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Test Your Resolution: Living Wills in an Era of Regulatory Uncertainty

SYLVIA A. MAYER AND HEATH P. TARBERT

This article summarizes the requirements of Section 165(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act") and the final rule implementing that provision. In addition, in light of the bank holding company rule's intersection with the resolution planning required of insured depository institutions ("IDIs"), this article also briefly discusses the similarities and differences between the IDI resolution planning requirements and resolution planning requirements under Section 165(d) of the Act. The article then considers several issues left unresolved by the Act and its implementing regulations.

Among the many mandates of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank" or the "Act") is the creation of a new requirement imposed on certain systemically important financial institutions ("SIFIs") and other companies[1] to submit an annual resolution plan (also known as a "living will") to the Federal Deposit Insurance Corporation ("FDIC") and Board of Governors of the Federal Reserve

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System ("FRB").[2] By requiring resolution plans — which detail how each company will, in the event of failure, engage in rapid and orderly resolution — the Act has imposed a previously unknown and heavy burden on SIFIs.[3] Like so many other provisions of Dodd-Frank, moreover, the section of the Act governing resolution plans provides but a skeletal outline of what covered institutions must do to satisfy its requirements, while creating a framework for penalizing companies for failure to comply.

On September 13, 2011, the FDIC issued a final rule ("the final rule" or "BHC rule") governing SIFI resolution plans for large, complex bank holding companies ("BHCs") and other SIFIs. It will become effective following both FRB approval and 30 days after its publication in the *Federal Register*. The BHC rule, which was developed jointly by the FDIC and FRB, fills in many of the gaps left by the legislation. The FDIC and FRB have defined several key statutory terms and clarified much of the informational content they expect to receive in each living will. As a result, the BHC rule provides covered institutions with some insight into what it will take to make a plan "credible," as required by the Act.[4] At the same time, however, the FDIC and FRB have acknowledged that they "expect the process of submission and review of the initial resolution plan iterations to include an ongoing dialogue,"[5] and thus, even a covered institution that strives to follow the Act and final rule to the letter will be left with unanswered questions.

This article summarizes the requirements of Section 165(d) of Dodd-Frank and the final rule implementing that provision, highlighting in particular the changes made by regulators in response to comments to the proposed rule the FDIC and FRB released in April 2011. In addition, in light of the BHC rule's intersection with the resolution planning required of insured depository institutions ("IDIs"), this article also briefly discusses the similarities and differences between the IDI resolution planning requirements and resolution planning requirements under Section 165(d) of the Act. The article then considers several issues left unresolved by the Act and its implementing regulations. In particular, the following emerging issues are considered:

- confidentiality;
- subsidiarization;
- the tension between the objectives of the Bankruptcy Code and the Act's

goal of reducing systemic risk in the U.S. financial system;

- tension between resolution under the Bankruptcy Code and other insolvency regimes;
- international requirements for resolution planning;
- the relationship, if any, between the living will requirement and other prudential measures imposed on SIFIs by Dodd-Frank; and
- navigation of the iterative process.

Although the regulators' apparent willingness to work with covered companies in navigating the uncharted waters of resolution planning is encouraging, the sheer volume of open issues and potential conflicts with other regimes suggests that the task of creating living wills that will work for both regulators and regulated institutions may be a challenging one.

OVERVIEW OF SECTION 165(d)

On July 21, 2010, President Obama signed Dodd-Frank, thereby enacting a package of financial regulatory reforms unparalleled in scope and depth since the New Deal. The Act was, in large part, a sweeping reaction to what were perceived to have been serious regulatory failings culminating in the global financial crisis — the most severe period of financial instability since the events leading to the Great Depression. Although the Act takes steps to bolster the federal financial regulatory regime, it also confronts the reality that, notwithstanding the intricacies of any framework that may be in place to regulate and supervise SIFIs, some of these entities — even those thought beyond reproach — may fail. The Act thus attempts to ensure that, if and when such failures occur, regulators and companies themselves will be better prepared to resolve a failing institution's affairs than they were during the recent crisis and to do so without taxpayer support.[6]

One key mechanism Congress adopted to ensure appropriate resolution planning is Section 165(d), which mandates that SIFIs develop and submit to federal regulators a plan detailing how they will engage in a "rapid and orderly resolution in the event of financial distress or failure."[7] Covered entities — which under the final rule include: (i) U.S. BHCs with assets of $50

billion or more, (ii) foreign banks or companies with global assets of $50 billion or more that are treated as BHCs under Section 8(a) of the International Banking Act of 1978, and (iii) nonbank financial companies supervised by the FRB[8] — must periodically submit their resolution plans to the FDIC and FRB, which must then determine whether a submitted plan is "credible."[9]

Although Congress has generally given the FDIC and FRB broad discretion to implement Section 165(d) through a required joint rulemaking, Dodd-Frank makes certain aspects of the resolution planning process non-negotiable. For example, in addition to any other information that the regulators may demand, the Act on its face specifically requires the following to be included in the living wills:

- "[I]nformation 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 any nonbank subsidiaries of the company;"
- "[F]ull descriptions of the ownership structure, assets, liabilities, and contractual obligations of the company;" and
- A list of cross-guarantees tied to different securities and major counterparties, and a process for determining to whom the company has pledged collateral.[10]

Section 165(d) further requires covered entities to report the nature and extent of their credit exposures to other significant BHCs and nonbank financial companies, as well as the nature and extent to which those SIFIs have credit exposures to them.[11] All of these requirements appear designed to further Congress's stated purpose of "prevent[ing] or mitigat[ing] risks to the financial stability of the United States that could arise from the material financial distress or failure, or ongoing activities, or large, interconnected financial institutions."[12]

In addition to assessing whether a submitted plan is "credible" overall, Dodd-Frank tasks the FDIC and FRB with determining whether the plan will in fact "facilitate an orderly resolution of the company" under the U.S. Bankruptcy Code.[13] If regulators determine that a plan is deficient, the covered company is required to resubmit the plan within a time period to be determined by the regulators.[14] A company's failure to do so permits the

FDIC and FRB jointly to impose "more stringent capital, leverage, or liquidity requirements, or restrictions on the growth, activities, or operations" of the company and its subsidiaries until that failure is cured.[15] If a company fails to comply within two years, moreover, the FDIC and FRB, along with the Financial Stability Oversight Council ("FSOC") may jointly order the company "to divest certain assets or operations" as deemed necessary to facilitate an orderly resolution.[16]

Although Dodd-Frank's requirements and the steep penalties for failure to comply underscore Congress's commitment to the resolution planning process, the Act imbues each resolution plan itself with little legal force going forward. Section 165(d) explicitly provides that the required plans "shall not be binding" on any bankruptcy court, receiver appointed under the Orderly Liquidation Authority under Title II of Dodd-Frank, or any other supervisor with authority to resolve a nonbank financial company,[17] and that the plan is not binding on any BHC, its subsidiaries, or its affiliates.[18] The Act further provides that "no private right of action may be based" on a resolution plan.[19]

THE FINAL RULE

Section 165(d)(8) directs the FDIC and FRB jointly to issue implementing rules on or before January 21, 2012.[20] In April 2011, regulators began that process with a notice of a proposed rulemaking.[21] Over the next several months, the FDIC and FRB considered comments on the proposed rule and met with interested parties to seek their input on the proposal. The final rule, which the FDIC adopted on September 13, 2011, reflects a number of significant clarifications and changes to the initial proposal. The most important clarifications and changes relate to timing, notice following a material event, scope of filing, relationship with other insolvency proceedings, data production, credit exposure reporting, and confidentiality. Also noteworthy are the similarities between the BHC rule and an interim final rule issued by the FDIC that covers living wills for IDIs with $50 billion or more in assets (the "IDI rule").[22] IDIs are not eligible to file for bankruptcy, but rather are resolved through a process in which the FDIC is appointed receiver pursuant to the Federal Deposit Insurance Act ("FDI Act").[23] Nonetheless, the IDI rule in many important respects tracks and builds upon the final BHC rule.

Timeline for Filing

The first major change evident in the final BHC rule is the regulators' modification of the timeline for filing resolution plans. The proposed rule would have required every covered company to file its living will within 180 days of the rule becoming effective. It also would have required companies to update their plans annually, no later than 90 days after the end of each calendar year.[24] The final rule relaxes those requirements and staggers the dates on which plans are due based on company size:

- Covered companies that have $250 billion or more in total nonbank assets (or, in the case of a company that is foreign-based, such company's total U.S. nonbank assets), must file an initial resolution plan by July 1, 2012.[25]
- Covered companies that have $100-249 billion or more in total nonbank assets (or, for a covered company that is foreign-based, such company's total U.S. nonbank assets), must file an initial resolution plan before July 1, 2013.[26]
- The remaining covered companies must file their resolution plan on or before December 31, 2013.[27]
- Entities that become covered companies after the effective date of the regulation must file their resolution plans by July 1 following the date they become subject to the statutory requirements, so long as they have been a covered company at that point for at least 270 days.[28]

The final rule likewise staggers the dates on which SIFIs are required to update their plans, calling for revisions annually on or before the anniversary of the company's first filing, for as long as a company remains covered by the terms of the Act.[29]

Material Events

The final rule also changes the manner in which covered companies are required to update their living wills in the event of a material change to the company's status. Under the regulators' initial proposal, each covered com-

pany would have been required to file an updated plan no later than 45 days after any event or change that resulted in, or reasonably could have been expected to result in, a material effect on the company's resolution plan.[30] The final rule is less demanding. The rule does permit the FDIC and FRB to require that a covered company file an update to its living will within any "reasonable amount of time" as determined by the regulators.[31] As a matter of course, however, the rule requires only that covered companies provide regulators with a "notice" no later than 45 days after a material event or change — describing the occurrence and explaining why it might require changes to the resolution plan.[32] The company need not update the plan itself until the next regularly scheduled filing.[33] And the company need not file a notice at all if the date on which the notice is due is within 90 days preceding the date on which the covered company is required to file its annual plan.[34]

Scope of Filing

As noted above, Section 165(d) of Dodd-Frank establishes certain baseline requirements governing the contents of living wills. The BHC rule implements those requirements, both by defining key terms in the Act and by specifying in greater detail the components of each plan that the regulators expect to see.

Definitions

To begin, the regulators have defined the "rapid and orderly resolution" required by the Act as one 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."[35] In other words, it is not enough that a company file a living will that maximizes the value of the company in resolution for creditors or shareholders. Rather, the plan demanded by the FDIC and FRB must be one that avoids significant consequences for the U.S. economic system as a whole. In that regard, the company must be particularly sensitive to its resolution of "critical operations" — which include "those operations of the covered company, including associated services, functions and support,

the failure or discontinuance of which…would pose a threat to the financial stability of the United States."[36] The same in true for "core business lines," or "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."[37]

Assumptions

In describing a proposed course of resolution, moreover, SIFIs are required to build upon a number of assumptions and, conversely, are prohibited from making certain assumptions. For example, companies are prohibited from assuming that they would receive any extraordinary funding or capital from the U.S. or any other government.[38] Effectively, only ordinary-course-of-business funding or capital may be relied upon.[39] In contrast to this prohibited assumption, drawing on baselines used for stress testing, the BHC rule establishes the required economic condition assumptions to be factored into a resolution plan: "the baseline, adverse and severely adverse economic conditions provided to the covered company by the [FRB] pursuant to [Section 165(i)(1)(B) of Dodd-Frank]."[40] For the initial submission, however, the company may focus solely on the baseline conditions.[41] Furthermore, a covered company with an IDI of $50 billion or more in total consolidated assets must assume that its IDI has failed and address its strategy under that circumstance, while a covered company with one or more IDIs of any size must assume that the IDI(s) is not the cause of failure and provide for a strategy to insulate the IDI(s) from the risks of the SIFI's various nonbank entities.

What is more, if a covered company relies on a "material entity" (a subsidiary that conducts core business lines or critical operations), and that material entity is able to seek relief pursuant to the Bankruptcy Code, then the resolution plan must assume the failure or discontinuation of that material entity. It must describe how both the covered company and the material entity would mitigate any adverse effects on the financial stability of the United States.[42] If, instead, the material entity is not eligible to seek relief under the Bankruptcy Code, then the resolution plan must address the resolution strategy under the applicable alternative insolvency regime — but only if the material entity conducts a critical operation or has $50 billion or more in as-

sets.[43] In sum, somewhat akin to a law school final exam question, the BHC rule requires covered entities to consider and respond to a host of failure scenarios that may — or may not — be realistic harbingers of the financial distress a company is actually likely to encounter.

Informational Content

Building on those definitions and baseline assumptions, the BHC rule goes on to specify the "informational content" regulators expect to see in each living will:

Executive Summary. This summary should describe in broad terms the key elements of the plan and, in subsequent submissions, detail any material changes made to the plan and actions taken since the previous filing to improve the effectiveness of the plan.[44]

Strategic Analysis. The final rule requires SIFIs to provide a strategic analysis outlining what the resolution plan entails, how it will be implemented, and why it will be effective. This analysis is the heart of the plan, and the regulators have described in great detail what they expect to learn about each company from its living will. First, the rule requires the covered company to articulate any key assumptions underlying the plan.[45] Next, the institution must detail the range of specific actions it would take to facilitate resolution of the company itself, its material entities, and its critical operations and core business lines.[46]

In particular, the rule requires each covered company to describe the funding, liquidity, capital needs, and available resources for the company and its material entities — both in the ordinary course of business and in the event of material financial distress or failure. The plan must include a strategy for funding and maintaining operations of the company and material entities.[47] But, as noted above, the analysis also must include a plan of attack should a material entity, core business line, or critical operation fail.[48] The company additionally must include a strategy for ensuring that any IDI subsidiary will be protected from risks arising from the activities of any nonbank subsidiaries.[49]

More generally, the company's strategic analysis must identify the amount of time the company anticipates will be required for successful execution of each step of the plan.[50] The analysis should therefore include any potential material weaknesses or impediments to the execution of the plan, as well as steps the company has taken or will take to mitigate those weaknesses.[51] The company also must describe in detail the processes it has used to determine the value of business lines and assets, to assess the feasibility of implementing the resolution plan, and to assess the impact of any restructuring contemplated by the plan.[52]

*Corporate Governanc*e. The BHC rule also requires that each company's living will describe how resolution planning is integrated into the company's corporate governance structure. Companies are expected to describe the procedures they have in place to ensure accountability of senior management and directors in the resolution planning process, including internal controls governing preparation of the plan, the identity of the senior officials primarily responsible for developing and implementing the plan, and the contact information for a senior management official who will serve as the regulators' point of contact regarding the plan.[53] The company is also expected to describe any actions taken since the filing of its last plan to improve or assess its viability.[54]

Organizational Structure. Next, each covered company must provide detailed information regarding its organizational structure. That includes a list of all material entities within the company's organization; a mapping of the company's critical operations and core business lines (including material asset holdings and liabilities); and an unconsolidated balance sheet for the company and a consolidating schedule for all material entities subject to consolidation.[55] Companies are also expected to identify and describe any material off-balance sheet exposures (including guarantees and contractual obligations), capital and cash flows, liabilities, pledged collateral, trading and derivatives activities, hedging activities, and material trading systems in which the company and its material entities participate.[56] The rule also requires an institution to identify and describe its relationships with major counterparties, and further analyze the impact of the failure of each counterparty on the company.[57]

Information Systems. The BHC rule additionally requires each covered company to provide a thorough accounting of its key management information systems. Companies are expected to describe their applications for risk management, accounting, and financial and regulatory reporting; to describe related agreements and intellectual property used by the covered company and its material entities; and to map the use of such systems with respect to critical operations and core business lines.[58] The resolution plan should also detail the scope and frequency of internal reports provided to senior management to monitor the financial health of the company, its material entities, and critical operations and core business lines. In addition, the company should analyze the capabilities of its information systems to collect and report the data underlying the plan and identify any deficiencies in those systems. And on top of all this, the living will must include a process for regulators to access the company's information systems.[59]

Interdependencies. Next, the BHC rule charges covered companies with identifying interconnections and interdependencies among the company and its material entities, critical operations, and core business lines. As part of this process, SIFIs are expected to report on shared resources, funding arrangements, credit and other exposures, cross-entity liabilities, risk transfers, and service level agreements.[60]

Regulatory Supervision. Furthermore, the final rule directs covered companies to identify and include contact information for all federal, state, or foreign agencies or authorities — other than federal banking agencies — with supervisory authority or responsibility over the covered company and its material entities, critical operations, and core business lines.[61]

Tailored Plans

It perhaps goes without saying that the FDIC and FRB's requirements for living wills place a heavy burden on covered companies, not only with respect to reporting but also with respect to information gathering and even corporate restructuring. The BHC rule does, however, slightly lessen the regulatory load when (i) the covered company has less than $100 billion in total nonbank assets (or, in the case of a covered company that is foreign-based,

total U.S. nonbank assets), and (ii) the covered company owns or controls an IDI whose assets comprise 85 percent or more of the SIFI's total consolidated assets (or, in the case of a covered company that is foreign-based, the company's U.S. IDI operations, branches, and agencies comprise 85 percent or more of its U.S. total consolidated assets).[62]

Those companies meeting the above criteria may file what the rule describes as a "tailored" resolution plan. Tailored plans are essentially a less detailed and complex version of the resolution plan required for other SIFIs. For example, a tailored plan must include a strategic analysis component, but only with respect to the covered company and its nonbanking material entities and operations.[63]

Data Production

The final rule also benefits SIFIs by lessening certain data production requirements. The proposed rule would have required a covered company to provide both an unconsolidated balance sheet and a consolidating schedule for all entities that are subject to consolidation.[64] Recognizing that this would have been a potentially burdensome requirement, however, the FDIC and FRB in the final rule required only that the company provide an unconsolidated balance sheet and a consolidating schedule for all *material* entities subject to consolidation.[65] SIFIs may aggregate amounts attributable to nonmaterial entities on the consolidating schedule.[66]

Despite that change, the BHC rule still requires that the covered company provide the FDIC and FRB with access to any information they determine necessary to facilitate their review process.[67] Moreover, the preamble to the BHC rule explains that, in preparing for a possible liquidation of a covered company under Title II of Dodd-Frank, the FDIC will "have access to the information included in such company's resolution plan."[68] The FDIC's knowledge and access to this information is considered a "vital element" of the FDIC's own resolution planning for the company should future regulators resort to their special authority under Title II of the Act.[69]

Relationship with Other Insolvency Proceedings

As many commenters pointed out in response to the proposed rule,

which was framed generally in terms of the Bankruptcy Code, not all of a company's material entities as defined by the proposed rule would have been subject to resolution under traditional bankruptcy laws. For example, a subsidiary might be subject to a specialized insolvency regime, such as the FDI Act, foreign insolvency regimes, and state insolvency regimes (in particular, for insurance companies).[70] In issuing the final rule, the FDIC and FRB responded to those distinctions by clarifying that any analysis with respect to entities ineligible to file for bankruptcy should address resolution under the applicable insolvency regime, including the strategy and actions that the company would take in such a proceeding.[71] If, moreover, a material entity is subject to an insolvency regime other than the Bankruptcy Code, the covered company, as noted above, need not describe the actions it would take to mitigate the adverse effects of the failure of that entity on the financial stability of the United States, unless that entity either has $50 billion or more in total assets or otherwise conducts a critical operation.[72] The BHC rule thus takes at least initial steps toward placing the resolution of covered entities under Dodd-Frank within the complex jurisdictional framework governing SIFIs in the United States.

Credit Exposure Reports

Another major revision to the final rule involves Section 165(d)'s corollary requirement that covered companies report the nature and extent of their credit exposures to other SIFIs. The FDIC and FRB initially included in their proposed rule provisions implementing this requirement. After receiving comments expressing "significant concerns" about the scope of the reporting requirement, however, the regulators decided against "finaliz[ing] the credit exposure reporting requirement" in conjunction with the rule governing living wills.[73]

Confidentiality

Lastly, the agencies made significant changes to the proposed rule's treatment of confidentiality concerns. In the proposed rule, the FDIC and FRB provided only that any covered company submitting a plan could request that

the information in the plan be treated as confidential under Section 552(b)(4) of Title 5 of the U.S. Code — a provision that permits agencies to withhold information from the disclosures otherwise mandated by the Freedom of Information Act ("FOIA") — and under the rules adopted by the FDIC, the FRB, and the FSOC governing the disclosure of information.[74] The proposed rule thus provided no guarantee that the information companies submitted would in fact be kept confidential. To begin, the proposed rule provided no assurances that the agencies would grant requests for confidential treatment. Furthermore, it was odd that the regulators failed to invoke another FOIA exemption that allows agencies to decline to disclose matters "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"[75] — precisely the type of information one would expect to see in a living will.

Those omissions did not go unnoticed, and changes in the final rule suggest that the FDIC and FRB took confidentiality concerns seriously. To begin, the regulators pointed out that under Section 112(d)(5)(A) of Dodd-Frank, the FDIC and FRB must "maintain the confidentiality of any data, information, and reports submitted under Title I," which would include a living will produced to comply with Section 165(d).[76] The agencies also recognized that the required disclosures necessarily will include information "that covered companies would not customarily make available to the public" and cautioned that public release of those details "would impede the quality and extent of information" SIFIs would provide to regulators and undermine the FDIC and FRB's work "to encourage effective and orderly unwind of the covered companies in a crisis."[77] The regulators accordingly stated their "expect[ation] that large portions of the submissions" would be "subject to withholding under exemptions 4 and 8 of the FOIA, 5 U.S.C. §§ 552(b)(4) and 552(b)(8)."[78]

The agencies also noted, however, that the BHC rule "calls for the submission of details regarding covered companies that are publicly available or otherwise are not sensitive."[79] Such information, the regulators concluded, "should be made public."[80] To achieve a balance in disclosure, therefore, the final rule directs each covered company to divide its resolution plan into two sections: one public and one confidential. The public section is to include "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," a description of the company's:

- material entities;
- core business lines;
- consolidated or segmented financial information regarding assets, liabilities, capital, and major funding sources;
- derivative and hedging activities;
- memberships in material payment, clearing, and settlement systems;
- foreign operations;
- supervisory authorities;
- principal officers;
- corporate governance structure and resolution planning processes; and
- material management information systems.[81]

The public section also must include "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."[82]

With respect to the non-public section of a company's submission, and consistent with the FDIC and FRB's introductory statements regarding their duties under Dodd-Frank, the BHC rule provides that regulators will determine confidentiality in accord with all "applicable exemptions" in FOIA and guarantees that, "[t]o the extent permitted by law, information comprising the Confidential Section of a resolution plan will be treated as confidential."[83] In addition, the rule preserves for SIFIs any privilege that might otherwise apply to the information, even after submitted to the regulators.[84]

The IDI Rule

The same day regulators issued the final BHC rule, the FDIC released an interim rule in final form (pending an additional comment period) that

will govern resolution of large IDIs under the receivership regime of the FDI Act.[85] The goal of this IDI rule is fundamentally the same as that of the BHC rule: to require large financial institutions to develop and submit contingency plans to resolve their depositories in the event of failure and to provide regulators with important information that regulators will need during the resolution process. There are, therefore, many similarities between the two rules. The IDI rule, for example, also requires covered institutions to include in their resolution plans non-confidential executive summaries, as well as a strategic analysis of the proposed resolution, information about the institution's corporate governance, information about its organizational structure and management information systems, and descriptions of the depository's interconnections with other financial entities, including parent organizations.[86]

The final BHC rule and interim IDI rule also complement each other in several ways designed to ease implementation. The IDI rule adopts the same timing and material change "notice" requirements as the BHC rule.[87] In addition, the IDI rule provides that, if a BHC is required to submit a resolution plan under the final rule, and one of its IDIs is required to submit a resolution plan under the IDI rule, the IDI "may incorporate data and information" from the BHC's living will in its submission.[88] The IDI rule also adopts review procedures analogous to those of the BHC rule, with the exception that it will be the FDIC alone (and not the FDIC and FRB jointly) that reviews each IDI's submission.[89] Thus, although there are some differences between the two rules — which is to be expected, given the different statutes the rules are implementing and the different underlying objectives (protecting depositors versus stabilizing U.S. financial markets) — the actions taken by the FDIC with respect to covered IDIs might well provide insight into the way in which the FDIC and FRB will treat SIFIs under the final rule implementing Section 165(d) of Dodd-Frank.

REGULATORY UNCERTAINTY

As explained above, the FDIC and FRB's final rule in many respects is an improvement upon the regulators' initial proposal. The BHC rule nonetheless leaves many open questions and raises several challenging issues that regulators, covered companies, and, likely, the courts will be left to resolve

going forward. Among the most important are:

- confidentiality;
- subsidiarization;
- tension between the objectives of the Bankruptcy Code and Dodd-Frank's goal of mitigating systemic risk;
- the interplay between and among the Bankruptcy Code and other resolution regimes;
- international requirements for resolution planning;
- the relationship, if any, between the living will requirement and other prudential measures to be imposed on SIFIs under Dodd-Frank; and
- the iterative process between covered companies and their regulators.

Confidentiality

In response to various concerns, the FDIC and FRB acknowledged that they anticipate large portions of the submissions to contain sensitive and confidential information and that this type of information is expected to be protected by applicable FOIA exemptions.[90] However, this protection must be balanced against the requirements in Section 165(d) for public disclosure of certain information related to living wills — hence the BHC rule's requirement that SIFIs divide their submissions between public information and confidential information.[91]

Unfortunately, in light of the sweeping requirements for the public section and the vagaries of FOIA exemption law, the confidentiality provision falls far short of a guarantee that the sensitive information SIFIs are required to submit to the FDIC and FRB will be protected from disclosure to the media, competitors, or any interested party willing to pursue a FOIA request aggressively. To begin, while the agencies' newly robust stance on the applicability of FOIA exemptions 4 and 8 represents an improvement upon the proposed rule, it may ultimately offer only limited protection to the confidential section of a submitted plan. That is because it is the federal judiciary, not the FDIC or FRB, that has the final say as to whether submitted information

in fact constitutes trade secrets and commercial or financial information[92] or matters related to reports prepared for the regulation or supervision of financial institutions[93] for purposes of FOIA exemptions 4 and 8, respectively.

The possibility of a court ordering such disclosures is not simply theoretical. The interpretation of those FOIA provisions is far from settled, and even if a court were to conclude that the information submitted by the company itself fell within FOIA exemption 4, for example, there is an open question regarding the extent to which that exemption protects from disclosure documents created by regulators that parrot the confidential information provided by SIFIs. Indeed, in the recent case *Bloomberg, L.P. v. Board of Governors of the Federal Reserve System*, the U.S. Court of Appeals for the Second Circuit held that exemption 4 did not apply to certain agency actions and accordingly mandated disclosure of previously confidential information related to loans made by the FRB during the recent crisis.[94] Further adding to the uncertainty in this area is the fact that recent decisions interpreting the FOIA in other contexts show the hesitancy of the U.S. Supreme Court to adopt anything beyond a narrow reading of FOIA's exemptions.[95] That would not seem to bode well for companies seeking room to maneuver within the exemptions generally.

An additional uncertainty arises in the context of international coordination. To the extent that the FDIC and FRB engage in discussions with non-U.S. regulators with regard to a SIFI operating across jurisdictions, it is unclear how much of the SIFI's confidential information will be shared and, if so, whether that would impact the company's ability to protect the information.

Given the remaining uncertainty on confidentiality issues, covered companies should stay abreast of any litigation implicating the involuntary public disclosure of resolution plans, and may want to consider taking early action in appropriate suits. It is worth noting that federal regulators do not always have the final say in their litigation positions and strategy before the courts. For example, in the *Bloomberg* case, the U.S. solicitor general denied the FRB's request to file a certiorari petition, leaving an intervenor, The Clearing House Association, to seek the high court's review.[96] Consequently, covered companies or their trade organizations may consider seeking early intervention in FOIA litigation that implicates resolution plans submitted under Dodd-Frank.

Subsidiarization

Another issue left open by the BHC rule — and one that may prove to be a point of contention between regulators and covered companies — is that of subsidiarization. Subsidiarization refers to the process of conducting the institution's operations in various countries or across differing business lines through separately capitalized legal entities. The process that resulted in the issuance of the final BHC rule has provided reason to believe that regulators may be inclined to encourage some degree of subsidiarization as a tool to be used in resolution planning. Some institutions could be required to "hive off" their systemically important businesses as stand-alone subsidiaries. Indeed, it was clear at a series of roundtable discussions the FDIC held on the implementation of Dodd-Frank that the FDIC was predisposed to consider such segmentation as a possible "fix" to systemic risk, and the question remains whether regulators will demand such segmentation as a condition of credibility.

In many — if not most — cases, however, financial institutions have had good reason to eschew divisions of that sort. Subsidiarization can be quite costly as a general matter. For example, the type of hiving-off some policymakers have proposed might well reduce or eliminate the benefits a company receives from consolidated management, the use of a common technology base, and the use of common delivery for services through intercompany agreements. Subsidiarization also may frustrate clients with global needs by impeding them from turning to one entity for full service. Companies facing forced subsidiarization might well find that liquidity and capital management also become more difficult and expensive, with more unused capital and liquidity that must be stationed at each subsidiary.

Those drawbacks may all be excellent arguments against subsidiarization from a business perspective. But the danger remains that this business case will fail to resonate with regulators who are charged not with maximizing the value of the company but rather with preventing the sort of systemic breakdown that occurred during the recent financial crisis. In that regard, SIFIs might be well advised to include in their strategic analyses a clear case against hiving off from a risk perspective that can help to educate the FDIC and FRB. Having something akin to a "firewall" to prevent intra-company contagion when an individual subsidiary fails is the central benefit of subsid-

iarization. But with that benefit comes the cost of not always being able to allocate the institution's collective capital and liquidity resources where they are most needed. In other words, "[w]hile the firewall may protect the fire from spreading, it could have the unintended effect of ensuring that the subsidiary burns."[97] At bottom, it stands to reason that regulators will be more hesitant to subsidiarize if convinced that doing so will prevent an institution from effectively managing risk on a global basis and increase the likelihood that the individual entities themselves will fail.

Bankruptcy Realities vs. Resolution Planning

The differences between a bankruptcy case and a resolution plan stem from two core issues: mechanics and objectives. The primary objective in a living will under Dodd-Frank is to avoid or mitigate both systemic risk and impact on U.S. financial markets. In contrast, the primary objective in bankruptcy is to maximize value for all stakeholders (creditors and equity holders). While there may be many situations in which these distinct objectives can be reconciled and both achieved, there will most certainly be other situations in which these objectives are in direct conflict. This distinction is borne out by the mechanics for crafting each plan.

A resolution plan must be crafted to include specified information and analysis based on a series of hypothetical assumptions, but nothing in Dodd-Frank or the BHC rule addresses creditor recoveries, classes of claims, or plan voting. While not relevant to resolution planning, these issues must be addressed to confirm a plan in a Chapter 11 proceeding or to make distributions in a Chapter 7 bankruptcy case. For example, in a Chapter 11 reorganization or liquidation, a plan can be approved only if the requisite creditor votes are obtained or if one impaired accepting class of creditors has voted in favor of the plan and certain statutory safeguards are satisfied in order to bind the rejecting creditor classes to the plan (often referred to as a "cramdown"). As a result, a debtor in possession or trustee in a bankruptcy case must consider and abide by the statutory priority scheme — and, in Chapter 11, confirmation requirements — even if the result is increased risk or instability in the U.S. financial system.

What remains unknown is how the realities of bankruptcy will, in fact,

play out in comparison to resolution planning in the event a SIFI actually fails. While the traditional objectives and mechanics are very different, the fiduciary charged with overseeing the SIFI's liquidation or reorganization (either the board of directors of a Chapter 11 debtor in possession or the Chapter 7 or 11 trustee) and the company's stakeholders will be forced to make decisions with the specter of Title II of the Act, the Orderly Liquidation Authority ("OLA"), being invoked by the government.[98] If at any time the FDIC and FRB determine that the bankruptcy proceeding is jeopardizing the stability of U.S. financial markets — and the treasury secretary concurs — the government may remove the case from the bankruptcy process. The company would then face eventual liquidation under the OLA with the FDIC serving as receiver and subject to only minimal court oversight and creditor input.

Interplay Between the BHC and IDI Rules

Another issue left open after the promulgation of the final rule is the relationship between resolution planning for SIFIs under the Bankruptcy Code or other insolvency regimes versus resolution planning for IDIs under the FDI Act. Many SIFIs will be required to file two resolution plans: one for their BHC and another one for their IDI. While the BHC rule allows for incorporation by reference, it does not address the potential tension between resolution planning for BHCs and resolution planning for IDIs. For example, one issue that will likely arise is how to reconcile the potentially competing interests between the BHC and its subsidiary in both living wills. Indeed, even before the enactment of Dodd-Frank, conflicts often arose when a BHC and its IDI subsidiary experienced financial failure at the same time. Under those circumstances, the FDIC (acting as receiver for the IDI) was frequently at odds with the bankrupt BHC over whether the BHC was obligated to provide capital support for the benefit of the IDI and its depositors. If the FDIC could convince a bankruptcy court that the BHC had made an affirmative commitment (such as through a capital maintenance agreement or other similar arrangement) to prop up the IDI, then Section 365(o) of the Bankruptcy Code provided that the arrangement was deemed assumed and the debt would receive priority in bankruptcy.[99]

Section 616(d) of Dodd-Frank further complicates the pre-existing issue by amending the FDI Act to require BHCs to "serve as a source of financial strength for any subsidiary…that is a depository institution."[100] It is unclear whether Congress was mindful of Section 365(o) when it enacted this provision of Dodd-Frank, or how the provisions might be reconciled. But BHCs addressing the solvency of their IDIs in a resolution plan under the Section 165(d) of Dodd-Frank and the BHC rule should consider how they phrase the financial support they will offer the IDIs, lest they give the FDIC grounds to argue that the BHC unwittingly has made a binding capital commitment for purposes of Section 365(o). And although a BHC would have a seemingly strong counter to any attempt to hold it to a statement in its living will — that Dodd-Frank explicitly provides that the submitted resolution plans are non-binding[101] — it is far from clear how that argument would play out in bankruptcy court.

International Harmonization

The final rule also leaves open the question of how U.S. regulators will interact with their foreign counterparts in the supervision of SIFIs with a global reach. Commenters on the proposed rule explicitly requested that the FDIC and FRB align their directives "with ongoing cross-border initiatives so as to avoid overlapping or inconsistent requirements for internationally active firms."[102] The BHC rule, however, does not go that far. Instead, the introduction of the rule states that each U.S.-based "covered company with foreign operations…should identify [in its plan] the extent of the risks related to its foreign operations" and "take into consideration, and address through practical responses, the complications created by differing national laws, regulations, and policies."[103] In addition, the final rule provides only that U.S. regulators "[m]ay," before issuing any notice of deficiency with respect to a submitted plan, "consult with any other Federal, state, or foreign supervisor as the [FDIC or FRB] considers appropriate."[104]

The lack of specificity with respect to foreign requirements is somewhat to be expected, however, in light of the fact that the international community is still in the process of developing uniform guidelines for resolution planning. In particular, the Financial Stability Board ("FSB") — an organization

comprising governmental and other financial authorities from the G-20 nations, established to coordinate the work of national regulators — has yet to present a final set of recommendations on resolution planning. Rather, the FSB is developing international standards, policies, and timelines to facilitate resolution planning for global SIFIs.[105] Authorities in the United Kingdom are also developing comprehensive requirements for resolution planning.[106] It remains to be seen how living will initiatives developed by the FSB, U.K. authorities, and various European regulators will ultimately comport with U.S. requirements.

Relationship with Other Prudential Measures

Another matter unaddressed by the FDIC and FRB's final rule is the possible relationship between a company's resolution plan and the host of other prudential measures Dodd-Frank requires or authorizes the FRB to impose on SIFIs under Section 165(a)-(k). The Act vests in the FRB the power to establish enhanced capital and leverage requirements,[107] additional liquidity provisioning, mandatory contingent capital instruments, various concentration and short-term debt limits, supplemental public disclosures, periodic stress testing,[108] and other risk management protocols.[109] The key question is how the living will requirement fits into Dodd-Frank's larger framework and within the context of related developments, such as Basel III's so-called "SIFI surcharge."[110] A resolution plan that convincingly demonstrates that the particular SIFI can be resolved under applicable law without posing a systemic risk should, in theory, eliminate or reduce the need for additional macro- and micro-prudential measures.

Furthermore, Dodd-Frank allows regulators to impose even harsher measures where the FSOC or individual regulators believe there is an acute or "grave" threat to financial stability — remedies that include the ultimate authority to break up a company with the consent of the treasury secretary and two-thirds of the FSOC members. [111] Those additional measures (which the Act describes as "mitigatory actions") include everything from limitations on the ability of the company to merge with or otherwise become affiliated with another company[112] to conditions or prohibitions on the performance of specified activities and even orders to transfer assets to unaffiliated entities.[113]

SIFIs understandably are anxious to avoid those limitations, and although the FDIC and FRB's final rule does not address the issue, well-prepared companies might be able to find ways in which to leverage a robust living will into some protection against such measures.

Navigating the Iterative Process

It is difficult to predict with precision how much time and manpower SIFIs will have to devote to the resolution planning process under Section 165(d) — not to mention the myriad other demands that they now face under Dodd-Frank as a whole. Indeed, the FDIC and FRB have "recognize[d] 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."[114] And covered companies might take at least some comfort in the regulators' acknowledgement that they "expect the process of submission and review of the initial resolution plan iterations to include an ongoing dialogue with firms," as well as their pledge to "take into account variances among companies in their core business lines, critical operations, domestic and foreign operations, capital structure, legal structure, risk, complexity, financial activities, size and other relevant factors" when evaluating the credibility and validity of a plan.[115]

But the FDIC and FRB's commitment to dialogue and apparent recognition that one size does not fit all only goes so far. That regulators have forecasted some flexibility with the "initial" round of plans says nothing with respect to what they will require of the "more robust annual resolution plans" they expect to receive "over the next few years following that initial period."[116] Covered institutions can only speculate as to how rapidly the FDIC and FRB will expect their living wills to develop into these "robust" incarnations, and it seems unrealistic to expect that institutions will have the planning process down to a science by July 1, 2012 (the date on which the first filers will be expected to submit their second-generation plans). This is particularly true in light of the regulators' delay in implementing many other provisions of Dodd-Frank that will no doubt bear on the contours of an acceptable resolution plan.[117] One would therefore hope that the regulatory flexibility and iterative process expected to characterize the first round of resolution plan-

ning will carry forward, even if the agencies have not promised as much by rule. And all of this is to suggest that SIFIs will likely benefit from approaching regulators early and often, both in the first go-round and with respect to subsequent versions of their living wills. The regulators' response to the comments on the proposed rule suggests that they are listening to the feedback provided to them in this new regulatory field.

CONCLUSION

Dodd-Frank's living will requirement raises a number of important issues as SIFIs and their regulators work to achieve Congress's aim of reducing systemic risk. To be sure, the FDIC and FRB's final rule implementing Section 165(d) has brought increased clarity to the resolution planning process. Nevertheless, the inherent complexity of the exercise and the novelty of resolution planning at present necessarily mean a high degree of regulatory uncertainty remains. The only real certainty is that the resolution planning process itself is bound to test the resolve of most SIFIs and make cooperation with their regulators more important than ever.

NOTES

[1] Although the term "SIFI" is used throughout this article as shorthand, the authors do not believe that all companies subject to Section 165(d) and the final rule are necessarily "systemically important."

[2] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010) [hereinafter Dodd-Frank Act].

[3] Dodd-Frank Act § 165(d)(1) (to be codified at 12 U.S.C. § 5365(d)(1)).

[4] *Id*. § 165(d)(4) (to be codified at 12 U.S.C. § 5365(d)(4)).

[5] FDIC, Resolution Plans Required, 22 (final rule Sept. 13, 2011), http://www.fdic.gov/news/board/Sept13no4.pdf [hereinafter FDIC Living Wills Final].

[6] *See* Duane D. Wall, et al., *Nuts and Bolts of Resolution Planning Under the Dodd-Frank Wall Street Reform and Consumer Protection Act*, 7 Pratt's J. of Bankr. Law 99, 99-100 (Feb./Mar. 2011).

[7] Dodd-Frank Act § 165(d)(1), (4) (to be codified at 12 U.S.C. § 5365(d)(1), (4)).

[8] *Id*. § 165(a), (d)(1) (to be codified at 12 U.S.C. § 5365(a), (d)(1)).

[9] *Id*. § 165(d)(4) (to be codified at 12 U.S.C. § 5365(d)(4)).

[10] *Id*. § 165(d)(1)(A)-(D) (to be codified at 12 U.S.C. § 5365(d)(1)(A)-(D)).
[11] *Id*. § 165(d)(2)(A)-(B) (to be codified at 12 U.S.C. § 5365(d)(2)(A)-(B)).
[12] *Id*. § 165(a)(1) (to be codified at 12 U.S.C. § 5365(a)(1)).
[13] *Id*. § 165(d)(4) (to be codified at 12 U.S.C. § 5365(d)(4)).
[14] *Id*. § 165(d)(4)(B) (to be codified at 12 U.S.C. § 5365(d)(4)(B)).
[15] *Id*. § 165(d)(5)(A) (to be codified at 12 U.S.C. § 5365(d)(5)(A)).
[16] *Id*. § 165(d)(5)(B) (to be codified at 12 U.S.C. § 5365(d)(5)(B)).
[17] *Id*. § 165(d)(6) (to be codified at 12 U.S.C. § 5365(d)(6)).
[18] *Id*.
[19] *Id*. § 165(d)(7) (to be codified at 12 U.S.C. § 5365(d)(7)).
[20] *Id*. § 165(d)(8) (to be codified at 12 U.S.C. § 5365 (d)(8)).
[21] Resolution Plans and Credit Exposure Reports Required, 76 Fed. Reg. 22648 (proposed Apr. 22, 2011) (to be codified at 12 C.F.R. pts. 252 & 381), http://www.gpo.gov/fdsys/pkg/FR-2011-04-22/pdf/2011-9357.pdf.
[22] Resolution Plans Required for Insured Depository Institutions With $50 Billion or More in Total Assets, 76 Fed. Reg. 58379 (interim rule Sept. 21, 2011) (to be codified at 12 C.F.R. pt. 360), http://www.gpo.gov/fdsys/pkg/FR-2011-09-21/pdf/2011-24179.pdf.
[23] *Id*.; *see also* 12 U.S.C. §§ 1821, 1823 (2011).
[24] FDIC Living Wills Final at 51.
[25] *Id*. (to be codified at 12 C.F.R. pt. 381.3(a)(1)(i)).
[26] *Id*. (to be codified at 12 C.F.R. pt. 381.3(a)(1)(ii)).
[27] *Id*. (to be codified at 12 C.F.R. pt. 381.3(a)(1)(iii)).
[28] *Id*. (to be codified at 12 C.F.R. pt. 381.3(a)(2)).
[29] *Id*. (to be codified at 12 C.F.R. pt. 381.3(a)(3)).
[30] *Id*. at 52 (to be codified at 12 C.F.R. pt. 381.3(b)).
[31] *Id*. (to be codified at 12 C.F.R. pt. 381.3(b)(2)).
[32] *Id*.
[33] *Id*.
[34] *Id*. (to be codified at 12 C.F.R. pt. 381.3(b)(3)).
[35] *Id*. at 50 (to be codified at 12 C.F.R. pt. 381.2(o)); see also 76 Fed. Reg. 22648, 22661 (proposed Apr. 22, 2011), http://www.gpo.gov/fdsys/pkg/FR-2011-04-22/pdf/2011-9357.pdf.
[36] *Id*. at 48 (to be codified at 12 C.F.R. pt. 381.2(g)).
[37] *Id*. at 47 (to be codified at 12 C.F.R. pt. 381.2(d)).
[38] *Id*. at 56 (to be codified at 12 C.F.R. pt. 381.4(a)(4)(ii)).
[39] *Id*. at 28.
[40] *Id*. at 56 (to be codified at 12 C.F.R. pt. 381.4(a)(4)(i)).
See Dodd-Frank § 165(i)(1)(B): TEST PARAMETERS AND CONSEQUENCES.—

The Board of Governors — (i) shall provide for at least 3 different sets of conditions under which the evaluation required by this subsection shall be conducted, including baseline, adverse, and severely adverse; (ii) may require the tests described in subparagraph (A) at bank holding companies and nonblank financial companies, in addition to those for which annual tests are required under subparagraph (A); (iii) may develop and apply such other analytic techniques as are necessary to identify, measure, and monitor risks to the financial stability of the United States; (iv) shall require the companies described in subparagraph (A) to update their resolution plans required under subsection (d)(1), as the Board of Governors determines appropriate, based on the results of the analyses; and (v) shall publish a summary of the results of the tests required under subparagraph (A) or clause (ii) of this subparagraph.

[41] FDIC Living Wills Final at 56.

[42] *Id*. at 58 (to be codified at 12 C.F.R. pt. 381.4(c)(5)).

[43] *Id*.

[44] *Id*. at 56-57 (to be codified at 12 C.F.R. pt. 381.4(b)(1)-(3)).

[45] *Id*. at 57 (to be codified at 12 C.F.R. pt. 381.4(c)(1)(i)).

[46] *Id*. at 57 (to be codified at 12 C.F.R. pt. 381.4(c)(1)(ii)).

[47] *Id*. at 57-58 (to be codified at 12 C.F.R. pt. 381.4(c)(1)(iii)-(iv)).

[48] *Id*. at 58 (to be codified at 12 C.F.R. pt. 381.4(c)(1)(v)).

[49] *Id*. at 58 (to be codified at 12 C.F.R. pt. 381.4(c)(1)(vi)).

[50] *Id*. at 58 (to be codified at 12 C.F.R. pt. 381.4(c)(2)).

[51] *Id*. at 58 (to be codified at 12 C.F.R. pt. 381.4(c)(3)-(4)).

[52] *Id*. at 58-59 (to be codified at 12 C.F.R. pt. 381.4(c)(5)(i)-(iii)).

[53] *Id*. at 59, 64 (to be codified at 12 C.F.R. pt. 381.4(d)(1)(i)-(iii), 4(i)).

[54] *Id*. at 59 (to be codified at 12 C.F.R. pt. 381.4(d)(2)).

[55] *Id*. at 60 (to be codified at 12 C.F.R. pt. 381.4(e)(1)-(3)).

[56] *Id*. at 61, 62 (to be codified at 12 C.F.R. pt. 381.4(e)(5)-(9), (12)).

[57] *Id*. at 61 (to be codified at 12 C.F.R. pt. 381.4(e)(10)-(11)).

[58] *Id*. at 62 (to be codified at 12 C.F.R. pt. 381.4(f)(1)(i)-(iii)).

[59] *Id*. at 62 (to be codified at 12 C.F.R. pt. 381.4(f)(1)(iv)-(v)).

[60] *Id*. at 63-64 (to be codified at 12 C.F.R. pt. 381.4(g)(1)-(6)).

[61] *Id*. at 63 (to be codified at 12 C.F.R. pt. 381.4(h)(1)-(3)).

[62] *Id*. at 54 (to be codified at 12 C.F.R. pt. 381.4(a)(3)).

[63] *Id*. at 55 (to be codified at 12 C.F.R. pt. 381.4(a)(3)(ii)(A)-(B)).

[64] Resolution Plans and Credit Exposure Reports Required, 76 Fed. Reg. 22648, 22657 (proposed Apr. 22, 2011) (to be codified at 12 C.F.R. pts. 252.4(e)(2) & 381.4(e)(2)), http://www.gpo.gov/fdsys/pkg/FR-2011-04-22/pdf/2011-9357.pdf.

[65] FDIC Living Wills Final at 60.

[66] *Id*. at 33.

[67] *Id*. at 53 (to be codified at 12 C.F.R. pt. 381.4(a)(3)(ii)(A)-(B)).
[68] *Id*. at 3.
[69] *Id*. at 3.
[70] *See* FDIC Living Wills Final at 30; *see also* Robert R. Bliss & George G. Kaufman, *Resolving Insolvent Large Complex Financial Institutions: A Better Way*, 128 Banking L. J. 339, 346 (Apr. 2011) (noting that SIFIs, "most of which are likely to have one or more bank, insurance, finance, dealer-broker and/or nonfinancial parents or subsidiaries, are subject to a large number of different jurisdictions and resolution regimes").
[71] FDIC Living Wills Final at 19 n.8.
[72] *Id*. at 58 (to be codified at 12 C.F.R. pt. 381.4(c)(1)(v)).
[73] *Id*. at 18.
[74] Resolution Plans and Credit Exposure Reports Required, 76 Fed. Reg. 22648, 22660 (proposed Apr. 22, 2011) (to be codified at 12 C.F.R. pts. 252.9(c) & 381.9(c)), http://www.gpo.gov/fdsys/pkg/FR-2011-04-22/pdf/2011-9357.pdf.
[75] 75 5 U.S.C. § 552(b)(8).
[76] FDIC Living Wills Final at 39.
[77] *Id*.
[78] *Id*. at 40.
[79] *Id*.
[80] *Id*.
[81] *Id*. at 69-70 (to be codified at 12 C.F.R. pt. 381.8(c)(1)-(10)).
[82] *Id*. at 70 (to be codified at 12 C.F.R. pt. 381.8(c)(11)).
[83] *Id*. (to be codified at 12 C.F.R. pt. 381.8(d)(1)-(3)).
[84] *Id*. (to be codified at 12 C.F.R. pt. 381.8(d)(4)).
[85] Resolution Plans Required for Insured Depository Institutions With $50 Billion or More in Total Assets, 76 Fed. Reg. 58379 (interim rule Sept. 21, 2011) (to be codified at 12 C.F.R. pt. 360), http://www.gpo.gov/fdsys/pkg/FR-2011-09-21/pdf/2011-24179.pdf.
[86] Resolution Plans Required for Insured Depository Institutions With $50 Billion or More in Total Assets, 76 Fed. Reg. 58379, 58390 (Fed. Deposit Ins. Corp. interim rule Sept. 21, 2011) (to be codified at 12 C.F.R. pt. 360.10(c)(2)(ii), (iv)-(vi), (ix), (xix)), http://www.gpo.gov/fdsys/pkg/FR-2011-09-21/pdf/2011-24179.pdf.
[87] *Id*. (to be codified at 12 C.F.R. pt. 360.10(c)(1)(i), (v)).
[88] *Id*. (to be codified at 12 C.F.R. pt. 360.10(c)(1)(iv)).
[89] *Id*. (to be codified at 12 C.F.R. pt. 360.10(c)(4)).
[90] FDIC Living Wills Final at 40.
[91] *Id*. at 69 (to be codified at 12 C.F.R. pt. 381.8(c)).
[92] 5 U.S.C. § 552(b)(4).

[93] 5 U.S.C. § 552(b)(8).
[94] 601 F.3d 143 (2d Cir. 2010), *cert. denied sub nom.* Clearing House Ass'n L.L.C. v. Bloomberg L.P., 131 S.Ct. 1674 (2011).
[95] *See Milner v. Dep't of Navy*, 131 S.Ct. 1259, 1262 (Mar. 7, 2011) (slip op., at 2, 8 n.5, 17) (explaining that FOIA exemptions "must be narrowly construed" and refusing to assess "whether disclosure interferes with good government"); see also FCC v. AT&T Inc., __ U.S. 131 S.Ct. 1177, 1185 (Mar. 1, 2011) (slip op., at 4, 11-12) (refusing to extend exemption related to "personal privacy" to corporations, even though definition of "person" governing FOIA includes "an individual, partnership, corporation, association, or public or private organization," 5 U.S.C. §551(2)).
[96] *The Clearing House Association L.L.C. v. Bloomberg L.P.*, No. 10-543, Petition for a Writ of Certiorari, at 19-20 (filed Oct. 26, 2010) (stating that "counsel for the Board informed the Clearing House that the Solicitor General denied the Board's request to file a certiorari petition").
[97] Joe Adler, *New Idea for Unwinding Big Banks May Be as Hard to Sell as It Is to Pronounce*, American Banker (Nov. 15, 2010), http://www.americanbanker.com/issues/175_220/resolution-rules-subsidiarization-1028712-1.html (quoting Heath P. Tarbert).
[98] *See generally* Alan Avery, Christopher L. Allen, & Rosa J. Evergreen, *New Resolution Process Created for Systemically Significant Institutions*, 127 Banking L.J. 784 (Sept. 2010) (outlining Title II of Dodd-Frank).
[99] *See* 11 U.S.C. § 365(o) (2011) (requiring that the trustee "immediately cure any deficit under any commitment by the debtor to a Federal depository institutions regulatory agency…to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority"); *see also* Jason A. Lien & Julian C. Zebot, *FDIC Receivership and Bank Litigation: What Litigators and Their Clients Need to Know*, 6 Pratt's J. of Bankr. Law 593 (Oct. 2010) (As receiver, the FDIC steps into the failed bank's shoes. It inherits the rights, powers, and privileges of the failed bank; it may collect on any debts or obligations owed to the bank)(internal citations omitted).
[100] Dodd-Frank Act § 616(d); *see also* 12 U.S.C. § 1831o-1(a) (2011).
[101] Dodd-Frank Act § 165(d)(7) (to be codified at 12 U.S.C. § 5365(d)(7)).
[102] FDIC Living Wills Final at 13; *see also* Gregory Husisian, *U.S. Regulation of International Financial Institutions: It's Time for an Integrated Approach to Compliance*, 127 Banking L.J. 195, 197(Mar. 2010) (noting that the "trend of increasing exposure to multiple regulations is of special interest to financial institutions that operate internationally").
[103] FDIC Living Wills Final at 33; *see also* Christopher R. Steele, *Cross-Border Insolvency: Substantive Consolidation and Non-Main Proceedings*, 7 Pratt's J. of Bankr.

Law 307, 322 (June 2011) ("With the increase in fiscal instability around the globe and with corporate business under the ever-advancing influence of globalization, it is only proper that the number of cross border insolvencies has increased in the last few years").

[104] FDIC Living Wills Final at 68.

[105] Financial Stability Board, *Consultative Document: Effective Resolution of Systemically Important Financial Institutions* (Jul. 19, 2011), *available at* http://www.financialstabilityboard.org/publications/r_110719.pdf.

[106] *See generally* Financial Services Authority, *Consultation Paper CP11/16: Recovery and Resolution Plans* (Aug. 2011) (covering the proposed requirements for certain financial services firms in the U.K. to prepare and maintain recovery and resolution plans); *see also* Edite Ligere, *Is a Shake-Up of the U.K.'s Banking Sector Inevitable?*, 128 Banking L.J. 494, 498(Jan. 2011) (noting that the U.K.'s Independent Commission on Banking has "called for the development of credible recovery and resolution tools and recognized that much work is under way in the U.K. and internationally to tackle this problem.").

[107] Michael B. Mierzewski, Howard L. Hyde, Beth S. Desimone & Wasim W. Quadir, *Stricter Capital Requirements Mandated for Financial Institutions*, 127 Banking L.J. 742, 745-46 (Sept. 2010) ("[T]he Federal Reserve is directed to impose more stringent risk-based capital requirements and leverage limits on those systemically significant nonbank financial companies it supervises and on other bank holding companies with total consolidated assets of at least $50 billion (unless it determines that doing so is not appropriate in light of the company's activities).")

[108] *See generally* Andrue E. Wall, *The 2009 Stress Tests: A Model for Periodic Transparent Examinations of the Largest Bank Holding Companies*, 128 Banking L.J. 291, 294 (Apr. 2011) (contending that "the benefits of periodic, transparent examinations of the largest bank holding companies, modeled on the 2009 stress tests, outweigh the costs and would contribute to enhanced market discipline.").

[109] Dodd-Frank Act § 165(d) (to be codified at 12 U.S.C. § 5365(d)).

[110] Peter King & Heath Tarbert, *Basel III: An Overview*, Banking & Fin. Serv. Policy Report, May 2011 at 10; *see also* Ernest T. Patrikis, *Basel III: Near Death Capital*, 128 Banking L.J. 401, 411 (May 2011) (outlining the intersection of Basel III and Dodd-Frank with respect to contingent capital).

[111] 12 U.S.C. § 5331(a).

[112] Michael J. Aiello & Heath P. Tarbert, *Bank M&A in the Wake of Dodd-Frank*, 127 Banking L.J. 909, 912 (Nov./Dec. 2010) (noting that bank regulators must now consider the extent to which a proposed acquisition, merger, or consolidation would result in greater or more concentrated risks to the stability of the United States banking or financial system.) (internal quotations omitted).

[113] 12 U.S.C. § 5331(a)(1)-(5); *see also* Alan W. Avery, Kathleen A. Scott, & Lindsey Carson, *Dodd-Frank Act Attempts to Curtail System Risk*, 127 Banking L. J. 766, 774 (Sept. 2010) (describing these and other prudential measures regulators might adopt under Dodd-Frank).
[114] FDIC Living Wills Final at 22.
[115] *Id*. at 26.
[116] *Id.* at 36.
[117] Interview, *Heath P. Tarbert on Dodd-Frank Compliance Issues*, METRO. CORP. COUNSEL, Oct. 2011 at 14-15 ("By July 21, 2011, the one-year anniversary of the Dodd-Frank Act, only about 10 percent of the statute's required regulations had been finalized …. certain agencies to date, including the SEC and CFTC, have missed nearly half of the deadlines established by Congress, and several other agencies have a similar record.").