THE FINANCIAL SERVICES ROUNDTABLE
Financing America's Economy

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Via email to: comments@FDIC.gov

Mr. Robert E. Feldman
Executive Secretary
Attn: Comments
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, DC 20429

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

Dear Mr. Feldman:

The Financial Services Roundtable[1] ("Roundtable") appreciates the opportunity to comment on the Federal Deposit Insurance Corporation's ("FDIC") proposed rule on Contingent Resolution Plans at Certain Large Insured Depository Institutions ("Proposed Rule") published in the Federal Register on May 17, 2010 (pages 27464 to 27471).

The Proposed Rule imposes a new regulatory obligation on subsidiary insured depository institutions with greater than $10 billion in total assets and are owned by a parent company with more than $100 billion in total assets (each a "Covered Insured Depository Institution" or "CIDI"). The Proposed Rule seeks to ease the administrative burden of the FDIC in acting as a receiver for failed subsidiaries whose resolution is complicated by parent company interrelationships. The Proposed Rule requires subsidiaries to submit a "Contingent Resolution

[1] The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for $85.5 trillion in managed assets, $965 billion in revenue, and 2.3 million jobs.

Plan" to serve as a blueprint for the subsidiary's efficient resolution. Finally, the Proposed Rule details minimum components that should be included in such a plan.

I. General Comments

The Roundtable recognizes the benefit of having contingent resolution plans in place for large, interconnected insured depository institutions. However, the Roundtable holds a fundamental concern that the FDIC is acting prematurely in relation to the financial reform legislation passed by the Senate yesterday, July 15, 2010. Moreover, through this rulemaking the FDIC ignores the efficiency and strength of well managed large, interconnected business models. Specifically, the requirement in the Proposed Rule that CIDIs resubmit contingent resolution plans, potentially on a repeated basis, until the FDIC is satisfied the CIDI can operate separately from its parent and affiliates during financial stress is, in practical terms, a demand that CIDIs operate today isolated from their parent companies and affiliates. We note that the requirement to produce a gap analysis identifying impediments to the orderly stand-alone resolution of the insured depository institution within a CIDI, and identifying reasonable steps that can or will be taken to eliminate or mitigate such impediments, has caused significant concern among our members that the FDIC will, in effect, require all such potential remediation activities to be implemented in order to obtain approval of the contingent resolution plan from the FDIC. Of note, the Roundtable is concerned that the Proposed Rule lacks standards against which a CIDI can measure its likelihood of compliance with the rule. As well, if the FDIC determines that a CIDI's contingent resolution plan lacks sufficient information or analysis, or proposes an unacceptable plan for resolution, the Proposed Rule does not provide for an appeal process. Furthermore, the Roundtable notes that the Proposed Rule would require CIDIs under financial or systemic stress to focus on wind down, separation and resolution as prescribed in the submitted plans at the same time those institutions are attempting to focus on survival and recovery. Not only would such activity be a distraction from the priority of recovery, but the Proposed Rule runs the substantial risk of forcing struggling institutions down a path of resolution even if they do not pose systemic risk or true risk to an insured depository institution.

II. Specific Concerns

The Roundtable has several significant specific concerns with this rulemaking, as discussed below.

a. Withdrawal of Proposed Rule

The Roundtable believes the FDIC should withdraw the Proposed Rule and reissue a revised proposed rule at a later date to reflect the substantial resolution requirements and changes called for in the "Dodd-Frank" Wall Street Reform and Consumer Protection Act ("DFA"). As you know, under the DFA the FDIC will be for the first time required to unwind large, systemically important banks and nonbanks to prevent disruption in the financial system and broader economy. The scope of the resolution authorities under the DFA is substantially different than what is called for in the Proposed Rule.

The DFA, in section 115, authorizes the Financial Services Oversight Council to make recommendations to the Federal Reserve Board of Governors regarding the resolution plans of systemically important financial firms, including nonbank financial firms. Moreover, section 165 of the DFA directs the Federal Reserve to work with the appropriate Council member, in this case the FDIC, to establish resolution plans for BHCs with $50 billion or more in assets. Not only is the asset size threshold different than the definition of a CIDI under the Proposed Rule, but the DFA clearly calls for coordination with the Federal Reserve. The Proposed Rule goes so far as to acknowledge the call to work with the Federal Reserve (27465), but does not indicate it has actually done so in the formulation of this proposed rule. Further, under the DFA the FDIC, in coordination with the Federal Reserve, will have to determine how to establish resolution funds for both banks and nonbank financial companies. Bank holding companies and nonbank financial companies may be forced to undergo significant changes as a result of the DFA legislation, particularly if they are designated for enhanced supervision by the Federal Reserve. Changes could include enhanced capital and liquidity standards, concentration limits, contingent capital requirements, and the adoption of intermediate holding company structures. These changes will affect the way a firm approaches the living will exercise, further underscoring the need to wait for a coordinated living will approach as required under the DFA. As such, the enactment of the DFA ensures that there will have to be another round of rulemaking. Proposing a rule now regarding the resolution of large banks, that will then need to be re-issued pursuant to the DFA, will cause confusion and instability in the market.

Furthermore, there is some question about the scope of the legal authority cited by the FDIC as a basis for this rulemaking. Specifically, Section 10(b)(3) of the Federal Deposit Insurance Act ("FDI Act") (12 U.S.C. § 1820(b)(3)) expressly authorizes the FDIC only to conduct "special examinations" of individual insured depository institutions on a case-by-case basis, by vote by the Board of the FDIC, to determine the condition of such depository institution for insurance purposes. Section 9(a)(Tenth) of the FDI Act (12 U.S.C. § 1819(a)(Tenth)), also cited the FDIC as legal underpinning for the Proposed Rule, grants the FDIC general authority to prescribe rules necessary to carry out the provisions of the FDI Act. In light of the clear authority prescribed in the DFA, we urge the FDIC to act under that express authority before acting further on the Proposed Rule.

Of equal importance to the DFA, foreign banking regulators are conducting studies and proposing actions closely related to those contemplated by the Proposed Rule. The Roundtable notes that a CIDI controlled by a foreign bank should be able to operate knowing that the FDIC's contingent resolution plan requirements are fully coordinated with that foreign bank's primary regulator. As well, the Financial Stability Board is working aggressively with the G20 leaders to develop international financial reforms, importantly, to include resolution planning. The Roundtable requests that the FDIC continue its good efforts in the international arena to engage in cooperative agreement on these matters.

There is no need to rush to a final regulation; delaying adoption of a final regulation until a revised Proposed Rule can be issued in accordance with the directives of the DFA will lead to a better and coordinated rule. The DFA, including resolution authority provisions, will likely be signed into law next week. Accordingly, the Roundtable respectfully requests that the FDIC withdraw the Proposed Rule and coordinate its efforts in this area with the Federal Reserve after

passage of the DFA. If the FDIC chooses to not withdraw this Proposed Rule, we urge the FDIC to issue another Proposed Rule reflecting both industry concerns expressed herein and in response to the DFA. The Roundtable believes this will enable CIDIs to better respond to the FDIC's efforts to ensure these institutions have adequate resolution plans in place.

b. Treatment of Sensitive Information

The Roundtable has significant concern about the weakness of the confidentiality provision in the Proposed Rule. As proposed, a CIDI submitting information pursuant to the rule would have to request that confidential information be protected by the FDIC only if it is proprietary or "could endanger the institution's safety and soundness" if disclosed. The "safety and soundness" threshold required in order to achieve protection is far too high. For example, while not threatening the safely and soundness of an institution, the disclosure of competitive information or the contingent resolution plan itself would be harmful to a CIDI. Disclosure of essentially any of the information related to a CIDI's divestiture strategy needs to be kept confidential because such information reveals to competitors insight into the CIDI's strategies, business model, pricing information and other extremely sensitive information. In particular, information regarding a CIDI's divestiture strategies, future plans, and projections should be afforded protection under the Freedom of Information Act. One of the goals of the FDIC should be to ensure that, in effecting divestitures the CIDI seeks to maximize its returns on the divestiture in order to enhance its capital position. However, if it is known to be compelled to divest, the return on the divestiture would most likely be far below market value. Furthermore, under the Federal Reserve's interpretation 5 USC 552(b)(4), the Federal Reserve treats future strategies as protected as either a trade secret, or commercial or financial information that should be granted confidential treatment. In addition, we request that the FDIC treat all information submitted as part of the resolution plan be protected under exemption b(8) of the Freedom of Information Act. We also request that the FDIC consider expanding the protection of confidential information to the exchange of correspondence and other material between the FDIC and the CIDI.

The protection of confidential information is impractical to apply as CIDIs would be required to analyze every piece of information to determine whether it is sufficiently sensitive, and then go through a separate analysis to connect its revelation with a threat to the safety and soundness of the institution itself. The Proposed Rule further requires that such information be segregated from non-confidential information, which in many cases would require extensive time and effort to achieve. Accordingly, the Roundtable respectfully requests that the FDIC fully and automatically protect from disclosure all information provided in connection with contingent resolution planning, including the plan itself.

Finally, on the point of confidential information, we note that the Proposed Rule states simply that confidential information will not be disclosed except as required by law. In this regard as well, the Roundtable urges the FDIC to work closely with the Federal Reserve given the Federal Reserve's experience with a large number of lawsuits pertaining to the handling of sensitive information.

c. Reporting and Attestation

Under the Proposed Rule, each CIDI's board of directors or designated executive committee within the board, must approve the CIDI's contingent resolution plan in its entirety, the supporting analysis underlying the contingent resolution plan, and further attest that the plan is accurate and that the information is current. This breadth of reporting at the board level is both impractical and concerning from a litigation perspective for board members. By requiring that the information is accurate and current, especially in light of the Proposed Rule's requirement that the contingent resolution plans be updated on a regular basis and where there are (loosely defined) material events, the FDIC would impose on boards of directors detailed responsibilities that are likely substantially greater in its focus on the minutia of reported information. While the Roundtable agrees that boards of directors need to be engaged in the contingent resolution process, establishing this regulatory standard for attestation as to the accuracy of the information in the contingent resolution plans invites litigation due to the practical impossibility of board members to individually verify the accuracy of information underlying resolution plans. Significant liability can be imposed if the information underlying an institution's contingent resolution plan is inaccurate. The Roundtable respectfully requests that the FDIC withdraw the board attestation requirements and, at most, require a process in which senior management are required to confirm that the information contained therein was collected and verified through an established and robust procedure similar to Sarbanes-Oxley forms of attestation.

d. Information to be Submitted

In broad strokes the FDIC describes the minimum standards and components of an acceptable contingent resolution plan, covering a vast amount of information to be provided by the CIDIs in a short period of time. Yet, the information to be submitted will be "in a form and at a place to be prescribed …." (27469). If the FDIC moves forward with this rulemaking, the Roundtable believes it would be helpful to both the FDIC and insured depository institutions to create, after an opportunity for public comment and input, a template for submission of the information as opposed to the open ended request for this information. In order to achieve this, the Roundtable believes it would be beneficial to seek public comment on the form of a template to be used for such information gathering purposes.

Related to the question of what information must be submitted, the Roundtable notes that our members have raised significant concern about the apparent requirement to provide audited financials for the parent company and "each subsidiary or affiliated entity." Banks within publicly listed bank holding company structures may not always prepare audited financials at the bank level, and subsidiaries and affiliates in particular may not do so. The Proposed Rule appears to impose a requirement for audited financials where none currently exists, at every level of the group structure. This could be enormously costly for the industry.

Finally, while beyond the question of what information is submitted, the Roundtable notes that our members have raised concern that the estimation of 500 hours for producing the initial analysis, information and contingent resolution plan is significantly underestimating the time required to comply, even once, with this rule. Producing the contingent resolution plan, analysis

and information involves instituting procedures, modifying technology, producing reports and engaging multiple layers of personnel.

e. Time for Compliance

The Roundtable also notes the substantial concern expressed by our member institutions about the timing of compliance required by the Proposed Rule. In light of the broad range of information to be gathered, reviewed for confidentiality, certified by the board of directors, and packaged for submission to the FDIC "in a form and at a place [yet] to be prescribed," six months is a woefully inadequate amount of time for meaningful compliance. Technology and systems changes required to comply with the Proposed Rule if implemented in its current form and the time required to implement such changes far exceed six months. The Roundtable requests that CIDIs be allowed at least 18 months to submit the initial contingent resolution plans.

f. Resolution and Risk

As previously noted, we commend the FDIC's desire to anticipate the need for resolving large, interconnected financial institutions in a manner that minimizes disruption to the financial system and broader economy. However, the scope of the Proposed Rule goes beyond the DFA in that it appears to place the FDIC in the role of the Financial Services Oversight Council. Though undefined under the Proposed Rule, the effect of the Proposed Rule is to require that covered financial companies identify systemic risks posed by their respective institutions and submit plans to the FDIC for resolving those systemic risks. In particular, the Proposed Rule requires that CIDIs:

> "[d]escribe systemically important functions that the CIDI, its subsidiaries and affiliates provide, including the nature and extent of the institution's involvement in payment systems, custodial or clearing operations, large sweep programs, and capital markets operations in which it plays a dominant role. Discuss critical vulnerabilities, estimated exposure and potential losses, and why certain attributes of the businesses detailed in previous sanctions could pose a systemic risk to the broader economy. (27470)

The Proposed Rule goes on to require that contingent resolution plans identify cross-border relationships and exposures. These requirements, in addition to other minimum requirements to be included in contingent resolution plans, must be viewed in combination with the Proposed Rules provision empowering the FDIC to "… reject the plan and require its resubmission if it fails to contain the required information or otherwise fails to meet the standards prescribed in this section." In effect, the FDIC becomes the entity identifying systemic risks. In practice, repeated rejection and resubmission of proposed contingent resolution plans by the FDIC would ultimately result in the covered financial institution being compelled to alter its legal and otherwise efficient operations in order to comply with what the FDIC finds objectionable in the submitted resolution plans – namely, the potential for CIDIs to pose systemic risks. At a minimum, the Proposed Rule empowers the FDIC to determine certain business functions, including directing a CIDI to renegotiate contracts, hedge risks, unwind transactions, make personnel changes or even separate from its parent.

g. Definitions

A "covered insured depository institution" or "CIDI" means an insured depository institution with greater than $10 billion in total assets that is owned or controlled by a parent company with more than $100 billion in total consolidated assets." There are two problems with this definition. First, this definition is too rigid. For example, the definition does not allow for large financial institutions that are not interconnected with affiliates in operations or contracts to be exempted from the rule. Further, even if a CIDI is well managed and highly rated year after year, by definition it does not escape the possibility that the FDIC will determine its contingent resolution plan is not sufficient. Second, as applied under the Proposed Rule, the definition is too broad. While the definition currently captures approximately 40 financial institutions, it also captures multiple insured depository institutions within holding companies larger than $100 billion. The result is that some CIDIs will be required to submit multiple contingent resolution plans. As proposed there may be institutions that have to file up to five contingent resolution plans. The Roundtable recommends that the rule provide for flexibility as to the appropriate number of contingent resolution plans submitted by a CIDI.

h. Materiality Standard

The scope of what is reported, and what is a "material event," is very broad. While the Proposed Rule requires only annual reporting of contingency plans, material events since the last iteration of the analysis must be reported on an ongoing basis. The Roundtable has concern that the Proposed Rule effectively defines "material event" as almost any operational activity within a CIDI in relation to its parent company or affiliates regardless of whether such an event would have an impact on the contingent resolution plan itself. Examples of "material events" include fiscal challenges and litigation. The Roundtable respectfully requests that "material events" need to be reported only when related to fulfillment of the contingent resolution plan.

III. Conclusion

In closing, the Roundtable again notes that it understands the need to address resolution of insured depository institutions, especially those within large parent companies. Nonetheless, in light of the DFA, the Roundtable urges the FDIC to withdraw the Proposed Rule at least until the FDIC staff have fully evaluated the impact of the DFA and coordinated with the Federal Reserve.

Thank you again for the opportunity to share our views with you on this subject. If you have any questions, please feel free to contact me or Brad Ipema at 202-289-4322.

Sincerely,

Richard M. Whiting

Rich Whiting