ranking can complicate cross-border resolutions. The FSB is therefore seeking public comments on the issue of whether or not greater convergence in the ranking of creditor claims across jurisdictions and in particular in, the treatment of deposit claims, could be pursued further at the international level.

I. The statutory hierarchy of claims in resolution

2. In insolvency, the liquidator or receiver distributes the proceeds according to a hierarchy of claims which is established by law. The highest-priority creditors are repaid first, and lower-priority ones are repaid only to the extent there are funds available. The typical classes consist in descending order of priority of: (i) secured creditors (up to the value of the collateral); (ii) those whose claims arise in the context of the administration of the liquidation or wind-down (e.g., fees of the liquidator and costs arising from continuing contract obligations that are essential for winding down the business); (iii) other preferred creditors; (iv) general unsecured creditors; (v) unsecured subordinated debt holders; and (vi) shareholders. The category of preferred creditors may be subdivided into several classes with differing priorities and typically includes: accrued payroll and wage claims; social security and claims of the fiscal and other public authorities; debtor in possession financing; and in some jurisdictions depositor claims. Further, the exercise of set-off and netting rights will also have the effect of providing a preference over other unsecured creditors.

II. Depositor preference

3. The ranking of claims in insolvency differs across jurisdictions. For example, in some countries depositors are treated as a class distinct from general unsecured creditors. This is referred to as "depositor preference" in insolvency. In the absence of depositor preference that subordinates the claims of other senior unsecured creditors to those of depositors, depositors have no greater claim on residual assets in the event of bankruptcy than senior

12 See Recommendation 12 of the SIFI recommendations.

unsecured creditors generally. Given that losses are imposed pro rata within each creditor class, depositors will bear the same losses, *pari passu* as senior unsecured creditors.

4. To the extent that depositors are insured by a deposit guarantee scheme, they will be compensated by the scheme. The existence of depositor preference is therefore only relevant for the uninsured portion of the depositor claim. It matters for recoveries by the deposit insurer. In most jurisdictions, the deposit insurer is subrogated to the rights of depositors against a failed institution. The concept of subrogation effectively allows the deposit insurance agency to "stand in the shoes" of the depositor when dealing with the liquidation of a deposit-taking institution and assume the claims of the depositor against the failed institution in order to recover its funds in the resolution process.

5. Certain jurisdictions provide for forms of depositor preference, including Australia, Argentina, China, Hong Kong, Switzerland and the United States. However, the scope of the preference differs. Some provide a broad preference, others, such as Hong Kong and Switzerland limit the preference to the insured amount. Broadly, the following approaches can be distinguished:

- **General depositor preference** gives preference to all deposit liabilities of a deposit-taking institution, irrespective of their deposit insurance eligibility, their covered status or the location where the deposits are booked or payable (whether in the local jurisdiction or at a foreign branch).
- **National depositor preference** gives preference to deposit liabilities booked and payable within the domestic jurisdiction and does not extend to deposits booked and payable at foreign branches.
- **Eligible depositor preference** gives preference to all deposits meeting the eligibility requirements for deposit insurance coverage (e.g., all classes of deposit covered by the scheme irrespective of limits).
- **Insured depositor preference** covers only insured depositors and no depositors outside the scope and limits of the deposit insurance system. The uninsured amount of a deposit will be treated as an unsecured senior creditor claim

III. The benefits and risks of depositor preference

6. The benefits and risks of depositor preference should be assessed in the light of the objectives of effective resolution regimes set out in the Preamble of the *Key Attributes* (see Annex 1).

7. On the one hand, there are arguments that a general depositor preference could offer additional protection and potentially higher recoveries to depositors (and where subrogation is present, deposit insurance agencies); reduce the incentive of uninsured depositors to run to the extent that they take comfort from the resolution regime's capacity to sustain their position; augment the incentives of holders of non-deposit liabilities to exercise more effective discipline over risk-taking by banks through closer monitoring; facilitate the implementation of resolution options, such as partial transfers, statutory bail-in or good bank/bad bank splits; reduce the eventual costs of providing deposit insurance (where subrogation is present and the deposit insurer is subrogated to the rights of insured depositors against the failed institution);

and contribute to more effective cross-border resolutions if a more uniform treatment of depositors were adopted across jurisdictions.

8. If depositors and other general unsecured creditors had to be treated *pari passu* by statute, resolution options that distinguish among depositors and other categories of creditors could be more difficult to achieve in some jurisdictions. For instance, if a resolution authority were to carve out all deposits and transfer them to a bridge bank or third party in order to preserve the continued operation of the deposit taking function, but leaves in the receivership other general creditors it could possibly face legal challenges in jurisdictions that require that similarly situated creditors within the same class be treated equally, unless the creditors left behind are not in a lesser position. These challenges could be less likely to arise if all depositor claims were preferred. Similarly, if the resolution authority chose to apply its statutory bail-in powers and convert senior unsecured creditor claim into equity in order to recapitalise the failing bank or alternatively to capitalise a newly established entity or bridge institution to which the failing institution's vital functions have been transferred, the resolution authority could face similar challenges. Some jurisdictions have deposit protections arrangements under which the protection of depositors is so extensive that these issues do not arise.

9. On the other hand, the argument could be made that preferences increase the risks for financial stability. When depositors are given a higher ranking than other creditors, it increases the potential loss exposure of the lower ranking creditors, thereby increasing incentives for them to exercise more market discipline and run than would otherwise be the case. Non-deposit creditors can take actions to better protect themselves such as collateralizing their claims, shortening terms of maturity, or imposing additional charges. Depositor preference could also impair the incentives of uninsured depositors to monitor risks and encourage troubled banks to attract depositors through offering high-yield large-scale deposits; lower recoveries to non-depositors. When a deposit insurance fund that is funded by contributions from the financial sector is subrogated to the right of depositors, the financial sector may indirectly benefit from deposit preference at the detriment of other senior unsecured creditors, in particular when it is funded on an *ex post* basis.

10. As a general matter, any change in the statutory hierarchy of claims will have far reaching implication for the overall ranking of claims in insolvency. Its implementation in national resolution regimes would therefore require strong political support and its benefits would need to clearly outweigh its costs.

IV. Cross-border implications

11. Differences in the ranking of claims across jurisdictions will affect the willingness of national authorities to cooperate and achieve coordinated cross-border solutions. The effective protection of local creditors and depositors, in particular, is an important consideration in the determination by national authorities of whether to cooperate with their foreign counterparts. A host authority will be more willing to support a resolution led by the home country, and to give effect to home country actions in its own jurisdiction, if the home jurisdiction's laws provide for the fair and equitable treatment of host country creditors and do not prefer local creditors in the home jurisdiction over foreign creditors. By contrast, a preference for the home jurisdiction's depositors over the depositors of the failing firm's foreign branches is

likely to lead host authorities to act locally in order to protect their local depositors. Convergence in the statutory ranking of creditors and in particular the treatment of depositors (including retail and wholesale depositors) – whether or not in the direction of depositor preference - could promote cross-border cooperation and improve the predictability of outcomes of cross-border resolutions, though it inevitably raises the question of the scope of the coverage and definition of a deposit, which differs across jurisdictions.

V. Interaction with deposit guarantee schemes

12. Statutory deposit guarantee schemes are designed to protect small-scale depositors and to mitigate, in part, the impact of a bank failure on financial stability. The features of effective deposit guarantee schemes are reflected in the Core Principles for Effective Deposit Insurance Systems promulgated by the International Association of Deposit Insurers (IADI) and Basel Committee on Banking Supervision (BCBS). Most mandatory deposit insurance arrangements are domestic in scope and provide protection for depositors of locally incorporated banks (whether foreign owned or not) and local branches of foreign banks. An exception is the deposit protection framework in the European Economic Area (EEA), where home country deposit insurance arrangements cover deposits in branches in other EEA countries. Coverage levels under deposit guarantee schemes differ across jurisdictions and are determined by a range of factors, including the average size of deposits in individual jurisdictions, the coverage levels of in the region.

13. It is generally recognized that deposit insurance is an effective means of protecting depositors of small and medium sized firms. However, some deposit insurance schemes may not have the capacity to effectively protect depositors of a large systemically important financial firm. Where this is the case, a system of depositor preference could provide an additional layer of protection and lower the costs of providing depositor protection by allowing depositors and the deposit insurer if it is subrogated to the rights of depositors to recover their claims in full before the remaining claimants are compensated. However, as discussed above, the individual firm's liability structure (and the changes it can undergo during times of financial stress) would ultimately determine the degree to which depositor preference could effectively lower an insurer's costs.

VI. Issues for discussion

14. Greater consistency in the statutory ranking of creditors, and in particular the treatment of depositors (including retail and wholesale depositors), could promote cross-border cooperation and facilitate the implementation of certain resolution measures, such as partial transfers. In this regard, if properly designed, convergence of the ranking of deposits in resolution could help address the objectives of protecting insured depositors and reducing any implicit government guarantee of deposits.

15. The FSB is therefore seeking comment on whether or not existing differences in statutory credit ranking represent an impediment to effective cross-border resolution and greater convergence in particular in, the treatment of deposit claims, should be pursued further at the international level (see ***Questions for public consultation*** in the Consultative Document Section II. 1.)

Annex 8

Discussion note on conditions for a temporary stay on early termination rights

1. Under standard market documentation for financial contracts, contractual acceleration, termination and other close-out rights (collectively, "early termination rights") in financial contracts may be triggered when the resolution authorities initiate resolution proceedings or take certain related resolution actions with respect to a financial institution. In the case of a systemically important financial institution (SIFI), the termination of large volumes of financial contracts upon entry into resolution could result in a disorderly rush for the exits and frustrate the implementation of resolution measures, such as the transfer of critical operations to a bridge bank, or the implementation of bail-in within resolution, which are aimed at achieving continuity of systemically important functions and of the financial contracts that support them. The objective of this note is to seek public comments on conditions under which a brief stay on early termination right should be imposed following entry into resolution and pending the use of resolution tools, as well as the length and scope of such a stay, possible exemptions and its cross-border application.

I. Background - role of stays in resolution proceedings

2. Special resolution proceedings for financial institutions, as well as general corporate insolvency frameworks, provide for moratoria or stays on the rights of creditors and counterparties to enforce their claims on the (assets of the) troubled entity. They also typically prohibit counterparties from exercising their contract termination rights under so-called contractual "ipso facto clauses" that treat the initiation of insolvency or resolution proceedings as an event of default and permit the non-defaulting counterparty to terminate the contract. Many jurisdictions have explicitly exempted certain types of financial contracts from the scope of such a stay on the exercise of contract termination rights on financial stability grounds to avoid adverse contagion effects spreading from an insolvent firm to its solvent counterparties.[13] Such exemptions typically cover swap agreements, spot, future, forward agreements, repurchase agreements, and agreements to buy, sell, borrow or lend securities. The initiation of insolvency or resolution proceedings or the taking of resolution-related actions with respect to the financial institution generally constitute an event of default under these contracts and triggers early termination rights.

13 For example, the Collateral Directive requires European Union Member States to ensure that financial collateral arrangements and close-out netting provisions can take effect in accordance with their terms, "notwithstanding the commencement or continuation of winding up proceedings or reorganisation measures in respect of the collateral provider and/or the collateral taker".

II. Discretionary versus automatic stays

3. The triggering of such early termination rights risks destabilising markets through, for example, the liquidation of collateral at fire-sale prices and the rush by counterparties to re-hedge their positions, particularly if the firm involved is large. It also complicates attempts to resolve the troubled financial institution and frustrate the implementation of resolution measures, such as the transfer of critical operations to a bridge bank, or the implementation of bail-in within resolution, aimed at achieving continuity of systemically important functions and of the financial contracts that support them. Preventing such close-out netting, termination, acceleration, or enforcement of security by any counterparty could be done in one of two ways:

(i) by providing the resolution authority with a discretionary power to impose, at its discretion, a temporary stay on close out rights upon the entry into resolution of the firm; or

(ii) by introducing a statutory provision that prevents the exercise of early termination clauses upon taking of certain resolution measures.

4. The stay would be aimed at achieving continuity of operations and therefore would not extend to all payment and delivery obligations and would not prevent close-out for reasons of failure to pay or deliver (so margin calls would still have to be met if due, or counterparties could close out, as at present). The starting point of the period of suspension would need to be clearly specified. Depending on the precise features of the jurisdiction's legal framework, it could be tied to the initiation of formal resolution proceedings or to a public announcement by the resolution authorities. A discretionary imposition of a temporary stay would in all cases require a public announcement.

III. Conditions and safeguards

5. In designing a legal framework that provides for a temporary stay of early termination rights, the following safeguards should be in place:

(i) The suspension should apply to provisions in financial contracts that trigger early termination rights by virtue of, or incidental to, the initiation of insolvency or resolution proceedings, or by virtue of a change in control of the relevant institution or its business arising from such proceedings;

(ii) The period of time during which the authorities could delay the immediate operation of such contractual early termination rights pending a transfer should be limited in duration (e.g., 24-48 hours or until the end of the next business day). It should provide authorities with sufficient time to decide on the resolution measures and to decide which assets or liabilities should be transferred and how to effect the transfer;

(iii) Counterparties' rights to terminate for "failure to pay" reasons (e.g., if a margin call is missed) should be preserved. After the period of the suspension, early termination rights could be exercised for those financial contracts that are not transferred to a sound financial institution, bridge financial institution or other public entity;

(iv) For contracts that are transferred to a third party or bridge bank, the acquiring entity would assume all the rights and obligations of the financial institution from which the contracts were transferred. In particular, the acquiring entity would assume all payment and margin requirements under all the transferred contracts;

(v) For contracts that are transferred, the exercise of early termination rights on the basis of the resolution of the troubled financial institution would continue to be precluded but any acceleration or termination rights based on a *subsequent* default by the acquiring entity should be preserved**;**

(vi) The authorities would only be permitted to transfer all of the contracts with a particular counterparty to a new entity and would not be permitted to select for transfer individual contracts with the same counterparty and subject to the same netting agreement ("cherry-picking");

(vii) In the case of a transfer to a bridge financial institution or other specialized entity that is not required to be capitalized under the applicable legal framework or that does not have a credit rating, some form of assurance may be needed. The availability of temporary liquidity funding through the resolution regime (without imposing costs on taxpayers) would generally provide sufficient assurances for counterparties. If the acquiring entity is a healthy institution that is fully capitalized and in compliance with prudential requirements, assurances of performance should not be necessary, especially since the counterparties' rights to terminate based upon a breach of the contract by the acquirer would be enforceable; and

(viii) Such legal authority would be implemented so as to avoid compromising the safe and orderly operations of regulated exchanges, Central Counterparties (CCPs) and financial market infrastructures (FMIs).

IV. Cross-border Issues

6. The imposition of a stay by a resolution authority in one jurisdiction does not have effect on contracts governed by the law of another jurisdiction. Conceptually, there would appear to be four different possible mechanisms ensure the cross-border effectiveness of a temporary suspension, some of which could be combined.

- **Contractual.** Authorities could require firms to incorporate provisions in their financial contracts whereby their counterparties recognize:

  (i) the right of the home jurisdiction to impose a temporary suspension of early termination rights as provided for under its resolution regime;

  (ii) the right of the home jurisdiction to transfer the relevant contracts; and

  (iii) that the transfer of such financial contracts to a third party, including bridge institutions, in and by itself does not constitute an event of default under the contract.

- **Administrative power given to host jurisdiction authorities.** Host jurisdiction authorities would be empowered to give effect in their jurisdiction, through an administrative act, to the suspension and the transfer implemented by the home jurisdiction. Such a power could most easily be established in jurisdictions where there are branches or regulated subsidiaries of the financial institution in resolution. Where there is no such physical presence but the financial institution in question has assets in the jurisdiction or has entered into contracts that are subject to the law of that jurisdiction as the governing law, other mechanisms for giving effect to the stay may need to be considered.
- **Courts.** Under existing legal mechanisms in many countries, the home jurisdiction authorities may apply to the courts in the relevant host jurisdiction for recognition of their resolution proceeding and seek a ruling giving effect to the suspension.
- **Automatic universality.** Some jurisdictions currently give automatic effect to the insolvency or reorganisation proceedings of other jurisdictions (e.g., within the EU), though this approach is not wide spread.

V. Issues for discussion

7. The FSB is seeking views on the suggested brief stay on early termination rights pending the implementation of certain resolution tools (see ***Questions for public consultation*** in the Consultative Document Section II. 2.)