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June 9, 2011

By Electronic Delivery via www.regulations.gov

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Robert E. Feldman
Executive Secretary
Attention: Comments/Legal ESS
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

RE: Resolution Plans and Credit Exposure Reports Required, Docket No. 1414, RIN 7100-AD73 and RIN 3064-AD77¹

Dear Ms. Johnson, Mr. Feldman:

In the attached comment, we respond to the April 22, 2011 Federal Reserve (Fed) and Federal Deposit Insurance Corporation (FDIC) proposed rule implementing section 165(d) of the Dodd-Frank Act, "Resolution Plans and Credit Exposure Reports Required."

The Pew Charitable Trusts is an independent nonprofit organization founded in 1948. Pew applies a rigorous, analytical approach to improve public policy, inform the public and stimulate civic life.

The Pew Financial Reform Project, formed in response to the 2008 financial crisis, brings a nonpartisan, fact-based approach to helping reform and modernize the financial sector. Over the past 18 months, the Project has commissioned scholarly papers, supported a bipartisan task force and in other ways facilitated debate on key aspects of reform. We worked to pass the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. We are now committed to contributing to the process of implementation.

As always, we are available to discuss this comment or any other aspect of our work at any time. Thank you for reviewing our comment.

Sincerely,

Charles Taylor
Director, Pew Financial Reform Project
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www.pewfr.org

¹ Proposed Rule: Resolution Plans and Credit Exposure Reports Required, Vol. 76, No. 78, pg. 22648 (April 22, 2011)
<http://www.fdic.gov/regulations/laws/federal/2011/11proposedAD77.pdf>

Pew Financial Reform Project

Comments in response to

**Federal Reserve System and Federal Deposit Insurance Corporation
Resolution Plans and Credit Exposure Reports
Proposed Rule
Request for Public Comment**

**(Federal Reserve System; Regulation YY: Docket No. R-1414, RIN 7100-AD73;
Federal Deposit Insurance Corporation RIN 3064-AD77)**

(Section 165(d) of the Dodd-Frank Act)

Submitted through www.regulations.gov

Section 165(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) addresses resolution planning for “Covered Companies,” that is, for financial companies that have been designated systemically significant.² Resolution Plans (Plans) are needed to end “Too Big To Fail” and are therefore crucial to reducing systemic risk.

The proposed rule in the Federal Register (pp 22648 et seq.) provides a good deal of detail on how the Federal Deposit Insurance Corporation (FDIC) and the Federal Reserve (Fed) plan to implement this Section. The Pew Financial Reform Project appreciates the opportunity to comment.

These comments are divided into general observations and comments in response to specific questions. They are based to some extent on the May 2011 Pew Financial Reform Project report “Standards for Rapid Resolution Plans” (“FRP Standards”) which is attached.³

In summary, our comments are that the final rule should:

- General
 - Require Plans to be instructions rather than analyses or descriptions.
 - Require thorough practice exercises as a part of planning.

² Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. <http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf>

³ It is also available at www.pewfr.org and www.pewtrusts.org under Economic Policy, Markets Program, Financial Reform.

- Require Covered Companies to identify individuals who are not employed by them who have key roles in a resolution and to engage them in planning.
- Require Plans to be a set of documents addressed to all individuals with key roles rather than a single document addressed to regulators.

- Strategic Analysis
 - Require a mobilization plan that is explicit and precise about who does what and when in the early stages of a resolution.
 - Require a legal opinion from a reputable law firm regarding which law would apply to each of its material entities if the Covered Company itself initiated a bankruptcy or if the Financial Stability Oversight Council intervened and the FDIC led a resolution at the parent or in a subsidiary.
 - Require a communications plan that addresses both internal and external constituencies.
 - Require analysis of different scenarios as part of the planning process but not as a part of the Plan itself.

- Informational Elements
 - Require IT systems that are able to integrate and distribute essential structural and operational information at short notice, and processes to confirm that people know their emergency roles and responsibilities at the beginning of a resolution and are ready to accept and use the information distributed to them.

- Process
 - Include criteria for an acceptable Plan. The two key criteria should be:
 - Will the Plan work if followed?
 - Can the individuals involved follow it?

- Credit Exposure Reports
 - Require Covered Companies to be able to produce Credit Exposure Reports with 24 hours notice.
 - Require Covered Companies to be able to report with 24 hours notice on liquidity exposures as well as credit exposures and on the likely effect of their distress sales on the prices of major classes of assets.

General Observations

A CD or a Score? The purpose of the proposed rule is to require Covered Companies to prepare for their own orderly resolution.

The proposed rule deals with two periodic reports that Covered Companies are expected to file with the Fed and FDIC. The first of these is an annual Plan which is divided into seven parts: (1) summary, (2) strategic analysis, (3) governance of planning, (4) organizational structure and related information, (5) management information systems, (6) interconnectedness and interdependencies and (7) supervisory and regulatory information. The second is a quarterly Credit Exposure Report (Exposure Report).

The heart of the Plan is the strategic analysis. The proposed rule says that this part should give detail on how a reorganization or liquidation “could be accomplished” and it should “identify the range of specific actions” to be taken.⁴ However, the rule is written in such a way as to suggest that this part is a description of a plan rather than a set of instructions. This is an important distinction. It is the difference between a music CD and a score. A CD is to be listened to and, indeed, is a good way to judge the quality of a piece of music. It will not however help an orchestra to play it.

To illustrate this point, the start of the proposed rule overview section dealing with the strategic analysis says it should “describe the Covered Company’s critical thinking detailing how, in practice, it could be resolved under the Bankruptcy Code.”⁵ It goes on to say that the strategic analysis should “include detailed information as to how ... a reorganization or liquidation of the Covered Company ... could be accomplished”⁶ The proposed rule calls for something for regulators to read, rather than a set of instructions to guide people on what actions to take to resolve the Covered Company. Even the name of the main section of a Plan – a strategic analysis – suggests that the proposed rule is asking for an essay, rather than a real guide to action.

The final rule should make it clear that this section of a Plan should consist primarily of instructions for all the individuals who are likely to have an important role to play in a resolution.

⁴ Federal Reserve System, Federal Deposit Insurance Corporation: Proposed Rule, [Resolution Plans and Credit Exposure Reports Required](#), 76 Fed. Reg. 22650 (April 22, 2011).

⁵ Ibid.

⁶ Ibid.

Exercises The rule focuses on the production of documents but documents by themselves will not achieve the goal of orchestrating a future resolution effectively even if they do provide guidance to everyone who is likely to be involved. That will require practice exercises along the lines discussed in the FRP Standards:

“Every other year, update[s] should include [practice exercises] to test the preparedness of all key people and committees, including outside advisors, receivership teams and regulatory teams from the different agencies concerned, including other members of the international college of supervisors. To be useful, [practice exercises] require a good deal of preparation by quite senior managers. [Practice exercises] should test the adequacy of key data, plans and strategies. To prepare themselves and to ensure these exercises are taken seriously throughout their organizations, senior management and board members should take part.”⁷

Contingency plans not practiced regularly are ineffective. For Covered Company resolution, the Plan will be very complex compared to, say, evacuation plans for a building in case of fire and as a result practice will be that much more important.

Comprehensive practice exercises will be costly and difficult to organize. It might be tempting, for example, to think that board members would not have to be involved. But the fact is that some key decisions in the parent organization and in significant subsidiaries may well have to be taken by board members during a failure. The value of effective exercises – the difference between effective and ineffective Plans -- justifies their cost.

The final rule should require thorough practice exercises as a part of resolution planning.

Who to Involve? In the event that a Covered Company must be resolved, it is likely that some members of management will be dismissed. Those who will act in their place, whether outside consultants, alumni or more junior management, have to be involved in resolution planning. So too should outsourcers and other vendors that may have to act cooperatively with the Covered Company during a resolution. If service level agreements are still in effect, there will be a legal basis for such action. But will everyone involved be ready to act quickly on instruction from the Covered Company or their regulator? An effective Plan covers those sorts of actions and practicing the Plan should test the readiness of key individuals and organizations outside as well as inside the Covered Company.

⁷ See the Pew Financial Reform Project’s “[Standards for Rapid Resolution Plans](#),” May 2011, Section 2.11, pg. 9. Here the term “exercises” is used in place of “war games.”

The final rule should require Covered Companies to identify individuals not employed by them who may have key roles in a resolution and to engage them in planning to ensure they are as prepared as possible.

The Modular Nature of Successful Plans Successful plans do not tell everyone everything. That is, they give specific instructions to individuals who need them in order to perform their roles. If the reasons might be unclear, they can also explain briefly why that role is necessary. The proposed rule is written as though the Plan should be a single document. It should not.

In the final rule, it should be clear that the Plan is a set of documents addressed to all individuals who will have key roles in a resolution, telling them what to do.

Specific Questions

Questions on Strategic Analysis

- *What additional elements of strategic analysis should be included in the Covered Company's Resolution Plan? Are there any elements listed in the rule that create an unnecessary burden or that should not be included in the Covered Company's Resolution Plan?*⁸

Mobilization The proposed rule focuses on strategic options under different scenarios. It should give at least equal weight to planning what happens on day one of a failure, the period of roll-out or mobilization. As the FRP Standards propose:

“Rapid resolution plans should specify roll-out steps that include accessing essential data on structure and operations. Key crisis management roles and responsibilities should be defined and understood.”⁹

Value was destroyed in the early stages of the Lehman bankruptcy by the delay as individuals worked out what they were supposed to do and struggled to find the information they needed to perform their roles.

⁸ In this discussion of specific questions, italics are used for wording taken directly from the proposed rule.

⁹ See the Pew Financial Reform Project's "[Standards for Rapid Resolution Plans](#)," May 2011, Section 2, pg. 6.

The final rule should require a mobilization plan that is explicit about who does what and when during the first few hours of a resolution.

Legal Opinion The scope of the rule should go beyond simple bankruptcy. It should explicitly address questions of legal jurisdiction and conflict of law.

The final rule should require that a Plan is supported by an opinion from a reputable law firm regarding which law would apply to each of its material entities if either the Covered Company itself initiated a bankruptcy or the FSOC intervened and the FDIC led a resolution at the parent or at a subsidiary.

Communications Plans The FRP Standards propose that mobilization plans should include provisions for:

“A coordinated communication plan for all the parties concerned, both internal and external, that addresses issues on the state, national and international levels.”¹⁰

Effective communication is always a key part of crisis management. Stakeholders have a right to it. It pays public policy dividends when it reduces speculation and panic. It will be difficult, especially when many different entities will be involved around the world, and it will therefore take careful planning.

The final rule should require that a Plan contains a communications plan addressing both internal and external communications needs.

Removing Analysis The proposed rule rightly emphasizes analysis as an input into sound planning. However, it seems to require a great deal of space in the Plan itself be devoted to reporting this analysis. This is unnecessary. By and large, analysis in the Plan is redundant.

The final rule should require careful analysis of different scenarios as part of the planning process but not as a part of the Plan itself.

¹⁰ See the Pew Financial Reform Project’s “[Standards for Rapid Resolution Plans](#),” May 2011, Section 2.9.4 pg. 9.

Questions on Informational Elements

- *Should any informational elements be required to be available on an “on demand” basis?*

Information The proposed rule asks for a great deal of information in the annual Plan. Some of that, especially organizational data, will be useful and will not become dated too quickly. But much of the operational data regarding for example current positions and values will become dated almost immediately. It will be essential, however, that this information can be assembled quickly when a resolution actually starts.

Covered Companies have to develop the capability to gather and distribute accurate, timely and sufficient information to everyone who will be involved in a mobilization. The FRP Standards suggest:

“Structural and operational data should be maintained continuously in a virtual data room. This means that specific data should be continuously available to those who will need access to it in the event of a failure, including the [Covered Company] management, board and its regulators.”¹¹

The rule should require that IT systems are able to integrate and *distribute* essential structural and operational information at short notice, to confirm that people are established in their emergency roles and responsibilities, and are ready to accept the information distributed to them.

Questions on Process

- *Are there explicit factors the Board and the Corporation should consider in determining whether a Resolution Plan is not credible or would not facilitate an orderly resolution under [the] Bankruptcy Code?*

The final rule should include criteria (other than content requirements) for an acceptable Plan. The two key criteria should be:

¹¹ See the Pew Financial Reform Project’s “[Standards for Rapid Resolution Plans](#),” May 2011, Section 3.5 pg. 10.

- Will the Plan work if followed? That means, critical operations would continue to operate, there would be no cost to the taxpayer and the disruption to the financial system would be minimal.
- Can the individuals involved follow it? Do they understand what they would have to do and are they capable of acting on that understanding?

It is a matter of urgency for likely Covered Companies to address international aspects of resolution since this is the issue most likely to cause their Plans to fail to meet these criteria.

Practice exercises will be important in judging whether these criteria have been met.

Questions on Credit Exposure Reports

- *Are the elements proposed for inclusion in the Credit Exposure Reports sufficiently clear? What further clarification would be appropriate?*

Frequency of Exposure Reports The proposed rule suggests that Covered Companies produce quarterly Exposure Reports. This is the traditional regulatory reporting cycle for financial firms and, for most purposes, is likely to be sufficient. However, it is insufficient for credit exposures and in particular estimates of the impact that a failure of the Covered Company would have on the rest of the financial system. The FRP Standards state:

“... credible failure assessments must be developed and maintained to show that a failing firm can be wound down without causing systemic risk and contagion. ... Based on the Exposure Reports of other [Covered Companies] mandated by the Dodd-Frank Act and on most recent stress-test results, these assessments must either be updated very frequently – perhaps as often as daily – or they must reflect very conservative assumptions that are likely to generate valid upper estimates of exposure between updates.”¹²

A Covered Company is unlikely to fail on the date of a quarterly report.

The final rule should require Covered Companies to be able to produce Credit Exposure Reports on 24 hours’ notice.

¹² See the Pew Financial Reform Project’s “[Standards for Rapid Resolution Plans](#),” May 2011, pg. 5.

Content of exposure reports Exposure reports should establish not just the vulnerability of other companies to credit risk. Whether as a part of Exposure Reports or in supplementary reporting requirements, it is important that Covered Companies also report estimates of the impact that their failure would have on the liquidity of other firms, and the effect that their distressed asset sales would have on the prices of assets.

The final rule should require Covered Companies to be able to report on their supply of liquidity to other firms and their dependence on other firms for liquidity. They should also be able to estimate and report on the likely effect of their sales on the prices of major classes of assets. They should be able to produce these reports with 24 hours notice, whether as a part of the Credit Exposure Report or separately.



The Pew Financial Reform Project

Standards for Rapid Resolution Plans

Executive Summary

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), signed into law in July 2010, requires systemically important financial institutions to develop and maintain rapid resolution plans. A rapid resolution plan lays out how a financial institution that is in the process of failing can be sold, broken up or closed quickly and effectively. The Dodd-Frank Act gives regulators discretion over how such plans should be structured and what information they should contain. These standards lay out some of the key attributes of successful rapid resolution plans.

When Lehman Brothers failed in September 2008, the absence of any preparation meant that bankruptcy proceedings got off to a slow start and faced many unnecessary obstacles along the way. Much economic value was lost as a result. More importantly, in the chaos that followed policy makers became very reluctant to allow other large institutions to go under and “Too Big To Fail” became the de facto policy of the United States government. Having effective resolution plans is critical to ending the era of “Too Big To Fail” as the default policy in times of crisis.

At the highest level, there are just four standards for rapid resolution planning:

- An Objective of Low-Cost, Low-Risk Resolution. Every systemically important financial institution should produce and maintain a plan to guide receivers and regulators through a low-cost and low-risk resolution.
- Tested Provisions for a Quick Start and Sustained Execution. The plan should contain provisions for accessing basic information, starting quickly and sustaining operations of systemically-important activities. There also should be a general strategy for every major aspect of a resolution process. These provisions should be tested regularly with “war games.”
- A Well-Governed, Managed and Resourced Process. The institution, its regulators and key third parties should devote sufficient resources to planning in order to ensure that effective resolution plans are kept up to date.
- Real Consequences. Any institution with a resolution plan that is unsatisfactory to its regulators must revise it promptly and start to implement any needed operational changes. If the revisions or the changes are insufficient, the institution should be required to divest businesses and close down operations until it is no longer systemically significant.

Every element of the standards proposed here should apply to all rapid resolution plans. Still, the specifics of each plan should reflect the complexity, interconnectedness and size of the institution in question. Careful application of these standards should help regulators and institutions meet the overall objective of rapid resolution planning – namely to ensure as far as possible that no future failure by a U.S. financial institution imposes costs on taxpayers or threatens the stability of the financial system as a whole.

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May 2011

The Pew Financial Reform Project, formed in response to the 2008 financial crisis, brings a nonpartisan, fact-based approach to reforming and modernizing the financial sector.



The Pew Charitable Trusts' economic policy work aims to encourage an informed debate and promote practices that strengthen the U.S. economy. Pew is a nonprofit organization that applies a rigorous, analytical approach to improve public policy, inform the public and stimulate civic life.

Introduction

During the 2008 financial crisis, the efforts of policy makers, lawyers and financial industry executives to cope with the failure of large complex financial institutions were greatly complicated by a lack of planning. In particular, when Lehman Brothers failed in September, basic information was missing about organizational structures and relationships between subsidiaries that made it difficult to start bankruptcy proceedings quickly, to anticipate the effects of different actions and to resolve conflicts between subsidiaries and jurisdictions. In the succeeding months, much economic value was lost as a result. But more importantly, the chaos in the days and weeks immediately following the Lehman failure made policy makers reluctant to allow the complete collapse of any other large institution. “Too Big To Fail” became de facto policy because it was seen as the only way to contain the extraordinary risks of that period.

A rapid resolution plan is a document that lays out how a financial institution that is in the process of failing could be sold, broken up or closed before it disrupts the financial system or imposes costs on the taxpayer.¹³ In the aftermath of the crisis, the idea of large institutions planning for their rapid resolution has gained wide acceptance among policy makers internationally.^{14,15} In the United States, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), which became law in July 2010, contains a provision requiring large complex financial institutions to produce rapid resolution plans. Now, as the federal financial regulatory agencies have begun to implement the Dodd-Frank Act,

¹³ Various authors use other terms such as “living wills” and “funeral plans” to refer to rapid resolution plans. This document uses the term “rapid resolution plans” following recent U.S. legislative language and emerging regulatory practice (Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, §165 (d)).

¹⁴ See Goldstein, Morris and Veron, Nicolas. “Too Big to Fail: The Transatlantic Debate.” Draft prepared for the Conference on Transatlantic Relationships in an Era of Growing Economic Multipolarity organized by Bruegel and the Peterson Institute for International Economics, sponsored by the European Commission, Washington D.C., October 8, 2010 <http://www.iie.com/publications/papers/goldstein-veron20101008.pdf> See also Carmassi, Jacopo and Herring, Richard. 2010. “The Corporate Structure of International Financial Conglomerates: Complexity and its Implications for Safety and Soundness” in *The Oxford Handbook of Banking*, eds. Berger, Allen, Molyneux, Philip, and Wilson, John. Oxford: Oxford University Press. Goldstein and Veron point to the Lehman Brothers bankruptcy and Carmassi and Herring’s work on the complexity of international systemically important financial institutions (SIFIs) and the complexity of managing their failures. According to Carmassi and Herring, Lehman Brothers had 433 subsidiaries in 20 countries.

¹⁵ Besides being mandated in the Dodd-Frank Act, coordinated steps are being taken internationally. The UK’s Financial Services Act 2010 provides the Financial Services Authority with a duty to make rules requiring firms to prepare recovery and resolution plans. The Financial Stability Board (FSB) will present to the G20 broad proposals requiring all banks judged to be “globally systemically important financial institutions” to have a resolution plan in place and their national regulator to have a resolution regime in place in the event of their failure. In November 2010, the G20 will decide upon recommendations put forth by the FSB. The European Commission also has proposed a new framework for crisis management in the financial sector, which includes resolution plans to ensure adequate planning for financial stress or failure.

they must decide on requirements for these plans and for the programs needed to maintain and update them as circumstances change.

This document is intended to support the federal financial regulatory agencies in their efforts to oversee rapid resolution planning. The standards here are intended to:

- Provide a nonpartisan point of reference. As rule-making and implementation for rapid resolution planning plays out over the next 24 months, many public advocacy and industry groups will make a variety of recommendations. These standards are a yardstick for assessing different proposals.
- Be a medium-term target. It will take some time for firms to meet these standards. International issues have to be resolved, and large internationally active financial institutions might have to reorganize themselves and make major investments in information systems before they can produce satisfactory plans. A phase-in period will be needed.

At the highest level, we identify four standards for any rapid resolution planning:

- An Objective of Low-Cost, Low-Risk Resolution. Every systemically important financial institution should produce and maintain a plan to guide receivers and regulators through a low-cost and low-risk resolution.
- Tested Provisions for a Quick Start and Sustained Execution. The plan should contain provisions for accessing basic information, starting quickly and sustaining operations of systemically-important activities. There should also be a general strategy for every major aspect of a resolution process. These provisions should be tested regularly with “war games.”
- A Well-Governed, Managed and Resourced Process. The institution, its regulators and key third parties should devote sufficient resources to planning in order to ensure that effective resolution plans are kept up to date.
- Real Consequences. Any institution with a resolution plan that is unsatisfactory to its regulators must revise it promptly and start to implement any needed operational changes. If the revisions or the changes are insufficient, the institution should be required to divest businesses and close down operations until it is no longer systemically significant.

Although it will generate large public benefits, effective planning will have some significant and immediate costs for every large complex financial institution involved. But the benefits of avoiding another crisis also are large. Regulators must insist on high standards. Otherwise, they will never have the confidence to take decisive action when a large complex financial institution gets into trouble and the idea or concept of “Too Big To Fail” will not end.¹⁶

¹⁶ See Bair, Sheila, “Ending Too Big To Fail: The FDIC and Financial Reform.” Speech at the 2010 Glauber Lecture at the John F. Kennedy Jr. Forum; Harvard University, Cambridge, Massachusetts. October 20, 2010. <http://www.fdic.gov/news/news/speeches/chairman/spoct2110.html> and Bernanke, Ben, Remarks on “The Squam Lake Report: Fixing the Financial System,” at the Squam Lake Conference, New York, New York. June 16, 2010. <http://www.federalreserve.gov/newsevents/speech/bernanke20100616a.htm>. Chairman Bair points to the

The main text is divided into four sections:

- *Legislative Background*, which describes the main rapid resolution planning provisions of the Dodd-Frank Act;
- *Context*, which highlights some important considerations that have to be addressed for rapid resolution planning to be effective;
- *Standards*, with four sub-sections that each lay out a proposed standard in some detail; and
- *Conclusion*.

Legislative Background

The Dodd-Frank Act requires financial institutions to establish and maintain rapid resolution plans. This requirement applies to bank holding companies with more than \$50 billion in total assets and nonbank financial companies that are subject to enhanced supervision by the Federal Reserve (Fed), so-called systemically important financial institutions, or SIFIs.¹⁷ Under the act, the Federal Deposit Insurance Corporation (FDIC) and the Fed have responsibility for these plans. On content, the act requires a plan to specify how well any affiliated FDIC-insured institution is protected; describe the institution's ownership structure, assets, liabilities and contractual obligations; and identify all cross-guarantees, major counterparties and owners of collateral.¹⁸ On consequences, the act specifies that, if a rapid resolution plan is judged to be inadequate, the Fed and the FDIC can require its revision within a specified timeframe. If it is still unworkable, they can immediately impose tougher standards for capital, leverage and liquidity, and they can restrict growth, activity and operations until the rapid resolution plan is adequately revised. If after two years it is still unworkable, the FDIC and the Fed can require divestiture of assets and operations.¹⁹

The Dodd-Frank Act does not make rapid resolution plans legally binding as some commentators had proposed. Neither the FDIC, nor a receiver appointed by a bankruptcy court, nor the management of a SIFI has to keep to the plan in the event of failure.²⁰

importance of having credible resolution plans as critical for the success of the new resolution regime. Chairman Bernanke believes the resolution plans can be a valuable supervisory tool.

¹⁷ Public Law 111-203: The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, §165(a) and (d).

¹⁸ Public Law 111-203: The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, §165(d) (1) A-C). However, Sec. 165 (d) (1) (D) also authorizes the Federal Reserve and FDIC to mandate, by joint order, that firms include any specific information they deem necessary.

¹⁹ Public Law 111-203, § 165 (d) (4) states that the Federal Reserve and FDIC will jointly notify a firm of deficiencies in its resolution plan; the report language leaves the timeline for resubmitting an updated plan to the Fed and FDIC. Sec. 165 (d) (5) grants the Fed and FDIC authority to “jointly impose more stringent capital, leverage, or liquidity requirements, or restrictions on the growth, activities, or operations of the company, or any subsidiary thereof, until such time as the company resubmits a plan that remedies the deficiencies.” The section also authorizes the Fed and FDIC, in consultation with the Financial Stability Oversight Council (FSOC), to order a firm to divest certain assets if it does not resubmit an acceptable resolution plan within two years.

²⁰ Public Law 111-203§ 165 (d) (6) and § 165 (d) (7).

With the goal of limiting contagion among financial institutions during periods when the system as a whole is under stress, the Dodd-Frank Act requires the Fed to set limits for every SIFI so that its exposure to any one of its creditors is at most 25 percent of its capital.²¹ Every SIFI is required to file periodic credit-exposure reports that detail its exposures to every other SIFI.²²

Finally, the Fed must report to Congress every year on implementation of rapid resolution planning as part of its annual report on heightened supervision activities.²³

Context

The effectiveness of a program of rapid resolution planning will depend on how well several other issues are resolved.

First, international legal issues have to be addressed.²⁴ As matters now stand, the actual resolution of any internationally active SIFI is likely to raise serious problems, regardless of whether it is affected through a bankruptcy or an administrative process. Issues to be addressed include: coordination of resolution initiation, continuity of systemically important operations, continuity of key contracts with third parties and among affiliates and subsidiaries within the SIFI, access to group-wide information by host country regulators in normal times and in the prelude to a crisis, access to critical operational information by different affiliates and subsidiaries in the event of a failure, treatment of employees and conflict of law – a critically important and complex subject. While Financial Stability Board (FSB) discussions under the auspices of the G20 have begun, they have a long way to go. Moreover, some topics such as conflict of law issues or derivative close-out procedures might require action outside the FSB's purview before they can be satisfactorily resolved.

²¹ This concentration limit is specified in §165 (e) (2) of the law.

²² Public Law 111-203 § 115 states that the FSOC may recommend to the Board of Governors that nonbank financial companies submit credit-exposure reports detailing a SIFI's nature and extent of exposure to other SIFIs.

²³ Public Law 111-203 § 165 (b) (5).

²⁴ See, for example Herring, Richard. "Wind-Down Plans as an Alternative to Bailouts." Pew Financial Reform Project Briefing Paper #15. 2009. http://www.pewfr.org/admin/project_reports/files/Wind-down-plans.pdf. Herring notes that international harmonization of resolution procedures would be difficult but points to the college of supervisors as the body that could verify the feasibility of SIFI resolution plans. See also Claessens, Stijn, Herring, Richard and Schoenmaker, Dirk. 2010. "A Safer World Financial System: Improving the Resolution of Systemic Institutions." London, Centre for Economic Policy Research.

<http://staff.feweb.vu.nl/dschoenmaker/Geneva12.pdf>.

Claessens and Herring review various model approaches of resolution practices for SIFIs on an international basis. Squam Lake Working Group on Financial Regulation. "Improving Resolution Options for Systemically Relevant Financial Institutions: A Squam Lake Working Group Paper." Council on Foreign Relations Press, October 2009. Recommendation #2 of this paper calls for negotiations to create a unified cross-country resolution process.

http://www.cfr.org/publication/20558/improving_resolution_options_for_systemically_relevant_financial_institutions.html#.

Second, credible failure assessments must be developed and maintained to show that a failing firm can be wound down without causing systemic risk and contagion.^{25,26} For this to be true, the exposure of other SIFIs must be small relative to their capital and funding liquidity, and there must be reasonable grounds to believe that asset sales by a failing SIFI will not so depress prices of assets of other SIFIs that their solvency will be threatened.²⁷ Based on the exposure reports of other SIFIs mandated by the Dodd-Frank Act and on most recent stress-test results, these assessments must either be updated very frequently – perhaps as often as daily – or they must reflect very conservative assumptions that are likely to generate valid upper estimates of exposure between updates.

Third, clear triggers for a resolution have to be defined for all kinds of SIFI. Triggers already exist for depository institutions: if capital falls below a minimum acceptable level, the FDIC can move in and start a resolution. Something similar must be specified for each type of SIFI so that all parties concerned can know what circumstances that will precipitate a resolution.²⁸

Finally, judgment will necessarily play a large part in how any crisis is ultimately managed, a factor that limits the ultimate value of a resolution plan. Effective planning cannot by itself assure systemic stability or even well-managed resolutions.²⁹ The more fragile and dynamic the systemic situation, the more complex and time-critical the judgments will be. Hopefully, SIFI failures will be rare.³⁰ However, that fact makes it likely that those who manage a future SIFI failure will never have managed anything like it before and will, therefore, stand to gain a great deal from a well thought out resolution plan that practice has made familiar.

²⁵ Dodd-Frank mandates the Federal Reserve to require periodic submissions of credit exposure reports to the Federal Reserve, the FSOC and the FDIC for all financial institutions that must submit rapid resolution plans. The legislation does not specify what “periodic” means. See Public Law 111-203, § 165 (d) (2).

²⁶ This issue was discussed during Pew interviews with financial market experts in New York City, October 2010.

²⁷ As in footnote 14, when submitting credit-exposure reports, Dodd-Frank does not define what “significant” credit exposure means. See Public Law 111-203, § 165 (d) (2).

²⁸ Claessens et al. 2010. <http://staff.feweb.vu.nl/dschoenmaker/Geneva12.pdf>.

²⁹ Kaufman, George. “Living Wills: Putting the Caboose before the Engine and Designing a Better Engine.” May 2010. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1599787.

³⁰ Some commentators have argued that it would be better if SIFIs failed more often so that the authorities and the other concerned parties stayed familiar with what to do. But a failure is always costly to those directly involved, and a SIFI failure is by its very nature potentially disruptive.

Standards

#1: An Objective of Low-Cost, Low-Risk Resolution

Every systemically important financial institution should produce and maintain a plan to guide receivers and regulators through a low-cost and low-risk resolution.

1.1 Rapid resolution planning at each SIFI should so far as possible:

- 1.1.1 Minimize systemic instability.³¹
- 1.1.2 Maintain the priority of claims among creditors.³²
- 1.1.3 Protect taxpayers from cost and protect the industry from ex-post assessments.
- 1.1.4 Maximize the value of the outcome for all the stakeholders involved.

1.2 In so doing, each planning program also should help:

- 1.2.1 Signal effectively that the institution is not “Too Big to Fail.”
- 1.2.2 Ensure that spillover costs associated with failure are internalized.
- 1.2.3 Prepare key decision-makers to act rapidly and effectively in the moment of crisis.

1.3 An effective plan might be complex. It should nevertheless be clear, well-organized, sufficiently comprehensive and completely accessible for all those who will need to use it on the day. No plan can provide for every contingency. A careful balance must be struck between specificity and flexibility to ensure the plan is both practical and relevant.

#2: Tested Provisions for a Quick Start and Sustained Execution

Rapid resolution plans should specify roll-out steps that include accessing essential data on structure and operations. Key crisis-management roles and responsibilities should be defined and understood. Systemically significant activities should be identified and provisions made to maintain them through a failure. A general strategy should be included for sustained execution of the resolution process. Resolution plans should address the risks uncovered during stress testing. Key dependencies should be protected by transaction-services agreements that can survive resolution. Plans should be tested biannually in comprehensive war-game exercises.

2.1. The roll-out plan for a resolution or a bankruptcy should provide for access to basic information and assignment of responsibilities for communication, coordination and decision-making by courts, receivers, the regulatory agencies and any other parties that need to be involved, at the state level, nationally and internationally. It should be possible to complete the roll-out plan in a short period of time, such as a weekend.

³¹ See, for example, Herring, Richard. “Wind-Down Plans as an Alternative to Bailouts.” Pew Financial Reform Project Briefing Paper #15. 2009. http://www.pewfr.org/admin/project_reports/files/Wind-down-plans.pdf.

³² Claessens et al. <http://staff.feweb.vu.nl/dschoenmaker/Geneva12.pdf>.

- 2.2. Strategies for sustained execution of subsequent stages should be sufficiently flexible to address different failure scenarios, including the failure of the parent company, the material financial distress of any systemically critical subsidiary, the collapse of any other line of business or the collapse of any potentially important legal entity.
- 2.3. Plans should address the risks uncovered by stress tests. Also mandated by the Dodd-Frank Act,³³ stress tests are exercises each SIFI must undertake to measure the potential impact of various risks -- such as higher unemployment or lower house prices -- on its financial position. Stress test results should provide valuable indications of how an institution might fail in practice.³⁴
- 2.4. To support a roll-out plan, programs for resolution planning should maintain up-to-date structural data³⁵:
 - 2.4.1. A mapping of lines of business into legal entities that might have to be resolved separately.
 - 2.4.2. A complete catalog of all legal entities, including subsidiaries, affiliates and any special-purpose entities, briefly explaining their purpose, their form, the main legal jurisdiction under which they operate and whether they operate cross-border. This catalog should distinguish between potentially important legal entities and those that are either dormant, contingent (for purposes other than crisis management) or immaterial.³⁶
 - 2.4.3. A table showing the legal jurisdictions in which claims are likely to arise in the event of failure for each business and potentially important legal entity.
 - 2.4.4. A mapping of key interconnections detailing their existence and nature (but not the size of obligations or financial flows) across all potentially important legal entities including cross-holdings, rights and obligations, credit exposures, common infrastructure and business dependencies.
 - 2.4.5. A chart of accounts for each potentially important legal entity.

³³ Public Law 111-203 § 165 (i).

³⁴ U.S. Government Accountability Office, "Troubled Asset Relief Program: Bank Stress Test Offers Lessons as Regulators Take Further Action to Strengthen Supervisory Oversight." Publication No. GAO-10-861. <http://www.gao.gov/new.items/d10861.pdf> and Committee of European Banking Supervisors (CEBS), "Aggregate outcome of the 2010 EU wide stress test exercise coordinated by CEBS in cooperation with the ECB," July 23, 2010. <http://stress-test.c-eps.org/documents/Summaryreport.pdf>.

³⁵ See Giddens, James W., Trustee for the SIPA Liquidation of Lehman Brothers Inc., Trustee's Preliminary Investigation Report and Recommendations, United States Bankruptcy Court Southern District of New York, Case No. 08-01420 (JMP) SIPA, pg. 112-115 and Trustee Recommendation: A Required Liquidation Plan (Exhibit D, pg 182-186), August 25, 2010. <http://dm.epiq11.com/LBI/document/GetDocument.aspx?DocumentId=1248470&DMWin=c41bb921-f885-435e-9c5a-387bd5835e45>.

³⁶ Some commentators have suggested that a tax on each legal entity within financial institutions should be introduced or in some other fashion, an incentive be created to reduce the sheer number of entities that SIFIs often seem to create. The receivers report that there were more than 8,000 legal entities at Lehman Brothers at the time it failed.

- 2.4.6. Information on material impediments to an orderly resolution in the event of failure.
- 2.5. Rapid resolution plan programs also should maintain operational data including:
 - 2.5.1. Volumes and values of activity by major market, instrument, contract, line of business and counterparty and the values and sources and users of collateral.
 - 2.5.2. Details of the scale and type of key operational and financial interdependencies among affiliates and subsidiaries, and any contingency plans for inter-entity funding.
 - 2.5.3. Information on contracts in sufficient detail to gauge how other SIFIs and major counterparty groupings would be affected in different scenarios and how rights and obligations of a bankruptcy receiver or of the FDIC might evolve during the management of a failure.
 - 2.5.4. Details of the present ownership and capital structures (including any convertible contingent capital) of the SIFI and of all other potentially important legal entities within it; details of the size of their assets, liabilities and contractual obligations; details of the size of all significant cross-guarantees, exposures and collateral arrangements.
 - 2.6. The plan should also define key crisis-management roles and responsibilities:
 - 2.6.1. Internal directories of key people, committees, reporting relationships, functions and roles in normal business circumstances should be available. More importantly, however, key roles, functions and responsibilities need to be defined, agreed upon and communicated from the moment a failure is declared.
 - 2.6.2. These assignments of responsibility should cover all major lines of business and potentially important legal entities and include boards as well as senior officers.
 - 2.6.3. They should also cover key people from outside the SIFI including receivership teams, FDIC and Fed resolution teams, key vendor contacts and key personnel in different parts of government and in other regulatory agencies at the state, national and international levels, including the international college of supervisors.
 - 2.7. The plan should identify systemically significant activities that should be sustained during a failure to minimize the risks of a systemic event. The plan should include measures to ensure the survival of these operations. Regulatory criteria similar to those that must be developed to designate SIFIs should be used for determining the systemic significance of specific activities. Payments, clearing and settlement, custodian activities, market making and prime brokerage are all examples of activities that might be considered systemically significant.
 - 2.8. Key dependencies should be protected by transaction-services agreements. These agreements among affiliates and subsidiaries and with key providers of outsourced services should be so structured that they can survive both bankruptcy or administrative resolution and the transfer of contracts to new legal entities, such as bridge banks.

2.9. Roll-out plans should also include provisions for:

- 2.9.1. Access to key data systems in each major jurisdiction for each potentially important legal entity and line of business during a resolution or bankruptcy.
- 2.9.2. The transfer of systemically critical activities into viable new business structures.
- 2.9.3. Nondisruptive disengagement from critical infrastructure such as clearing houses.
- 2.9.4. A coordinated communication plan for all the parties concerned, both internal and external, that addresses issues on the state, national and international levels.

2.10. Rapid resolution plans also should include strategies for sustained execution:

- 2.10.1. Unwinding of each legal entity and nonsystemic business.
- 2.10.2. The later stages in any bankruptcy or resolution process.

2.11. Every other year, update exercises should include war games to test the preparedness of all key people and committees, including outside advisors, receivership teams and regulatory teams from the different agencies concerned, including other members of the international college of supervisors. To be useful, war games require a good deal of preparation by experienced managers. War gaming should test the adequacy of key data, plans and strategies. To prepare themselves and to ensure these exercises are taken seriously throughout their organizations, senior management and board members should take part.³⁷

#3: A Well-Governed, Managed and Resourced Process

Rapid resolution planning should be well-governed, managed and resourced. Key third parties should be involved. Congress should include rapid resolution planning in its oversight. Responsibilities among the federal financial regulatory agencies and their international counterparts should be well-defined. Within SIFIs, senior management should sponsor rapid resolution plans, create a resolution-planning office and ensure its full institutional support. A comprehensive summary of every rapid resolution plan should be published regularly.

3.1. Because the FDIC will be the user of the plan in the event of an administrative resolution, the FDIC should lead and coordinate rapid resolution planning among the national financial regulators with the close support of the Fed. The other federal financial regulatory agencies and any involved state agencies should support the FDIC. Responsibilities among the agencies and their international counterparts should be well-defined, agreed-upon and well-understood by all concerned in advance of a crisis.

³⁷ George Kaufman advocates for war games in his “Living Wills: Putting the Caboose before the Engine and Designing a Better Engine.” http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1599787.

Ron Feldman in his “Forcing Financial Institution Change through Credible Recovery/Resolution Plans” recommends that living wills develop responses to “what if” scenarios. http://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=4434.

- 3.2. Resolution planning will require close cooperation with key third parties. These include vendors, counterparties and outside counsel. While confidential information must be protected, these outsiders should be engaged in the planning process since they might have vital roles to play in the event of a failure. If possible, coordination with the major bankruptcy courts would be desirable as well.³⁸ These third parties constitute a valuable resource with capabilities that the agencies and the institution should not try to duplicate.
- 3.3. The FDIC and the Fed should continue to work with the Financial Stability Board to develop frameworks to address international coordination issues. The FDIC and the Fed should coordinate international preparation of rapid resolution plans with the college of supervisors for every internationally active SIFI with significant U.S. operations. This coordination should extend to joint planning and participation in war-game exercises. There should be a two-way exchange of information among college members that is as open and complete as possible.
- 3.4. SIFI senior management should sponsor rapid resolution planning and should create a well-resourced resolution-planning office devoted to maintaining the necessary data, preparing plans, running war games and working with the FDIC and the other responsible regulatory agencies. The rapid resolution-planning office should have the full support and cooperation of the risk-management, IT, finance, compliance and legal functions as well as the businesses.
- 3.5. Structural and operational data should be maintained continuously in a virtual data room. This means that specific data should be continuously available to those who will need access to it in the event of a failure, including the SIFI management, board and its regulators.
- 3.6. Plans should be updated regularly at least once a year, and whenever there is a merger, divestiture, outsourcing or any other major change in legal structure or other business and operational circumstances. Substantive plan adjustments should be communicated promptly to regulators and other key crisis managers.
- 3.7. Working with their international regulatory counterparts, the FDIC and the Fed should use the planning process to exchange knowledge to develop and disseminate best practices over time not only for planning, but also for such matters as IT organization, and legal and capital structures that concern the day-to-day management of SIFIs.
- 3.8. Rapid resolution plans produced during update exercises should be signed off by senior management, the SIFI board, the Fed, the FDIC and the international college of supervisors. Sign-off should indicate: an understanding of the plan; agreement with the plan; and an assessment that the plan can achieve low-cost, low-risk resolution in the event of a failure.

³⁸ The importance of including information that will be useful to third parties under time constraints is a consistent theme in the relevant literature. See for example, UK Financial Services Authority, "Turner Review Conference Discussion Paper" 09/4, October 2009. http://www.fsa.gov.uk/pubs/discussion/dp09_04.pdf.

Sign-off should reflect a suitable level of involvement in oversight, design and implementation of the plan.

- 3.9. Resolution plans should be designed to help in court-administered bankruptcies as well as resolutions administered by the FDIC. The failure of a nonbank subsidiary of a SIFI subject to regulation by an agency such as the Securities and Exchange Commission, the Commodity Futures Trading Commission or a state financial regulator, could well end up in bankruptcy court.³⁹
- 3.10. A comprehensive summary report of every rapid resolution plan should be published regularly either as a part of standard public-disclosure documents or separately. Such a summary should be published within 90 days of any major revisions in a resolution plan resulting from a material change in organization or business circumstance. Sufficient organizational data on lines of business and legal entities should be included for creditors and other interested parties to understand broadly how their claims will be addressed and by whom in the event of a failure.
- 3.11. The Chairman of the Board of Directors, the Chief Executive Officer, the examiners-in-charge from the FDIC, the Fed and the external auditor should all attest publicly that the summary is a fair description of the plan. The FDIC and the Fed also should attest to the fact that there is a satisfactory failure assessment.

#4: Real Consequences

Any institution with a resolution plan that is unsatisfactory to its regulators must revise it promptly and start to implement any needed operational changes. If the revisions or the changes are insufficient, the institution should be required to divest businesses and close down operations until it is no longer systemically significant.

- 4.1. The Dodd-Frank Act specifies that, if a rapid resolution plan is judged inadequate by the FDIC or the Fed, the SIFI in question must revise and resubmit its plan within a specified time period. If that revision is still judged unworkable, the FDIC and the Fed can raise capital, leverage and liquidity standards immediately. Then, after two years and consultation with the Financial Stability Oversight Council that was created by the Dodd-Frank Act, the Fed and the FDIC can direct the SIFI to divest assets or operations if necessary.⁴⁰
- 4.2. In the event of egregious plan inadequacy, the Fed should adopt a policy of using its general supervisory authority to require divestiture of assets and operations before two years has

³⁹ Herring, Richard, "Why and How Resolution Policy Must be Improved." In: Ciorciari, John D. and Taylor, John B., eds., *The Road Ahead for the Fed*. (Stanford, CA: Hoover Institution Press, 2009).

http://media.hoover.org/sites/default/files/documents/9780817950019_171.pdf.

⁴⁰ Public Law 111-203, §165 (d) (4-5).

elapsed, unless for some reason possible short-term economic costs of disruption to credit flows seem likely to outweigh the long-term benefits of encouraging increased plan effectiveness for all SIFIs.

- 4.3. If the FDIC and the Fed believe changes are needed in legal or capital structure, organization, liquidity management, business strategy or IT infrastructure, then the Fed and FDIC should give the institution a tight deadline to resubmit its resolution plan. If insufficient information is available to know whether changes are needed, the SIFI should make up any information shortfall as quickly as possible. If changes are needed, the SIFI should submit an implementation plan for changes within a short period, and once approved, the SIFI should start to implement them as expeditiously as possible. Specific deadlines should be set with a view to balancing the likely long-term benefits of encouraging effective planning against the possible costs to the economy of a policy of quick enforcement.
- 4.4. In the event that the plans or the failure assessment are unsatisfactory, then the attestation on the published comprehensive summary report should be withheld and a summary of the plan to address the deficiencies should be published with an indication of acceptance from the FDIC and the Fed. Such a policy would help ensure that institutional commitment to planning would be sustained.
- 4.5. If revisions or the plan for changes are still deficient, increases should result in minimum capital and liquidity standards. They should be commensurate with the seriousness of the shortfall and sufficient to act as an incentive to prompt correction. The Fed and the FDIC should consider a policy of imposing a significant increase immediately and raising it repeatedly until a revision is submitted that is satisfactory. During this period, the SIFI should not grow its assets, enter into any new activity or expand any operations. Once again, any possible short-term economic costs of raising standards should be weighed against the long-term benefits of an exacting and unambiguous policy before the size and frequency of standard increases are set.
- 4.6. If a SIFI's rapid resolution plan is still unworkable after a period from the date of the first unsatisfactory submission, then the FDIC and the Fed should require permanent divestiture of assets and cessation of specific operations under their general supervisory authority to bring the resolution plan up to standard or to shrink the institution to the point where it is no longer systemically significant.

Conclusion

Although “Too Big To Fail” was not the only reason for the 2008 financial crisis, it was a major contributor. The costs of the misallocation of resources that marked the bubble and the lingering effects of the bust have been large. U.S. households lost on average nearly \$5,800 in income due to reduced economic growth during the acute stage of the financial crisis from September 2008 through the end of 2009.⁴¹ Although creating plans for resolving systemically important institutions that fail will carry costs, the benefits of effective and credible plan programs are significant.

The specifics of an individual resolution plan should reflect the complexity, interconnectedness and size of the SIFI in question. Although every applicable element of every standard proposed here should be included in all rapid resolution plans, the standards should be interpreted to fit the circumstances of the institution.

The fundamental objective of rapid resolution planning is to ensure that, as far as possible in the future, any SIFI resolution poses a small risk to the financial system and does not impose costs on taxpayers or the financial services industry at large. If the standards laid out here can be met, then there is a good chance that this objective of minimizing risks and costs can be achieved.

⁴¹ See Swagel, Phillip. “The Cost of the Financial Crisis: The Impact of the September 2008 Economic Collapse.” Pew Financial Reform Project Briefing Paper #18. April, 2010.
http://www.pewfr.org/admin/project_reports/files/Cost-of-the-Crisis-final.pdf.

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