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July 16, 2010

Via Electronic Delivery

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

Attention: Comments

Re: Special Reporting, Analysis and Contingent Resolution Plans at Certain Large Depository Institutions

Dear Mr. Feldman:

The Clearing House Association L.L.C. ("The Clearing House"),[1] an association of major commercial banks, appreciates the opportunity to comment on the Federal Deposit Insurance Corporation's ("FDIC") proposed rule that would require certain large insured depository institutions to submit to the FDIC contingent resolution plans and related information and analysis (the "Proposed Rule"). The Proposed Rule would apply only to those insured depository institutions ("Covered IDIs" or "CIDIs") with total assets of over $10 billion that are owned by holding companies with total assets of over $100 billion.

Summary

To summarize our comments, The Clearing House strongly supports the adoption of contingent resolution plans as an important element of regulatory reform. Nonetheless, we are concerned that the Proposed Rule would overlap and potentially conflict with the more holistic contingent resolution plan requirements of the newly enacted financial reform legislation and with cross-border regulatory coordination efforts. We also believe that there are several ambiguities in the Proposed Rule that need to be clarified, and that the FDIC has underestimated the time and resources that CIDIs will have to devote to compliance with the Proposed Rule.

1 The members of The Clearing House are Bank of America, National Association; The Bank of New York Mellon; Capital One, National Association; Citibank, N.A; Deutsche Bank Trust Company Americas; HSBC Bank USA, National Association; JPMorgan Chase Bank, National Association; The Royal Bank of Scotland, N.V.; UBS AG; U.S. Bank, National Association; and Wells Fargo Bank, National Association.

As recent events have demonstrated, there is a clear need for improvement in the way the failure of a large, interconnected financial institution is addressed by U.S. law. The Clearing House agrees with the FDIC's goal of improving the ability of the federal banking regulators to resolve such a failure and that contingent resolution plans should be an important element in the process. Nonetheless, we believe that the FDIC should reconsider the need for the Proposed Rule and follow Congress' approach of working together with the Board of Governors of the Federal Reserve System ("Board") to implement the contingent resolution plan requirements in the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), recently passed by the House of Representatives and Senate, rather than adopting a separate contingent resolution plan rule for CIDIs. We believe Dodd-Frank provides a more holistic and uniform approach to contingent resolution planning by financial companies than that contained in the Proposed Rule, and is therefore preferable as a policy matter.

<u>The FDIC Should Reconsider Its Stand-Alone Requirement in Light of Dodd-Frank's Joint Regulatory Approach to Contingent Resolution Plans</u>

In Section 165(d) of Dodd-Frank, Congress has designed an approach for the preparation of contingent resolution plans by including a requirement that certain large, complex financial companies submit to the FDIC and the Board contingent resolution plans intended to facilitate the orderly resolution of the company under the Bankruptcy Code or the special resolution regime established by Dodd-Frank in the event the company fails. Dodd-Frank requires "Covered Bank Holding Companies" and "Covered Nonbank Companies" to submit these plans for review by the FDIC and the Board, and gives the FDIC and Board the ability to impose special capital, leverage, or liquidity requirements on those companies that do not revise their plans to address any deficiencies noted by the FDIC or the Board.

In light of the passage of Dodd-Frank, The Clearing House believes that the FDIC should reconsider the appropriateness of and need for a requirement that certain insured depository institutions prepare contingent resolution plans separate from the enterprise-wide ones prepared by their holding companies. We believe that the FDIC can address the concerns underpinning the Proposed Rule through the joint FDIC/Board process under Section 165(d) of Dodd-Frank and avoid the confusion and duplication of effort that would result from the existence of two, potentially conflicting, resolution plans.

<u>Going Forward with the Proposal at this Time Would Have a Negative Effect on Cross-Border Coordination</u>

Foreign banking supervisors are engaged in projects similar to those contemplated by the Proposed Rule with regard to banks based in their countries, which include recovery and resolution planning and organizational mapping components. In addition, the Cross-Border Bank Resolution Group of the Basel Committee on Banking Supervision, co-chaired by the

FDIC, recommended in its March 2010 report (the "BCBS Report") that systemically important cross-border financial institutions develop contingency plans "to preserve the firm as a going concern, promote the resiliency of key functions and facilitate the rapid resolution or wind-down should that prove necessary."[2] The BCBS Report emphasizes the importance of cross-border coordination between home and host country supervisors with respect to the development of such plans, particularly to ensure "mutual understanding of all aspects of the legal and regulatory framework that are critical for both contingency planning and management and resolution of a crisis."[3]

The Clearing House is concerned that proceeding with the Proposed Rule, particularly on the short timeline it sets out, would not permit the type of cross-border coordination emphasized in the BCBS Report. This is important for both U.S. insured depository institutions with overseas operations and U.S. insured depository institutions controlled by a foreign bank. For both types of institutions, compliance with the Proposed Rule will be difficult if it does not take into account the similar or related requirements that would apply to the institutions under relevant host or home country rules. If the FDIC proceeds with the Proposed Rule, the time period allotted for CIDIs to submit their contingent resolution plans to the FDIC should be extended by at least six months to permit CIDIs with cross-border operations to factor in any current or anticipated requirements under relevant non-U.S. host or home country resolution planning regimes that would impact the plan required by the Proposed Rule. In addition, the FDIC should attempt to coordinate with foreign supervisors of CIDIs regarding the Proposed Rule. Similar coordination will also be appropriate as part of the implementation of Section 165(d) of Dodd-Frank.

Resolution Planning Will Be Most Effective if Done on an Enterprise-Wide Basis

The Clearing House understands that the principal concern underlying the Proposed Rule relates to the resolution of CIDIs, whereas the contingent resolution plan provisions in Dodd-Frank are focused on "covered" companies (bank holding companies and other financial companies) as a whole, and must include "information regarding the manner and extent to which any insured depository institution affiliated with the company is adequately protected from risks arising from the activities of any nonbank subsidiaries of the company".[4] That is to say, Dodd-Frank's contingent resolution plan requirements address all the activities and subsidiaries of a covered organization, not only select subsidiaries, but also specifically address the relationships between a covered organization's subsidiary depository institutions and

2 *Report and Recommendations of the Cross-border Bank Resolution Group*, Basel Committee on Banking Supervision (Mar. 2010), at 32.

3 *Id.* at 33.

4 Dodd-Frank § 165(d)(1)(A).

their affiliates. We think such an enterprise-wide approach is a more appropriate way to address the question of resolution planning.

In the event of a failure of a large, complex financial organization that includes an insured depository institution, it will usually be the case that the least loss to stakeholders (including creditors and the FDIC as insurer of the depository institution) can be realized, the systemic consequences most contained, and the resolution process managed most efficiently if the failed organization is resolved as an entirety. This is one of the reasons The Clearing House favored having the FDIC as the resolution authority for failed systemically significant institutions, so that one agency would manage the entire resolution process. Consequently, resolution planning would in our view be most effective if the required plans address each Covered Bank Holding Company as a whole, including, but not limited to, its subsidiary insured depository institutions.

Resolution Should be the Second Element of a Remediation and Resolution Plan

We believe that the approach embodied in the Proposed Rule does not address one of the two core policy objectives that should be incorporated into any requirement that a financial institution prepare a contingency plan. Those objectives are, in the first instance, to facilitate the recovery of the institution before it requires resolution. Second, the resolution planning process should be designed to permit a resolution authority to maximize the value of the institution if recovery is not possible. The approach to contingency plans embodied in Dodd-Frank addresses both objectives, as do similar planning requirements under consideration in other countries, while the Proposed Rule would address only the latter.

Because the Proposed Rule does not in the first instance seek to assist a CIDI in recovering from severe stress, we are concerned that it would create an undesirable bias in contingency planning. This bias would be towards separation of a CIDI from its affiliates followed by its resolution by the FDIC, instead of first looking to maintain the integrity and enterprise value of the organization of which the CIDI is a part. We believe that this could reduce not only the recovery potential of the CIDI itself, but also the ability of the CIDI's holding company to find a buyer in the event the holding company encounters significant financial stress.

There Should Be an Option to Submit a Combined Resolution Plan for Affiliated CIDIs

In view of the desirability of enterprise-wide resolution, we question the Proposed Rule's approach of requiring separate contingent resolution plans from each CIDI within a given holding company, particularly in view of the cross-guaranty provisions in the FDI Act.[5] Instead,

[5] 12 U.S.C. § 1815(e).

should the FDIC proceed with the Proposed Rule, we believe that permitting all subsidiary CIDIs of a given holding company to submit a single plan covering all of them would in some, if not most, cases be more efficient and provide the FDIC with a better tool for maximizing the value of its receiverships in the event of the failure of an organization with multiple subsidiary CIDIs. We would therefore suggest that any final rule permit CIDIs controlled by the same holding company the option of submitting a combined contingent resolution plan rather than mandating that each submit its own.

The FDIC Needs to Clarify that the Gap Analysis Is to Be Used to Identify Information that Must Be Dealt with in Reorganization Plan and is not a Basis for Requiring an Organization's reorganization

In The Clearing House's view, the core element of the Proposed Rule is the requirement that a CIDI submit, in addition to a contingent resolution plan, a "gap analysis of its ability to separate the covered IDI from the conglomerate structure in the most cost-effective and timely fashion." We see this requirement as central to the Proposed Rule both because the bulk of the work it would require would be devoted to performing the gap analysis, and because the findings of the analysis would determine the contents of a CIDI's contingent resolution plan. Because of the importance of the gap analysis, it would be helpful if any final rule would confirm that the gap analysis is to be used to identify information that needs to be included in a CIDI's contingent resolution plan, rather than as a basis for reorganizing a CIDI's operations. That is, we understand that the purpose of the gap analysis is to identify those relationships and interdependencies that connect a CIDI and its affiliates so that they may be addressed, if necessary, were the CIDI to fail (*e.g.*, service or hedging agreements with affiliates). It is not meant to provide a plan or map for reorganizing a CIDI's relationships with its affiliates outside of a failure scenario. We firmly believe that a CIDI's holding company should remain free to organize its internal operations in the way it deems to be most appropriate for the company, though we recognize that it is important for the regulators of both the holding company and its subsidiary depository institutions to understand the company's organization.

In addition, we believe that it would be useful to have more information regarding what information the FDIC expects the gap analysis to address. Specifically, the Notice of Proposed Rulemaking (the "NPR") accompanying the Proposed Rule explains that this analysis should "reveal all material obstacles to an orderly resolution of the covered IDI," but it remains unclear what precisely the analysis is intended to cover. Any additional explanation or clarification of the FDIC's expectations for the contents or coverage of this analysis would be welcome.

Any Resolutions Must Be Accorded Confidential Treatment

The Proposed Rule provides that a CIDI submitting information to the FDIC pursuant to the rule could request confidential treatment for information that "could endanger the institution's safety and soundness" if disclosed. The Clearing House believes that this is an inappropriate standard given that the material to be submitted pursuant to the Proposed Rule is necessarily highly sensitive and nonpublic, and would be obtained by the FDIC at least in part pursuant to its FDI Act examination authority. It therefore seems appropriate, if not required, for the FDIC to treat the information obtained as confidential supervisory or examination information that is exempt from public disclosure.[6] As the FDIC and the other federal banking agencies have long recognized, the special protection given to information obtained by an agency pursuant to its supervisory or examination authority is crucial to protect the free flow of information between institutions and their regulators in the supervision and examination process. We believe that this concern applies equally to the contingent resolution planning process under the Proposed Rule, and therefore any final rule should make it clear that this is how the information will be treated.

We would also note that Section 112(d)(5)(A) of Dodd-Frank specifically provides that the member agencies of the Financial Stability Oversight Council will be required to "maintain the confidentiality of any data, information, and reports submitted under" Title I of Dodd-Frank, which includes Section 165(d).[7] Information submitted pursuant to the Proposed Rule should not receive lesser protection in light of this Congressional mandate.

Other Elements of The Proposed Rule

In addition to the general concerns we have outlined with the approach of the Proposed Rule, there are a number of specific aspects of the Proposed Rule on which we have comments and observations.

Legal Authority. The statutory bases for the Proposed Rule outlined in the NPR include a reference to the special examination authority given to the FDIC by Section 10(b)(3) of the Federal Deposit Insurance Act ("FDI Act") (12 U.S.C. § 1820(b)(3)). We have always understood Section 10(b)(3) to permit the FDIC to examine individual insured depository institutions on a case-by-case basis when it appears that an institution is under stress and may fail.[8] We question whether it provides support for a regulation that generally requires an entire class of insured depository institutions to submit reports and information to the FDIC,

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6 *See* 12 C.F.R. § 309.5(g)(8).

7 Dodd-Frank § 112(d)(5)(A).

8 In this connection, we note the FDIC's July 12, 2010 approval of the revised Memorandum of Understanding with the other federal banking agencies regarding the FDIC's authority under Section 10(b)(3) to conduct special examinations of individual depository institutions deemed to present heightened risk to the Deposit Insurance Fund.

particularly when the class of institutions is defined without reference to their financial health. We also believe that it may be an overbroad reading of Section 9(a)(Tenth) of the FDI Act (12 U.S.C. § 1819(a)(Tenth)), granting the FDIC general authority to prescribe rules necessary to carry out the provisions of the FDI Act and also cited in the NPR, to permit imposition of a reporting requirement not required by the FDI Act itself. The FDIC could eliminate any legal uncertainty associated with the Proposed Rule by relying instead on the contingent resolution plan process included in Section 165(d) of Dodd-Frank to address the concerns articulated in the NPR.

Attestation by the CIDI's Board. The Proposed Rule requires that a CIDI's board of directors or designated executive committee not only approve the CIDI's contingent resolution plan and its supporting analysis but also "attest that the plan is accurate and that the information is current." We submit that requiring a CIDI's board to provide an attestation regarding a contingent resolution plan, as opposed to approval of the plan, is inconsistent with the basic corporate governance principles regarding the respective roles of board and management. A board's role is to provide oversight, in contrast with with the role of an institution's management, which is responsible for the actual conduct of its operations. We therefore request the FDIC to limit a board's review to approval of each contingent resolution plan. In any event, we do not understand how a plan could be "accurate."

Preparation of a Resolution Plan – Required Timing and Paperwork Reduction Act Analysis. The Proposed Rule provides that a CIDI would have six months from the effective date of the final rule (or from the date it becomes a CIDI) to submit its gap analysis and contingent resolution plan. Given the complexity of the undertaking, and in particular the fact that creation of a plan will be an iterative process, this appears to us to be insufficient time for the required work. This is especially true for those institutions covered by both the Proposed Rule and Section 165(d) of Dodd-Frank, or which have cross-border operations that will require consultations with non-U.S. supervisors on any contingent resolution plan. These institutions would have to prepare multiple plans simultaneously, in addition to all the other compliance work that most banking organizations will have to undertake as a result of Dodd-Frank and its required rules. We also believe that the estimated time per response set out in the NPR's Paperwork Reduction Act analysis underestimates the amount of time any affected institution will have to devote to the required analysis and planning, which our members' experience with similar enterprise-wide projects suggests will be a multiple of the estimated 500 hours. Any attestation process will place even more of a premium on attempting to assure accuracy.

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Thank you for considering the views expressed in this letter. We would be happy to discuss any of them further at your convenience. If you have any questions, please contact me at 212-612-9234.

Very truly yours,

Joseph R. Alexander