

Memorandum

Federal Reserve and FDIC Propose Revisions to “Living Will” Filing Requirements and Expectations for Regional Banks

September 1, 2023

On August 29, 2023, the FDIC proposed modifications to its resolution plan filing requirements for mid-sized insured depository institutions (the “IDI Proposal”), and the FDIC and Federal Reserve jointly proposed guidance on the agencies’ expectations regarding resolution plan filings by large regional bank holding companies and certain intermediate holding companies of foreign banking organizations (the “Proposed Guidance”).

The IDI Proposal would amend and restate the FDIC’s current resolution plan rule, which requires insured depository institutions (“IDIs”) with \$50 billion or more in total assets to periodically to submit resolution plans to the FDIC. Since the original issuance of the rule in 2012, the FDIC has made several major modifications that culminated in a full moratorium on submissions in 2018, followed by a reinstatement of filing requirements for IDIs with \$100 billion or more in total assets in January 2021. The IDI Proposal would modify the FDIC’s current filing requirements for mid-sized banks by:

- creating two groups of IDIs with different submission content requirements;
- adjusting required resolution plan filing content (including with respect to the resolution strategy), and codifying certain aspects of previously-issued guidance and feedback;
- establishing a two-prong standard by which IDI resolution submissions will be assessed;
- adjusting the frequency of IDI resolution plan submissions to a two-year cycle, which will include engagement and capabilities testing; and
- introducing an “interim supplement” requiring certain key content elements to be provided by all covered IDIs in the year between submissions.

The Proposed Guidance would establish expectations of the FDIC and Federal Reserve for resolution plan filings by large U.S. regional banks (those with at least \$250 billion in total assets) and certain large foreign banking organizations (“FBOs”) pursuant to Section 165(d) of the Dodd-Frank Act, with a focus on key areas of potential obstacles to resolvability such as capital, liquidity, governance mechanisms, operational capabilities, legal entity rationalization and separability, derivatives and trading activities.

Additional detail regarding these resolution planning proposals is provided below.

Resolution Plan Filing Requirements for Large and Mid-Sized Insured Depository Institutions

A. SCOPE AND FREQUENCY OF FILING REQUIREMENTS

The proposed rule would establish distinct requirements for the content and frequency of resolution plan filings for two groups of IDIs, determined by asset size:

- *Group A*: IDIs with \$100 billion or more in total assets; and
- *Group B*: IDIs with at least \$50 billion but less than \$100 billion in total assets.

Under the IDI Proposal, Group A IDIs would be required to submit “complete” resolution plans (containing all elements described in the IDI Proposal) while Group B IDIs would be required to submit reduced “informational filings,” each on a two-year cycle. This two-year cycle falls in-between the annual requirement outlined in the current rule and the three-year cycle implemented through supplementary guidance issued by the FDIC. Both Group A and Group B would be required to file certain key information as an interim supplement on the off year between comprehensive submissions under the proposed rule. Importantly, under the proposed rule, the FDIC would retain the authority to shorten or lengthen the period between submissions.

The IDI Proposal is a significant expansion of current resolution plan filing requirements for all IDIs within the scope of the proposal, but particularly for Group B IDIs, given that they are currently exempt from all submissions under the moratorium noted above. The FDIC acknowledged that the IDI Proposal represents a material increase in burden on impacted banking organizations, particularly Group B IDIs and Group A IDIs with asset sizes closer to the \$100 billion threshold. Under the FDIC’s estimates, the proposed changes would add approximately 2,400 extra work hours on resolution planning for a Group A IDI with \$100 billion in assets and approximately 3,350 work hours for a Group B IDI with \$50 billion in assets. After absorbing the full extent of the proposed changes, banking organizations may find that these FDIC expectations underestimate the proposal’s operational burden.

B. REQUIRED RESOLUTION PLAN CONTENTS

As summarized in the chart provided in Annex A, the resolution plans of Group A and Group B filers would both need to provide similar information regarding a wide array of business operations. However, the Group A filing requirements would differ from the Group B filing requirements in the following significant respects:

- *Identified Strategy and Failure Scenario*: The IDI Proposal would require Group A IDIs to provide an “identified strategy” that the FDIC could effectuate in the case of a failure, developed according to an identified failure scenario. Group B IDIs would not be required to provide an identified failure scenario and strategy for resolution.

In response to public criticisms about the facilitated acquisition of First Republic Bank, the proposal would require Group A IDIs to use a bridge bank as the default identified strategy, and require Group A IDIs to

outline an exit strategy from the bridge bank through some means. Showing some interest in resolution strategy alternatives to the standard weekend sale to a single buyer, the FDIC lists a number of possible bridge-bank exit options, including multiple acquirer exit, orderly wind down of certain business lines and asset sales, or restructuring and subsequent initial public offering or other capital markets transactions.

Highlighting the point above, the IDI Proposal notes that an IDI could use an identified strategy other than a bridge bank resolution, but specifies that a weekend sale to one or more acquirers would not be a permissible identified strategy. The FDIC stated that although “such a transaction poses the least execution risk for the FDIC, and is often the least disruptive and most efficient, it may not be available, particularly for the largest [IDIs] of \$100 billion or more in total assets, and particularly where the runway for contingency planning for resolution is short.”

The IDI Proposal would require the identified strategy to be based on a failure scenario where the IDI is experiencing material financial distress and outlines details about conditions that must be assumed. The proposed rule also gives the FDIC flexibility to develop specific failure scenario assumptions for individual IDIs, groups of IDIs or for all Group A IDIs.

- *Valuation to Assist FDIC's Least-Cost Analysis*: To assist the FDIC with its statutorily required least-cost analysis for a failed bank resolution, Group A IDIs would also be required to demonstrate the ability to produce valuations that the FDIC can use at the time of an actual failure. To demonstrate this capability, the IDI Proposal would require a Group A IDI to describe its valuation process in its resolution submission and provide a valuation analysis that includes a range of quantitative estimates of value under an array of scenarios.

C. FDIC ENGAGEMENT AND CAPABILITIES TESTING

The proposed rulemaking would expand on current guidance with respect to engagement with the FDIC and capabilities testing. With respect to engagement, the proposed rule would require the IDI to provide the FDIC with information and access to IDI personnel that the FDIC determines are “relevant to any provision of the Rule.” The FDIC notes that this is an expansion of its current authority which is limited to information and personnel access “necessary to assess the credibility of the resolution plan and the ability of the [IDI] to implement the resolution plan.”

With respect to capabilities testing and in response to criticism that the FDIC hasn't been able to provide sufficient information quickly enough for a more competitive and adaptable resolution process, the proposed rule would require an IDI to establish that it has the capability to maintain a virtual due diligence data room promptly in preparation for or upon failure of the IDI, populate it with enough information for interested parties to bid on the bank, or certain of its assets or operations, prior to or in connection with a resolution, and provide the FDIC with full access to such a data room. The proposed rule does not, however, require IDIs to actually operationalize and maintain a virtual data room prior to it being needed for a resolution.

D. TIMING AND IMPACT ON EXISTING FILING REQUIREMENTS

IDIs that would be in Group A under the proposed rulemaking are currently required to submit resolution plans in December 2023, December 2024 or December 2025. The preamble to the proposal states that Group A IDIs that were directed to file in December 2023 should make those submissions as previously planned unless they receive written notice of an extension. The FDIC noted that those plans would be evaluated under the current rule but that the FDIC will focus its review on concepts that would apply under the proposed rulemaking.

The FDIC also stated that it expects the proposed rulemaking to be finalized shortly after the December 2023 filings are submitted. The proposed rulemaking is open for public comment until November 30, 2023. Going forward under the IDI Proposal, if adopted as proposed, approximately half of the Group A IDIs would submit their first resolution plan under the new rule at least 270 days after the effective date of the final rulemaking. The other half of Group A IDIs would submit their first resolution plan under the new rule the following year but would need to provide an interim supplement at the same time as the first half of Group A makes their initial submissions. Group B IDIs would be required to submit their first filings at least 270 days after the effective date of the final rule. However, if finalized, the IDI proposal gives the FDIC significant flexibility to change the timing and substance of required resolution plan submissions.

E. INITIAL REACTIONS

As noted above, there are meaningful concerns that the FDIC is not able to consider a wide-enough array of possible purchasers or structural permutations for resolving failing banks. There is also a vocal group of politicians and agency leaders that have deep concerns about the competitive and financial stability impacts—as well as the practicality—of resolving mid-sized banks. The IDI Proposal is intended to address these concerns.

The proposed rule would, however, impose significant additional burdens on covered organizations, resulting in two FDIC Directors voting against the proposal. In voting against the proposed rule, Vice Chairman Travis Hill stated that “[h]istorically, the FDIC has repeatedly struggled to provide firms meaningful, timely feedback on IDI resolution plans” under the current timelines and structure and that he believes the proposed rule is “trying to do much all at once, rather than focusing on and prioritizing key aspects of resolution readiness.” Director Jonathan McKernan also voted against the proposed rule and questioned whether the FDIC has the statutory authority to require and enforce portions of the rulemaking.

Resolution Planning Guidance for Category II and III Banking Organizations

Concurrently with the IDI Proposal, the FDIC and Federal Reserve also issued proposed joint guidance with respect to resolution planning obligations required under section 165(d) of the Dodd-Frank Act for domestic and foreign banking organizations subject to Category II and III enhanced prudential standards (triennial filers). In contrast to the IDI resolution plans discussed above, the section 165(d) resolution plans are submitted by bank holding companies or foreign banks that control U.S. IDIs, and cover the consolidated operations of the banking

organization. Category IV banking organization will continue to be exempt from any obligation to file resolution plans under section 165(d).

Plans to release the Proposed Guidance were previewed by the agencies in September 2022, when the agencies indicated that the previous living will submissions by banking organizations “revealed significant inconsistencies in the amount and nature of information provided on critical informational elements...as well as optimistic assumptions about their failure scenarios.” The Proposed Guidance also reflects lessons learned by the agencies from the recent bank failures, although none of the banks that failed in the spring of 2023 were required to file resolutions plans under section 165(d).

A. RESOLUTION STRATEGY

Consistent with the current regulatory framework, banking organizations would not be expressly required to adopt any particular resolution strategy under the Proposed Guidance. Instead, Category II and III banking organizations would continue to be able to adopt either a single-point-of-entry (“SPOE”) or a multiple-point-of-entry (“MPOE”) resolution strategy. Although the Proposed Guidance indicates that it is not intended to favor one strategy over another, in voting against the proposal, Federal Reserve Governor Michelle Bowman noted that “ongoing regulatory reform efforts could effectively eliminate this optionality” while FDIC Vice Chairman Travis Hill noted that “it would be natural to wonder if the agencies intend to push Category II and III firms to an SPOE strategy.”

The Proposed Guidance notes that all domestic Category II and III banking organizations and most foreign Category II and III banking organizations adopted a MPOE resolution strategy in their previous submissions. The Proposed Guidance states that resolution plans submitted pursuant to section 165(d) that select MPOE should contain information about the feasibility of resolving their U.S. IDI under the FDIC resolution planning process discussed above. The Proposed Guidance also outlines expectations for a firm adopting an MPOE resolution strategy to demonstrate how the IDI can be resolved in a manner that would substantially mitigate the risk that the failure would have serious adverse effects on financial stability in the U.S. and would not require the use of the systemic risk exception to provide extraordinary assistance.

B. EXPECTATIONS REGARDING LIVING WILL CONTENT

The Proposed Guidance articulates the agencies’ expectations for either resolution strategy with respect to: capital, liquidity, governance mechanisms for decisions associated with entering bankruptcy, operational issues, legal entity rationalization and separability, and IDI resolution.

The Proposed Guidance would contain two additional topics relevant to FBOs related to home country resolution plans and branches. In light of the failure of a large FBO earlier this year, the FBO-specific Proposed Guidance focuses on gathering information about how a global resolution plan required by a home country regulator affects

resolution planning in the U.S. and identifying where the FBO's U.S. plan relies on assumptions, strategies and capabilities that may be different from the global plan.

C. TIMING AND IMPACT ON EXISTING FILING REQUIREMENTS

Under the current rule, the next resolution plans for Category II and III banking organizations are due by July 1, 2024. The Proposed Guidance states that the agencies are considering providing a short extension of this due date (possibly six months) to provide banking organizations with time to make necessary changes once the Proposed Guidance is finalized. The proposed guidance does not change the rule based requirement that Category II and III banking organizations must file a resolution plan for purposes of section 165(d) every three years (alternating between full and targeted resolution plans).

The agencies acknowledged in the Proposed Guidance that the interagency proposed rulemaking on long-term debt will have a material impact on the resolution planning strategies of banking organizations. The agencies are requesting public comments on the interactions between the two proposals. The Proposed Guidance is open for public comment until November 30, 2023.

D. INITIAL REACTIONS

The Proposed Guidance is based on previous guidance issued by the agencies in 2019 and 2020 with respect to global systemically important banking organizations. As a result, the Proposed Guidance represents another incremental step, together with the IDI Proposal, the proposed long-term debt rulemaking and the proposed “Basel III Endgame” capital rulemaking, towards creating two categories of banking organizations—large and small.

FDIC Internal Procedures for Mid-Sized and Large Failed Bank Sales

The FDIC also approved modifications to the agency's internal practices related to resolutions of large and mid-sized banks. Under current FDIC processes, when an IDI is in danger of default and it appears that the FDIC will be appointed as receiver, the FDIC Board of Directors approves a resolution specific to that IDI that often permits designated staff to facilitate the effective sale or wind down of the IDI, consistent with marketing plans outlined by staff to the FDIC Board. Staff may consult or brief FDIC Board members during the resolution process, particularly for larger IDIs, but there are no formal rules governing that process.

To address concerns regarding the FDIC's resolution processes in the recent bank failures (including that the FDIC did not consider a sufficient array of possible bidders in recent bank resolutions and that the FDIC Board should take a more active role in reviewing resolution transactions), and to accommodate the more tailored approach to bank resolutions favored by the IDI Proposal, the FDIC has adopted a new Board-level review process for resolution transactions involving IDIs with \$50 billion or more in total assets. In future failed bank resolutions, once FDIC staff have settled on a recommendation of a proposed purchaser, staff will be required to consult with each member of the FDIC Board as to the marketing of the failing IDI to potential bidders, the

number and terms of bids that were submitted, and the least-cost determination analysis conducted to determine the recommended resolution transaction.

In connection with this consultation process, staff must now inquire whether each Board member would like a full Board vote on the proposed transaction. If a majority of the members of the FDIC Board request such a vote, staff cannot proceed with the proposed transaction without the approval of the FDIC Board. If a majority of the members of the FDIC Board do not request such a vote, staff can proceed with the proposed transaction under their normal processes. The FDIC did not approve a counter proposal supported by Director Jonathan McKernan and Vice Chairman Travis Hill that would have automatically required an FDIC Board approval for any resolution transaction involving an IDI with \$50 billion or more in total assets.

To read our overview of the federal banking agencies proposed rules and guidance, please click [here](#). Additional detail regarding the proposed LTD and “clean holding company” requirements for regional banking organizations is available [here](#).

For further information regarding this memorandum, please contact any member of the Firm’s [Financial Institutions Group](#), including those listed below.

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Annex

**COMPARISON OF GROUP A IDI SUBMISSIONS, GROUP B IDI SUBMISSIONS
AND INTERIM SUPPLEMENTS**

	Group A	Group B	Groups A and B
Filing Type	Resolution Plan Submissions	Informational Filings	Interim Supplement
Filing Frequency	2 Year Cycle	2 Year Cycle	Off-Year Cycle
Identified Strategy	X	--	--
Failure Scenario	X	--	--
Valuation for Least Costly Resolution	X	--	--
Executive Summary	X	--	--
Org. Structure / Legal Entities / Core Business Lines / Branches	X	X	X
Methodology for Material Entity Designation	X	X	--
Separation from Parent / Obstacles to Orderly Resolution	X	X	--
Deposit Activities	X	X	Key Info
Critical Services	X	X	Key Info
Key Personnel	X	X	Key Info
Franchise Components	X	X	Key Info
Asset Portfolio Sales	X	X	Key Info
Off-Balance Sheet Exposures	X	X	X
Qualified Financial Contracts	X	X	--
Unconsolidated Balance Sheet	X	X	X
Payment, Clearing & Settlement	X	X	Key Info
Capital Structure / Funding Sources	X	X	Key Info
Parent & Affiliate Funding / Transactions / Exposures / Concentrations	X	X	--
Economic Effects of Resolution	X	X	--
Non-Deposit Claims	X	X	--
Cross-Border Elements	X	X	X
Management Information Systems / Licenses / IP	X	X	Key Info
Digital Services / Electronic Platforms	X	X	--
Communications Playbook	X	X	--
Corporate Governance	X	X	--
IDI's Assessment of Resolution Plan	X	X	--
Other Material Factors	X	X	--