Katten Muchin Rosenman LLP
CORPORATE & FINANCIAL WEEKLY DIGEST

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FDIC Approves Rules Requiring Living Wills and Contingency Plans

The Federal Deposit Insurance Corporation (FDIC) on September 13 approved a final rule (the Rule) to be issued jointly by the FDIC and the Federal Reserve Board (the Board) to implement Section 165(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act. This provision requires bank holding companies with assets of $50 billion or more and companies designated as systemic by the Financial Stability Oversight Council to report periodically to the FDIC and the Federal Reserve the company's plan for its rapid and orderly resolution in the event of material financial distress or failure. The Rule approved by the FDIC implements these requirements and "will be considered by the Federal Reserve in the coming days." Approval is expected.

The rule requires the company to describe its plan of how it could be resolved in a bankruptcy proceeding. The goal is to achieve a rapid and orderly resolution of an organization in such a way as not to cause a systemic risk to the financial system. The final rule also sets specific standards for the resolution plans (the Plans), including "requiring a strategic analysis of the plan's components, a description of the range of specific actions to be taken in the resolution, and analyses of the company's organization, material entities, interconnections and interdependencies, and management information systems among other elements." Additionally, the rule would require covered entities to identify core business lines, critical services and their providers, and "provide a strategy for the sale of core business lines." Further, the Plans "should provide a strategy to unwind or separate the covered depository institution (CIDI) and its subsidiaries from the organizational structure of its parent company in a cost-effective and timely fashion ... [and] should also describe remediation or mitigating steps that can be taken to eliminate or mitigate obstacles to such separation." Moreover, the Plans "should provide a strategy for the sale or disposition of the deposit franchise, including branches, core business lines and major assets of the CIDI in a manner that ensures that depositors receive access to their insured deposits within one business day of the institution’s failure [and in cases of a closure other than on a Friday, two days]…, maximizes the net present value return from the sale or disposition of such assets and minimizes the amount of any loss realized in the resolution of cases. The Plans should also describe how the strategies for the separation of the CIDI and its subsidiaries from its parent company’s organization and sale or disposition of deposit franchise, core business lines and major assets can be demonstrated to be the least costly to the Deposit Insurance Fund." With respect to these criteria, it would seem that

bankers will need to have knowledge of FDIC receivership operations, including how the FDIC analyzes transactional costs to the DIF.

Submission of resolution plans will be staggered based on the asset size of a covered company's U.S. operations. Companies with $250 billion or more in non-bank assets must submit plans on or before July 1, 2012; companies with $100 billion or more in total non-bank assets must submit plans on or before July 1, 2013; and companies that predominately operate through one or more insured depository institutions must submit plans on or before December 31, 2013. Plans are required to be updated annually. A company that experiences a material event after a plan is submitted has 45 days to notify regulators "after any event, occurrence, change in conditions or circumstances or change which results in, or *could reasonably be foreseen to have* [emphasis supplied], a material effect on the Plans of the CIDI. The FDIC further stated that "[i]n regard to what constitutes a material effect on the Plans, the effect on the Plans should be of such significance as to render the Plans ineffective, in whole *or in part* [emphasis supplied], until an update is made to the plan. It is believed that the italicized portions of the quoted rule will cause bankers to grapple with concerns about hindsight and what constitutes ineffectiveness of "part" of the plan. The FDIC stated that the Rule now provides for a multi-step review process that "affords the covered institutions the opportunity to correct deficiencies in their resolution plans before the FDIC would use its enforcement powers."

The FDIC expects that plans submitted would be subject to the Freedom of Information Act (FOIA). It proposed that plans be submitted in two sections: public and confidential. The FDIC stated that "it will presume" the confidential section is exempt under FOIA, but also stated that "a CIDI 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 FDIC will have to make formal exemption and segregability determinations if and when a plan is requested under the FOIA."

Separately, the FDIC's Board of Directors approved a complementary Interim Final Rule under the Federal Deposit Insurance Act to require insured depository institutions with $50 billion or more in total assets to submit periodic contingency plans to the FDIC for resolution in the event of the depository institution failure. The interim rule follows a Notice of Proposed Rulemaking issued by the FDIC in May 2010. This interim rule has a 60-day comment period.

To read the Interim Final Rule, click here.
To review Resolution Plan Work Streams, click here.

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