American Bankers Association
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Mr. Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Re: *Special Reporting, Analysis and Contingent Resolution Plans at Certain Large Insured Depository Institutions*, RIN 3064-AD59

Dear Mr. Feldman:

The American Bankers Association[1] (ABA) welcomes the opportunity to comment on the FDIC's notice of proposed rulemaking, *Special Reporting, Analysis and Contingent Resolution Plans at Certain Large Insured Depository Institutions*, published in the Federal Register on May 17, 2010 (NPR). The ABA fully supports the important role of the FDIC in strengthening the stability of the banking system and maintaining public confidence in the banking industry in the United States. We also support the FDIC's interest in maintaining a comprehensive understanding of the organization, operation, and business practices of banks in the United States. However, we have concerns about the timing and scope of the NPR:

- As the NPR notes, the Financial Stability Board (FSB) is due to propose by the end of October 2010 measures to address many of the same issues addressed by the NPR. The soon-to-be-signed Dodd-Frank legislation also addresses large bank resolution plans. We believe that the NPR should be coordinated with the FSB and the new legislative requirements and issued only once these efforts can be fully harmonized.

- The required submission of a gap analysis and contingent resolution plan within six months of the effective date of the rule would not provide covered insured depository institutions (CIDIs) with an adequate period of time to develop a comprehensive and appropriate analysis and plan. We note that under the Large-Bank Deposit Insurance Determination Modernization Rule (Large-Bank Insurance Rule) issued in August 2008, affected insured depository institutions were given 18 months from the effective date of the rule to implement its requirements. The requirements of the Large-Bank Insurance Rule, albeit highly technical and complex, are considerably less onerous than those proposed in the NPR. We would urge an implementation schedule of 18 to 24 months.

- The information requirements of the NPR are vague, overbroad, duplicative, and inappropriately burdensome. In fact, the NPR is in substance more of an advanced notice of proposed rulemaking and needs to be further elaborated before banks can comment adequately on the proposed requirements. The NPR would benefit greatly from a model template or framework, the development of Frequently Asked Questions (FAQs) similar to those provided by the FDIC on a

[1] The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's $13 trillion banking industry and its two million employees.

regular basis following publication of the Large-Bank Insurance Rule, and FDIC staff guidance to assist banks in the development of a gap analysis and a plan.

- Adoption of the NPR could create confusion and the possibility for conflicting messages or instructions from the FDIC and a bank's primary federal regulator, the holding company regulator, or a functional regulator. This is particularly an issue for banks owned by parent organizations in non-U.S. jurisdictions. The NPR is silent as to how any requirements for contingency resolution plans that would apply to the non-U.S. parent (e.g., as a result of FSB initiatives) would be reconciled with the requirements of the FDIC's rule. In addition, the NPR is silent with respect to resolutions of non-bank subsidiaries and affiliates subject to other functional regulators, whether located in the U.S. or in foreign jurisdictions. Non-bank subsidiaries and affiliates include but are not limited to, broker-dealers, registered investment advisers, registered investment companies, and insurance subsidiaries.

- The requirements of the NPR could also compel banks to alter their business practices or structures in a manner that could go well beyond well-established and appropriate regulatory authority to require a bank to cease or change the structure of activities that pose risks to the safety and soundness of the bank. The NPR should be recast as a Basel Pillar 2 process that would allow the bank and its regulators to engage in a dialogue regarding the conduct of its activities and make adjustments in a more effective and also less disruptive way.

- A materiality standard should be applied to all aspects of the rule.

- The ability of the FDIC to terminate deposit insurance (a regulatory "nuclear option") or take other formal enforcement action against a CIDI or an institution-affiliated party (IAP) of a CIDI for failure to provide required information should be limited to instances of material willful or continued failure to comply with the provisions of a fully elaborated set of requirements.

- The NPR should contain a provision allowing a bank to request an extension of time to comply with the rule in appropriate circumstances.

- The estimate of 500 hours for preparation of an initial analysis and plan provided under the Paperwork Reduction Act severely underestimates the time that is likely to be required of a CIDI required to comply with the NPR, particularly for the CIDI to provide the quality of work that seems to be the purpose of the exercise.

First Finalize Financial Stability Board and Congressional Efforts. The FSB has work well underway to address the resolution plans of systemically significant financial firms. This work is due to be proposed in October 2010 and finalized shortly thereafter. We strongly urge the FDIC to wait until the finalization of the FSB efforts before embarking on the NPR. This will maximize the coordination of international and domestic efforts, reducing burden on the industy and the regulatory community alike, and minimizing regulatory confusion in the complex regulatory implementation environment following enactment of Dodd-Frank.

The NPR should also take into consideration provisions of Dodd-Frank that would require certain banks to develop resolution plans. Failure to do so would risk the adoption of a rule at odds with laws enacted by Congress. The provisions of Dodd-Frank would allow the federal government to place "covered

financial companies" into receivership under an orderly liquidation process. The definition of a covered financial company overlaps with, and is broader than, the definition of a CIDI; this likely would cause substantial confusion among companies covered under both definitions. The NPR should be coordinated with the new legislation.

Provide Adequate Time for Development of Gap Analysis and Plan. The plan requirements are extensive and will require significant senior management and board resources to develop a plan to isolate the depository institution from the rest of the organization in a manner that maximizes recovery value and minimizes systemic impacts. These plans will be a matter of first impression for CIDIs and, thus, more time is needed to allow for careful consideration and study. Failure to provide an adequate period of time to develop the required analysis and plan would result in rushed and sub-optimal products that may not benefit from proper board review and consideration, given the many competing duties of the board and senior management in light of the multitude of new regulatory burdens recently imposed and proposed by the regulatory community.

We note that under the Large-Bank Insurance Rule issued in August 2008, affected insured depository institutions were given 18 months from the effective date of the rule to implement its requirements. The requirements of the Large-Bank Insurance Rule, while very complex, are considerably less onerous than those proposed in the NPR. We would urge an implementation schedule of 18 to 24 months, given the importance of and complexity involved in the analysis and planning.

A six-month timeframe would also apply to CIDIs resulting from the merger of two or more non-CIDIs or two or more CIDIs. Given the significant integration challenges that are inherent in even the merger of smaller banks, imposing a six-month timeframe for the development of a gap analysis and contingent resolution plan for a combined larger organization simply is infeasible. Again, a longer implementation period of 24 months is highly encouraged following a merger or acquisition. We would also request clarification of the regulatory language to refer to acquisitions as well as mergers.

We urge the deletion of section 360.10(d)(6), which would grant the FDIC the authority to accelerate the implementation and updating timeframes for all or part of the requirements of the rule. This provision would make it impossible for a CIDI to adopt a robust plan for compliance with the rule, recognizing that the organization could be subjected, at any time, to accelerated requirements. Especially when combined with the provisions of the rule providing for formal enforcement action for failure to meet the rule's requirements, this aspect of the proposed rule is unduly harsh and onerous.

Clarify Vague, Overbroad, Duplicative and Burdensome Information Requirements. The proposed rule would require a CIDI to provide information to the FDIC to allow for the isolation of the CIDI and the development of a resolution strategy and contingency planning for a period of severe financial distress. As banks and the Corporation are aware, financial distress can arise from a variety of sources and the response to financial distress necessarily depends on its source. It would be virtually impossible for a CIDI to evaluate all of the myriad potential sources of financial distress and formulate a comprehensive and appropriate response plan. Rather than imposing this vague and overbroad standard, the rule should indicate the types of stresses to which the plan should respond (e.g., a loss of secured and unsecured funding).

In addition, the requirement of section 360.10(c)(3)(i) to provide detailed information, covering material risks, business lines, operations, activities, and exposures of the CIDI and its subsidiaries on a current basis is duplicative of other reporting requirements applied to CIDIs under federal banking and

securities law and could be, if expansively interpreted, extremely and inordinately burdensome. It is not clear what additional information would be required by the rule that is not already provided in Call reports and other reports to bank supervisory authorities and in quarterly and annual reports filed publicly, including new reporting demands that will be required by the systemic review authorities under Dodd-Frank. The FDIC should inventory and specify the information that currently is not available to it and necessary to resolve a CIDI. Given the significant burdens that have been placed on banks under various regulatory and legislative initiatives, the FDIC should refrain from imposing additional informational and reporting requirements unless critical to the resolution function.

Section 360.10(c)(4) of the proposed rule requires detailed information covering the activities, risks, and exposures of the CIDI. The activities and, particularly, the risks and exposures of a CIDI are subject to constant change – for example, counterparty credit risks and derivatives exposures can change hourly – and the proposed rule could be interpreted as requiring almost real-time information that is beyond the current information technology capabilities of banks. It would be extremely burdensome, if not infeasible for a CIDI to meet this requirement on an ongoing basis and it is unlikely that the FDIC could utilize effectively such a large amount of information, even if it could be provided. Again, the FDIC should consider carefully the benefits and burdens of providing very extensive information.

In particular, section 360.10(c)(4)(iv) of the proposed rule states that a CIDI must provide complete financial information in the form of audited financial statements presented along with line-item descriptions of the assets, liabilities, and equity comprising the balance sheets of each subsidiary or affiliated entity. The need for information regarding subsidiaries and affiliates is well understood; however, requiring audited financial statements for each subsidiary and affiliate of a CIDI – generally a large number of entities – could result in significant additional burden and cost.

We urge the FDIC to consider carefully the types of information it needs from CIDIs in addition to what is already provided through the supervisory and public reporting processes and re-propose the NPR with greater specificity regarding the supplemental information needed and provide for its collection on a periodic, as opposed to an ongoing, basis. We would also urge the FDIC to develop a template framework or model to help guide banks in developing their contingent resolution plans. Such a template would ensure that banks are providing information in the format that the FDIC needs and would promote consistency of information provided to the FDIC from across the industry.

Potential for Conflicts with Other Regulators. Adoption of the NPR could create confusion and the possibility for conflicting messages or instructions from the FDIC and the bank's primary federal regulator, the holding company regulator, or a functional regulator of a subsidiary or affiliate, whether located in the U.S. or in another jurisdiction. An important role of those regulators is to provide supervision and guidance with respect to the prudential conduct of the business of the regulated entity. Actions or guidance from the FDIC under the NPR could conflict with the guidance provided by the primary or functional regulator. For example, the FDIC may oppose an acquisition approved by another regulator on the grounds that it would complicate any eventual resolution of the bank, even if resolution is an extremely remote possibility. Moreover, as a practical matter, there is significant potential for the organization to receive duplicative requests for information or, more troubling, requests for similar information in different formats or covering different time frames.

Potential for Conflict with Sound Corporate Governance Standards. Under long-standing corporate governance principles, the board of directors ultimately is responsible for the strategic direction and business operations of the bank. Prudential regulators, such as the FDIC, are charged with reviewing the

strategies and activities of the bank in order to confirm that it is operating in a safe and sound manner. If the bank fails to operate in a safe and sound manner, the prudential regulators have the authority to initiate an action to impose additional prudential requirements or require that certain activities cease. The bank then has the option to consent to the regulatory action or to request a hearing to challenge the appropriateness of the action under well-established rules of procedure.

The NPR could be read to permit the FDIC to take prudential action that would change the strategic direction and business operations of the bank without the safeguard of allowing the bank to challenge that action. We respectfully submit that this would establish a dangerous precedent that would alter significantly the role of the board in a manner that is contrary to well-established corporate governance standards. We encourage the FDIC to reconsider the NPR in light of a Basel II Pillar 2-type process that would improve the FDIC's understanding of risk within a bank (and the bank's own understanding of its risk exposures) and create a dialogue between the bank and its regulators regarding appropriate measures to address risk, including the remote risk of bank failure.

Apply a Materiality Standard Throughout the Rule. The NPR applies a materiality standard to some, but not all, provisions of the rule. Adoption of a rule-wide materiality standard would reduce burden substantially without depriving the Corporation of the information it needs to plan for a potential resolution.

For example, section 360.10(c)(4)(v) requires a description of intra-group funding relationships, accounts, and exposures. This description should be limited to those that are material and would serve as a key source of financial exposure to the CIDI. Another example is section 360.10(c)(4)(viii), which requires the disclosure of cross-border interrelationships and exposures; a materiality standard would substantially reduce burden without compromising the information provided to the Corporation. As noted above, section 360.10(c)(4)(iv) would require audited financial statements for all subsidiaries and affiliates, regardless of size or the significance of their role in the larger organization.

Limit Enforcement Actions to Material Willful or Continued Violations. The preamble of the proposed rule provides that the failure of an insured depository institution to provide the information required by the rule would constitute a regulatory violation that would allow the FDIC to initiate deposit insurance termination (a regulatory "nuclear option") or to use formal enforcement authority under section 8 of the FDI Act, including cease-and-desist orders, civil money penalties, and removal and prohibition actions. As the preamble is written, formal enforcement action, including the termination of bank insurance and, thus, the inevitable closure of the bank, and career-ending personal actions against IAPs could be brought for any violation, even if minor, unintentional, or promptly remedied. The mere initiation of such an action could be all that would be required to bring about the demise of the depository institution or impair the reputation of its IAPs.

Enforcement action should be limited to only the most egregious instances of willful or continued violation of a final rule that is elaborated fully. As discussed above, the NPR does not provide the basis for a fully elaborated final rule and needs substantially more substance and detail before banks can have any degree of certainty as to what is being proposed and what may be required by a final rule.

Provide for Requests for Extensions of Time to Comply for Good Cause Shown. The Large-Bank Insurance Rule provides that a covered institution may request an extension of the deadline for complying with the requirements of that rule from the FDIC. We urge the FDIC to include a similar provision in the NPR so that banks may request extensions of time in appropriate circumstances. For

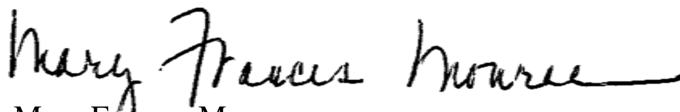
example, a CIDI involved in an acquisition requiring the integration of multiple systems, operations and processes, could warrant an extension of time to comply with the requirements of the NPR.

Estimate the Burden More Accurately. The proposal estimates that respondents would spend 500 hours in developing an initial gap analysis and contingent resolution plan and an additional maximum of 250 hours in updating its plans annually. We submit that this is a gross underestimation of the time that would be spent in complying with the proposed rule. Indeed, the proposal, if adopted in its current form, would require several multiples of the time estimated by the FDIC, as well as additional staff resources in order to comply.

This is not quibbling about a meaningless "check the box" exercise required by administrative law. The legal requirements for the FDIC to take costs and burdens fully into account has been a recurrent theme with the Congress and is essential to effective regulation and must be given major attention before taking regulatory action. The burdens of this rule would be enormous and could impact negatively the ability of the Corporation to achieve the goals of the rule. The FDIC must have a realistic sense of the burdens it is imposing in considering the optimal cost/benefit balance. Moreover, the impact of this rule must be considered in conjunction with the myriad of other bank regulatory rules recently adopted,[2] those that will be required by Dodd-Frank, including for non-bank subsidiaries and affiliates, and those that will be adopted as a result of changes to the standards adopted by the Basel Committee on Banking Supervision and other international regulatory fora.

We appreciate the opportunity to comment on the NPR. Please direct any questions or requests for additional information to the undersigned.

Respectfully submitted,



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[2] The ABA recently conducted a review of new regulatory and supervisory burdens imposed by the banking agencies over the past two years and found 50 new burdens. See www.aba.com/aba/documents/press/RegBurdenCatalog052410.pdf.