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June 10, 2011

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

Mr. Robert E. Feldman
Executive Secretary
Attention: Comments/Legal ESS
Federal Deposit Insurance Corporation
555 17th Street, NW
Washington, DC 20429

Re: Notice of Proposed Rulemaking Regarding Resolution Plans and Credit Exposure Reports Required; Federal Reserve Board RIN 7100-AD73, FDIC RIN 3064-AD77

Dear Ms. Johnson and Mr. Feldman:

The U.S. Chamber of Commerce ("Chamber") is the world's largest business federation, representing the interests of over three million companies of every size, sector, and region. The Chamber created the Center for Capital Markets Competitiveness ("CCMC") to promote a modern regulatory structure for capital markets to function effectively in the 21st Century economy. The CMCC welcomes the opportunity to comment on the Notice of Proposed Rulemaking regarding resolution plans and credit exposure reports published by the Board of Governors of the Federal Reserve System ("Board") and the Federal Deposit Insurance Corporation ("FDIC") (together, the "Agencies") on April 22, 2011.

As drafted, the proposed rule in regard to resolution plans ("Resolution Plans") imposes on Covered Companies[1] an essentially unbounded requirement to develop a Resolution Plan covering a multitude of speculative scenarios in order to attempt to satisfy an unattainable regulatory standard. This requirement would provide the Agencies with largely unchecked authority to use their discretion as to whether to accept a Covered Company's Resolution Plan as the basis to substitute and impose their judgment on the strategic and operational decisions of Covered Companies (which are most likely at such time to be financially strong and well managed) and potentially to mandate significant restrictions on their activities and operations. Ultimately, the exercise of this unchecked authority could include issuing an order directing a healthy Covered Company to divest significant assets or activities in pursuit of the hypothetical mitigation of unknown and uncertain future difficulties.

In short, the Agencies are proposing to impose an unworkable burden of "knowing the unknowables" and subjecting Covered Companies to the unbridled discretion of regulators with limited real world experience in the daily operation and strategic planning for a major business.

The proposed rules would further impose significant costs and burdens upon Covered Companies that would ripple throughout the entire economy. The potential exists to stifle job creation and economic growth, while laying the ground work for a centrally planned economy that is the antithesis of the free enterprise system that has allowed the American economy to be the most successful in world history. Accordingly, the CCMC urges the Agencies to reconsider the approach that they have taken in regard to Resolution Plans. Moreover, the proposed rules should be withdrawn and re-proposed in light of the comments received.

Our comments and concerns are discussed in more detail below.

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[1] A "Covered Company" is any bank holding company or any foreign bank or company that is treated as a bank holding company under Section 8(a) of the International Banking Act of 1978 ("FBO") that has consolidated assets of $50 billion or more or any nonbank financial company that is designated by the Financial Stability Oversight Council for supervision by the Board. Resolution Plans and Credit Exposure Reports, 76 Fed. Reg. 22648, 22661 (April 22, 2011); 12 C.F.R. § 381.2(e) (proposed).

Discussion

1. The Unbounded Range of Scenarios to Be Addressed in a Resolution Plan and the Unattainability of the Objective Must Be Remedied

The proposed rule has two key deficiencies that must be remedied. First, the Resolution Plan must address an unbounded set of possible scenarios. This imposes an unwarranted burden on a Covered Company that is required to develop and continually update a Resolution Plan. Second, the proposed rule establishes an unattainable standard in regard to ensuring a Covered Company's rapid and orderly resolution. These are critical issues because they potentially impose substantial financial and managerial burdens on Covered Companies and the economy in pursuit of uncertain regulatory mandates.

The proposed rule requires that a Covered Company submit a report for its rapid and orderly resolution under the Bankruptcy Code in the event of the Covered Company's material financial distress or failure.[2] As recent history has demonstrated, there are myriad reasons why a Covered Company could experience financial distress.

For example, many companies have recently experienced financial difficulties as a result of the impairment of the value of their investments in AAA-rated private label mortgage-backed securities. Companies also have experienced significant losses due to their investments in the preferred stock of Fannie Mae and Fannie Mac, investments that were considered so safe that depository institutions were authorized to invest an unlimited percentage of their assets in such stock. Other companies have found their financial condition threatened by sharp reductions in the value of what were considered to be prudent holdings of residential or commercial real estate loans that were adversely impacted by broad market trends that were not anticipated by the financial services sector or its regulators. Various financial markets essentially froze, which left companies unable to sell otherwise marketable instruments or to obtain a reasonable price for such instruments. Rumors, sometimes unfounded, and the

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[2] 76 Fed. Reg. 22648, 22655; 12 C.F.R. § _.1(b)(1)(i) (proposed).

contraction of available liquidity sources have left companies facing sudden shortages of liquidity.

Each potential material financial distress scenario could present a unique situation for the Covered Company that could call for a unique approach to achieve a rapid and orderly resolution. A resolution for a Covered Company facing a short-term liquidity problem but with a fundamentally sound business could differ substantially from the resolution of a company that is experiencing dramatic declines in the value of its assets. The proposed rule could be read to require a Covered Company to address all such scenarios that could lead to its material financial distress.

Depending on the size and complexity of the Covered Company there could be numerous individual or combined factors at the Covered Company that could theoretically result in material financial distress. Adding to the burden on companies seeking to develop an acceptable Resolution Plan is the fact that the proposed rule requires that a Resolution Plan take into account that the material financial distress at the Covered Company may occur at a time when financial markets, or other significant companies, are also under stress and the material financial distress of the Covered Company may be the result of a range of stresses experienced by the Covered Company.[3] Thus, in addition to factors that a Covered Company could anticipate based on its knowledge of its own operations, it appears that a Covered Company would have to anticipate that its material financial distress could be principally caused by problems experienced by other companies or by a particular market or the economy in general. This would further compound the burden on a Covered Company to develop numerous scenarios for a Resolution Plan.

At the same time that the proposed rule seems to contemplate the Covered Company should prepare multiple scenarios for how it might experience material financial distress, including through no fault of its own, it appears to anticipate that all circumstances involving financial distress at a Covered Company would be resolved in the same manner. For example, directing a Covered Company to describe the range of "specific actions to be taken by the Covered Company to facilitate a rapid and

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[3] 76 Fed. Reg. at 22656; 12 C.F.R. § _.4(a)(3)(i) (proposed).

orderly resolution"[4] seems not to meaningfully acknowledge that the course a Covered Company might take could differ dramatically based on the particular circumstances that it faced.

The resolution plan must address how a Covered Company experiencing material financial distress would achieve a "rapid and orderly resolution." That term is defined in the proposed rule as:

> [A] reorganization or liquidation of the Covered Company . . . under the Bankruptcy Code that can be accomplished within a reasonable period of time and in a manner that substantially mitigates the risk that the failure of the Covered Company would have serious adverse effects on financial stability in the United States.[5]

These requirements are not contained in section 165(d) of the Dodd-Frank Act, which provides for Resolution Plans by Covered Companies.

It is not clear, for the reasons discussed below, how a Covered Company could assert in a Resolution Plan that it could achieve a "rapid and orderly resolution" under the Bankruptcy Code that (i) occurs in a reasonable period of time and (ii) substantially mitigates the risk that the failure of the company would have serious adverse effects on U.S. financial stability. For the same reasons, it is not clear how a Covered Company subject to a determination that its Resolution Plan is deficient would be able to submit a revised Resolution Plan that the company believes "would result in an orderly resolution of the Covered Company under the Bankruptcy Code."[6]

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4 76 Fed. Reg. at 22657; 12 C.F.R. § _.4(c)(1)(i) (proposed).

5 76 Fed. Reg. at 22662; 12 C.F.R. §381.2(m) (proposed).

6 76 Fed. Reg. at 22659; 12 C.F.R. §_.6(c)(3) (proposed).

First, a Covered Company cannot provide any assurance of what will happen in a proceeding under the Bankruptcy Code. The Covered Company in bankruptcy does not control the outcome of the proceeding. While a Covered Company as a debtor in possession can have the exclusive right for up to the first 18 months of a case in bankruptcy to propose a plan of resolution, it needs to receive substantial creditor support in order to implement its plan.[7] Indeed, an attempt by a Covered Company as debtor in possession to implement a Resolution Plan could be grounds for the appointment of a trustee to the extent that the implementation of the Resolution Plan could result in substantial loss to the estate and its creditors.[8] A debtor in possession's actions and resolution of a case under Chapter 11 of the Bankruptcy Code will also be dependent on the terms of its post-petition financing, which in many instances will be controlled by its most senior creditors.[9] As described above, a Covered Company in bankruptcy does not control the outcome of its bankruptcy proceeding. The proposed rule, in effect, acknowledges this critical point when it states that "[a] Resolution Plan submitted pursuant to this part shall not have any binding effect on . . . [a] court or trustee in a proceeding under the Bankruptcy Code."[10]

Second, a Covered Company cannot provide any assurance that a reorganization or liquidation under the Bankruptcy Code will occur within a "reasonable period of time." The proposed rule gives no indication of what would constitute a "reasonable period of time" in the view of the Agencies. The Lehman bankruptcy matter has been underway for over two and a half years without a final resolution. Even the far less complicated bankruptcy matter involving WMI, Inc., the parent holding company of Washington Mutual Bank, has been underway since September 2008 without a final resolution. As a matter of fact, the timing of the resolution of a bankruptcy case is frequently out of the control of the debtor and is

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7 11 U.S.C. § 1129.

8 11 U.S.C. § 1104(a).

9 11 U.S.C. § 364.

10 76 Fed. Reg. at 22660; 12 C.F.R. §_.9(a)(1) (proposed).

largely dependent on the resolution of issues among creditors, the availability of credit for exit financing, or the condition of the market for the debtor's assets.

Third, a Covered Company cannot provide any assurance that a reorganization or liquidation under the Bankruptcy Code will occur in a manner that substantially mitigates the risk that the failure of the company would have serious adverse effects on financial stability in the United States. Both a debtor in possession and a trustee have a fiduciary duty to maximize the value of the estate for the benefit of all stakeholders (generally, creditors). This duty could come into conflict with the goals of a Resolution Plan as contemplated by the Agencies in the proposed rule. A debtor in possession and a trustee are neither directed nor permitted under the Bankruptcy Code to act to substantially mitigate the risk that the failure of the company would have serious adverse effects on the financial stability of the United States, but rather have the duties established under the Bankruptcy Code.[11]

In fact, Congress enacted Title II of the Dodd-Frank Act, which provides for the Secretary of the Treasury under certain circumstances to appoint a receiver to act under a federal receivership statute to resolve a bank holding company or nonbank financial company, precisely because it believed that the resolution of such companies under the Bankruptcy Code did not adequately address concerns regarding U.S. financial stability.[12]

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11 Similarly, as a general matter under state law, the fiduciary duties of the board of directors and management of a company are owed to the shareholders of the company (*see, North American Catholic Educational Programming Foundation, Inc.*, 930 A.2d 92, 99 (Del. 2007) ("It is well established that the directors owe their fiduciary obligations to the corporation and its shareholders.")) and, if the company is insolvent, then expand to the benefit of creditors (*see, id.* at 100-02) (holding that creditors of insolvent corporations may bring derivative claims against directors on behalf of the corporation for breaches of fiduciary duties)). The concept of a duty to act to mitigate the impact of material distress on the financial stability in the U.S. is not addressed in state law. The proposed rule and the preamble do not address the potential for a conflict in the responsibilities of directors and management in connection with the preparation of a Resolution Plan. Directors and management should not be expected to take actions that are contrary to their fiduciary duties in the absence of clear legal protection for doing so. *See, e.g.*, section 207 of the Dodd-Frank Act, providing that the members of the board of directors of a company shall not be liable to the shareholders or creditors of the company for acquiescing in or consenting in good faith to the appointment of the FDIC as receiver for the company under section 203 of the Dodd-Frank Act.

12 *See* S. Rep. No. 111-176, at 4 (2010) ("Title II established an orderly liquidation authority to give the U.S. government a viable alternative to the undesirable choice it faced during the financial crisis between bankruptcy of a large, complex financial company that would disrupt markets and damage the economy,

In light of the foregoing, we request that the Agencies revise any final rule to expressly limit the number of scenarios that a Covered Company must address in a Resolution Plan. We recommend that any final rule require that a Covered Company meet with representatives of the Agencies prior to the filing of its initial Resolution Plan to reach an agreement on a limited number of material financial distress scenarios to be addressed. The rule should provide for subsequent annual meetings to discuss whether changes to the existing scenarios should be made in an upcoming revised Resolution Plan.

We also request that the Agencies delete the proposed elements of the definition of "rapid and orderly resolution" which, as discussed above, lack specificity and are outside of the control of a Covered Company. Covered Companies should not be placed in the position of having to make assertions that they are not in a position to fulfill since the timing and outcome of a Bankruptcy Code-based resolution is subject to a range of factors and parties not under the control of the Covered Company. Furthermore, any revised definition of the phrase "rapid and orderly resolution" should make clear that the board of directors and management of a Covered Company, in connection with the development of a Resolution Plan, are not required to include any provisions which in their reasonable judgment could involve a breach of their applicable fiduciary duties.

2. The Proposed Rule Establishes a Bias in Favor of Restricting or Dismantling Covered Companies

Under the proposed rule, as discussed in Section 1, a Covered Company is at risk of being required both to address a virtually limitless set of material financial distress scenarios and to develop a Resolution Plan to ensure that it will meet objectives that are beyond its control. We believe that, if the proposed rule is adopted in its current form, Covered Companies will be unfairly and inappropriately exposed to significant risk that the Agencies will determine that their Resolution Plans are deficient.

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and bailout of such financial company that would expose taxpayers to losses and undermine market discipline.").

The power to issue a deficiency finding gives the Agencies enormous leverage over a Covered Company. Under the proposed rule, a Covered Company that is completely healthy and well managed could be subject to significant restrictions on its operations and activities because the Agencies were not satisfied with its hypothetical responses to a range of scenarios that are unlikely to ever come to pass as postulated. That is why we believe it is essential that the Agencies' discretion in this regard be exercised within a context that creates reasonable requirements and expectations in connection with the development and review of Resolution Plans.

This bias is particularly troubling to the CCMC because of the lack of progress to reform the financial regulators, particularly the failure to develop employment policies and strategic plans to attract employees with market expertise who understand the operation of Covered Companies and the marketplace that they operate in.[13]

Ultimately, the operation of an inadequately structured and tailored rule could lead the Agencies toward a bias in favor of rejecting Resolution Plans and using their authority to impose more stringent capital, leverage, or liquidity requirements, or restrictions on the growth, activities or operations of a Covered Company if it did not correct deficiencies in its Resolution Plan.[14] Over time, a deficiency finding could result in the Agencies ordering the divestitures of assets or operations.[15] These would,

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13 *See* the CCMC study: *Examining the Efficiency and Effectiveness of the U.S. Securities and Exchange Commission.* While the study makes 23 recommendations to improve the management and operation of the Securities and Exchange Commission ("SEC"), deficiencies were found in the lack of market expertise amongst staff and an overemphasis on the hiring of lawyers and accountants. Recommendation 6 of the report states: The SEC should expand the breadth of its staff expertise. Legal and accounting expertise should be complemented with staff experts in capital market operations and the business operations of regulated entities as well as financial economics. While this study focused on the SEC, the CCMC believes that the same staff deficiencies may exist with Agencies with jurisdiction over the Resolution Plans and that such a lack of expertise will hamper the effectiveness of the agencies to properly evaluate the Resolution Plans and execute their duties as required by law. The study is available at http://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/ExaminingtheSECrdcfinal.pdf

14 76 Fed. Reg. at 22660; 12 C.F.R. § _.7(a) (proposed).

15 *Id.*; 12 C.F.R. § _.7(b) (proposed). The preamble does not discuss the significant constitutional issues and potential governmental liability that may be raised by a forced divestiture that may occur at fire sale prices. A forced divestiture can constitute a taking under the Fifth Amendment of the United States Constitution. In *Amen v. City of Dearborn*, 718 F.2d 789 (6th Cir. 1983), the Sixth Circuit Court of Appeals held that the defendant's actions constituted a taking when it "engaged in several activities designed to force residents in

of course, be serious actions, particularly if directed at a Covered Company that was in full compliance with the prudential requirements of Title I of the Dodd-Frank Act. In our view, the regulatory process for implementing Resolution Plans should be structured to avoid, to the maximum extent possible, situations that could lead to possible regulatory sanctions.

At a more general level, we are deeply concerned that the discretionary element in the review of Resolution Plans will grant broad authority for the Agencies to, in effect, exercise their business judgment in place of the business judgment of the boards of directors and management of the Covered Companies in the name of making Covered Companies easier to resolve. It is widely recognized both in government and the private sector that large U.S. financial services companies operate in a highly competitive global environment. Companies may legitimately and appropriately take very different approaches in their efforts to compete and succeed in this challenging environment. We are concerned that a regulatory focus on the reduction of hypothetical risk as perceived by the Agencies will have an adverse impact on the willingness and ability of Covered Companies to make prudent, deliberate, risk-conscious decisions to expand and diversify their businesses. We urge the Agencies to make clear in any final rule and the preamble thereto that this is not their intention and to design the final rule and any related administrative procedures in a manner that will prevent such an adverse impact on both individual Covered Companies and the American economy as a whole.

3. Additional Issues Raised by the Proposed Rule

3.1. Mandating a corporate governance structure and processes in connection with a Resolution Plan is an inappropriate micro-management of Covered Companies by the Agencies

The proposed rule requires that a Resolution Plan include a detailed description of how the planning process for the plan is integrated into a Covered Company's

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the southeast section of Dearborn to sell their property to the City." *Id.* at 795. *See also, Armendariz v. Penman*, 75 F.3d 1311, 1321 (9th Cir. 1996), abrogated on other grounds by *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005) (assuming that the purpose of the alleged government conduct was to "deprive plaintiffs of their property [including by] forced sale," the government action would constitute a taking).

corporate governance structure and processes.[16] The proposed rule also requires a description of the Covered Company's policies, procedures and internal controls governing the preparation of the Resolution Plan, the identity and position of the senior management official primarily responsible for developing, maintaining and implementing the Resolution Plan and a description of the Covered Company's management information systems that provide senior management and the board of directors with the data underlying the Resolution Plan.[17] The preamble states that these are minimum requirements. It also suggests that it may be necessary for the largest and most complex Covered Companies to establish a "control planning function" headed by a senior management official who reports to the CEO or chief risk officer and to the board of directors.[18]

The specificity of the proposed rule and the preamble with regard to how a Resolution Plan is developed and revised is quite unusual. It represents a sharp departure from the long-standing regulatory practices of the Agencies. The regulations of the Board and the FDIC generally do not dictate to a well-managed bank or bank holding company how to plan or conduct even those functions that are most important to its safe and sound operation. However, under the corporate governance informational requirements in the proposed rule, the Agencies could, in effect, dictate precisely how a Covered Company is to draw up, review and maintain its Resolution Plan, who is to do the planning, which resources and what amount of resources are to be devoted to the planning and how and by whom the planning function is to be reviewed, as a result of the Agencies' ability to reject a Resolution Plan that does not satisfy their interpretation of the corporate governance standards. Such micro-management by the Agencies would be harmful to the Covered Companies and to the U.S. financial system in several respects, including by undermining management authority, potentially misallocating corporate resources and fostering undue uniformity in management and corporate structure among Covered Companies.

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16 76 Fed. Reg. at 22657; 12 C.F.R. § _.4(d)(1)(i) (proposed).

17 *Id.*: 12 C.F.R. § _.4(d)(1)(ii-iv) (proposed).

18 76 Fed. Reg. at 22650-22651.

To ensure that the proposed rule, if adopted, is not used to impose a rigid process and structure on Covered Companies, it should, at a minimum, be amended in two respects. First, the proposed rule should include an express requirement that a Covered Company's corporate governance with regard to resolution planning shall be determined by the Agencies as part of their review of a Resolution Plan under proposed 12 C.F.R. § _.6 to be informationally complete, to be credible and to facilitate an orderly resolution of the Covered Company, unless the Agencies determine that the Covered Company's corporate governance is substantially defective in one or more respects. Such defects must be described with specificity as part of the notice or notices provided to a Covered Company under proposed 12 C.F.R. § _.6(a)(2) and (b). Second, the proposed rule should provide, if such a determination is made, that the corporate governance process, procedures, structure and resources proposed in response thereto shall be accepted by the Agencies if they appear to be reasonably appropriate to address the deficiencies specifically described in the notice or notices provided to the Covered Company.

3.2. Satisfying the requirements regarding funding and service level arrangements may require a Covered Company to be structured and operated to anticipate its failure rather than to facilitate its success

The proposed rule requires that the strategic analysis in a Resolution Plan describe the funding, liquidity, and capital requirements of a Covered Company and its material entities in both the ordinary course of business and in the event of the Covered Company's material financial distress or failure, and that those requirements be "mapped" to the Covered Company's core business lines and critical operations.[19] The proposed rule also requires that the strategic analysis set forth a Covered Company's strategy to maintain funding for and the operation of the Covered Company and its material entities, and that it map the strategy as described above.[20] With regard to a Covered Company's insured depository institution subsidiaries, the strategic analysis must "ensure" that those subsidiaries are "adequately protected"

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19 76 Fed. Reg. at 22657; 12 C.F.R. § _.4(c)(1)(iii) (proposed).

20 *Id.*; 12 C.F.R. § _.4(c)(1)(iv) (proposed).

from the risks arising from the Covered Company's nonbanking subsidiaries (other than the depository institution's own subsidiaries).[21]

The preamble states that the mapping should demonstrate how the Covered Company's core business lines and critical operations could survive in conditions that include general material financial distress and the failure or insolvency of one or more of the Covered Company's entities and how those lines and operations could be resolved and transferred to potential acquirors. The preamble also states that it is "particularly important" to map internal and external service level agreements for business services that are essential for the continued operation of the Covered Company's core business lines and critical operations, and that "steps to ensure that such service level agreements "survive insolvency" should be "demonstrated."[22]

In order for a Covered Company to keep its material entities open and operating in the face of its own material financial distress or failure, it would appear that the Covered Company must to some extent isolate the material entities from its general funding arrangements and service level agreements or that it must make alternative arrangements for the material entities that can be relied on to be immediately effective when called on. The degree of isolation and the robustness of the alternatives may vary from case to case based on such factors as the breadth and depth of the Covered Company's financial distress, the exposure and susceptibility of the material entities to financial contagion and the amount of reliance that other persons inside and outside the Covered Company place on the material entities. Presumably, the greater the distress, the exposure, the susceptibility or the reliance of others, the more the material entities should be isolated or the more robust their alternatives should be made. At some point, the likelihood that the material entities may experience material financial distress or may fail, or that the material entities' distress or failure may affect U.S. financial stability, may justify providing the material entities with separate or redundant funding arrangements and service level agreements.

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21 *Id.*; 12 C.F.R. § _.4(c)(1)(vi) (proposed).

22 76 Fed. Reg. at 22651.

At the point that the material entities are placed into semi-autonomous "silos," the Covered Company may become so balkanized that the benefits of operating as a single firm – in terms of such factors as shared management, shared information systems, shared funding, shared technology, dedicated internal sources of funding and general coordination among business units – are lost or severely degraded. When that occurs, then the costs of the proposed rule in terms of lost efficiency, lost profits and lost competitiveness may be considerable and are unaccounted for in this rulemaking.

"Silo-ization" under the proposed rule is a real threat. The preamble indicates that a Covered Company should "demonstrate" through detailed mapping how it will maintain its core business lines and critical operations in order that its material entities can be resolved and transferred to potential acquirors notwithstanding the condition of financial markets and the failure or insolvency of the Covered Company or one or more of its subsidiaries. The preamble also indicates that a Covered Company should "ensure" that service level agreements for its material entities can survive the Covered Company's insolvency.[23] These requirements may be so difficult to satisfy under the numerous conditions contemplated under the proposed rule that a Covered Company may be unable to submit a "credible" Resolution Plan unless the Covered Company is essentially ready-made for instantaneous break-up into a number of independent going concerns. Organizing and operating a Covered Company in anticipation of its failure, rather than to facilitate its growth and success, would almost certainly reduce the Covered Company's ability to adapt, compete and succeed.

We believe that in any final rule it is essential that the Agencies make clear that duplicative capacity is not mandated. The Agencies should indicate that, in reviewing a Resolution Plan, they will take into account a Covered Company's own cost-benefit analysis in regard to whether financial and human resources should be devoted to providing duplicative capacity.

3.3. <u>The proposed rule may deter Covered Companies from undertaking acquisitions and may deter other companies from growing or acquiring Covered Companies, thus causing the U.S. financial services industry to be less dynamic</u>

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23 *Id.*

Depending on how any final rule is structured and how it is implemented by the Agencies, the Resolution Plan requirements may deter Covered Companies from engaging in merger and acquisition activity. Covered Companies will be forced to speculate as to how the Agencies may react to an acquisition in relation to a Covered Company's Resolution Plan.[24] A Covered Company may also be concerned that whatever requirements may, in effect, be imposed on its relationship with a newly acquired entity may significantly diminish the value of that acquisition to the Covered Company. The regulatory uncertainties and costs associated with updating a Resolution Plan to reflect a major acquisition could dampen a company's interest in making certain acquisitions that may cause it to become a Covered Company and adversely impact the attractiveness of an acquisition offer made by a Covered Company to a target company.

The Agencies should recognize in any final rule the importance of conducting the Resolution Plan process in a manner that does not inappropriately discourage Covered Companies from pursuing merger and acquisition opportunities. The Agencies should provide meaningful assurances that they are committed to maintaining the dynamic character of the financial services industry without unwarranted disruption based on their administration of the final rule.

3.4. The Agencies have not met the requirements of the Paperwork Reduction Act

Under the Paperwork Reduction Act ("PRA"), the preamble is required to set forth, among other matters, a description of the likely respondents to the information collection activities under the Proposed Rule and an estimate of the burden that shall result from the collection of information.[25] In this case, the Agencies have estimated that there are 124 respondents, but have failed to identify what types of entities are included in that number. It is inappropriate for the Agencies to require the public to

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[24] Under the proposed rule, a Covered Company must file an updated Resolution Plan within not more than 45 days after any event that results in, or could reasonably be foreseen to have, a material effect on its Resolution Plan. 12 C.F.R. § _.3(b)(1) (proposed). According to the preamble, a material change may include a significant acquisition or series of such acquisitions. 76 Fed. Reg. at 22650.

[25] 44 U.S.C. § 3507(a)(1)(D)(i)(IV) and (V).

speculate as to the composition of this group of entities. Moreover, the lack of description of the likely respondents makes it difficult for the public meaningfully to analyze the estimated burden.

Presumably included in this group are approximately 35 large bank holding companies.[26] FDIC officials have been quoted as stating that the remainder of the respondents are FBOs.[27] However, Section 165(d)(1) of the Dodd-Frank Act also directs the Board to require each nonbank financial company that it supervises to submit a plan for its rapid and orderly resolution in the event of material financial distress or failure. The Agencies have failed to address the possible coverage of nonbank financial companies by the Resolution Plan requirement in their PRA statement, to indicate that they have omitted a significant group of potential respondents or to explain why no estimate of the number of these potential respondents has been provided.

While the PRA indicates that preparing and revising a Resolution Plan will be an expensive and time-consuming process, the Agencies have not explained how they arrived at the estimated burden or whether the estimate takes into account the significant differences among the companies that will be subject to the proposed rule. For the FBOs in the group, their Resolution Plans are required only to cover their subsidiaries, branches and agencies domiciled in the U.S. and their core business lines and critical operations conducted in whole or material part in the U.S., and to explain how their resolution planning for their U.S. operations is integrated into their overall resolution or other contingency planning process.[28] Since many of these FBOs may have limited U.S. operations, it is likely that their Resolution Plans will require substantially less time than will be required for the preparation of Resolution Plans by bank holding companies. Moreover, if nonbank financial companies that may be designated for Board supervision, all of which must be sufficiently large and complex

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26 *See* the list of the largest U.S. bank holding companies maintained by the National Information Center, *available at* http://www.ffiec.gov/nicpubweb/nicweb/Top50Form.aspx.

27 *See* Victoria McGrane and Alan Zibel, *FDIC Drafts Rule on 'Living Wills' for Banks*, WALL ST. J. (March 29, 2011).

28 76 Fed. Reg. at 22656; 12 C.F.R. § _.4(a)(2) (proposed).

to be found to pose a threat to U.S. financial stability, were included, it is likely that the estimated compliance burden would be even larger.

Based on the inadequacies of the PRA estimate as described above, the public has not been provided with the necessary information to permit adequate public comments. For this reason, the Agencies should publish a corrected PRA notice, and provide the public a 60-day period following its publication to comment on the corrected notice.

3.5. The Agencies should seek to limit the costs of complying with the proposed rule

As the Agencies acknowledge, there will be significant direct costs in complying with the proposed rule. However, the costs to Covered Companies are likely to go well beyond the cost of preparing and revising a Resolution Plan. For example, Covered Companies may incur substantial costs if they are required to implement redundant business systems and arrangements.

President Obama has recently highlighted Administration concerns regarding the need to avoid unduly burdensome regulation. On January 18, 2011, the President issued an Executive Order directing each department and agency that is subject to the Executive Order to propose or adopt regulations only upon making a reasoned cost-benefit analysis and to tailor regulations to the extent possible, consistent with obtaining regulatory objectives, to impose the least burden on society.[29] On February 1, 2011, the Chamber wrote to the independent agencies, including the Board and FDIC, requesting that they voluntarily comply with the executive order because of the ramifications of regulations upon job creation and economic growth.[30] Sheila

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29 Improving Regulation and Regulatory Review, Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

30 Letter to The Honorable Ben Bernanke, Chairman, Federal Reserve Board, available at http://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/EO_Fed.pdf and letter to The Honorable Sheila Bair, Chairman, Federal Deposit Insurance Corporation, available at http://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/EO_FDIC1.pdf

On May 4, 2011, the Republican members of the Senate Committee on Housing, Banking, and Urban Affairs wrote jointly to the inspectors general of the Board and the FDIC and certain other agencies or departments asking them to review the conduct of the economic analysis undertaken by their respective agencies or departments in connection with rulemaking under the Dodd-Frank Act.[31] The senators expressed their concern that "the rules adopted under the Dodd-Frank Act will have a long-term effect on job creation and economic growth, and will affect how consumers and businesses obtain credit, allocate capital, and manage risk."[32]

The direct and indirect costs and other burdens associated with the proposed rule could have a significant adverse impact on the operations and prospects of the nation's leading financial services companies. Therefore, we urge the Agencies in this rulemaking to embrace the concepts set forth in the Executive Order as "best practices" and to address the issues raised by the May 4 letter. Any final rule should avoid the unnecessary imposition of costs and burdens on Covered Companies. Accordingly, because the proposed rules would seem to meet the $100 million threshold for an economically significant regulation, we respectfully request that the agencies voluntarily submit the proposed rule to an Office of Information and Regulatory Affairs (OIRA) regulatory review process.

3.6. Under the proposed rule, a Resolution Plan poses unique challenges to a Covered Company and is unrealistic

The requirements of a Resolution Plan under the proposed rule are novel and far exceed the requirements of the contingency planning and stress testing that the Covered Companies undertake in other circumstances. Covered Companies will have to put significant efforts into, among other things, (i) extensive data gathering and organization, (ii) establishing policies and procedures to ensure that the appropriate data is gathered to monitor developments that may require the Resolution Plan to be revised and periodically to update the Resolution Plan, (iii) developing appropriate audit procedures and (iv) addressing any technological challenges that may be

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31 Letter to Elizabeth A. Coleman, Inspector General, Federal Reserve Board, *et al.*, available at http://www.aba.com/aba/documents/blogs/doddfrank/DFA.Econ.Analysis.RequestMay2011.pdf.

32 *Id.*

encountered to develop a credible Resolution Plan. Simply put, the proposal does not provide sufficient time for Covered Companies to establish and fully implement the systems and processes required in order to fully comply with any final regulation.

These challenges are compounded by the need to meet numerous requirements under other provisions of the Dodd-Frank Act and related developments, such as the implementation of Basel III capital and liquidity requirements, as well as new reporting and prudential requirements, each of which is challenging in its own right. It is particularly important in these circumstances to avoid unnecessary duplication and conflicting requirements.

For nonbank financial companies designated for supervision by the Board the difficulties are compounded. The regulatory and supervision environment they will encounter under the Dodd-Frank Act will be dramatically different and the changes required significantly more substantial. Moreover, their circumstances are fraught with uncertainty because nonbank financial companies may or may not be designated for supervision by the Board of Governors and may or may not be required to establish or designate an intermediate holding company.

There are certain concrete steps that the Agencies can take in order to minimize the cost, confusion and disruption that Covered Companies may encounter in the resolution planning process. The rule should not be made effective before the required statutory date. This will provide the maximum opportunity for potential duplication and conflicts in statutory and regulatory requirements to be identified and resolved before those requirements are applied in the field. It will also provide the opportunity to take into account the special circumstances related to nonbank financial companies. The initial Resolution Plans should not be made due to go into effect until 18 months after the effective date of the proposed rule. During this period, Covered Companies should have the opportunity to submit drafts and work with regulators in a flexible and iterative process.

This will enable each Covered Company to establish reporting cycles for its Resolution Plan that that can be fully integrated with the Covered Company's related risk management processes and procedures. It will be particularly important to minimize the overlap of reporting cycles for the sizeable undertaking of preparing and

reviewing a Resolution Plan with fiscal and calendar year-end reporting and compliance obligations. Finally, the authority given to the Agencies to grant exemptions from the requirements for the contents of a Resolution Plan should be liberally exercised.[33]

3.7. Certain specific objectives for a Resolution Plan under the proposed rule are not consistent with the general objective of the proposed rule to facilitate the resolution of a Covered Company under the Bankruptcy Code

The proposed rule requires that a Resolution Plan set forth a Covered Company's strategy for "ensuring that any insured depository institution subsidiary will be adequately protected from risks arising from the activities of any nonbank subsidiaries of the Covered Company (other than those that are subsidiaries of an insured depository institution)."[34] Under the Bankruptcy Code, there is no provision that authorizes the debtor in possession or trustee to provide special protection for any particular subsidiary of the debtor. Indeed, the only obligation that a debtor in possession or trustee has with regard to the subsidiaries of the debtor is to maximize their value for the benefit of the debtor's own creditors and shareholders, or if it determines that a subsidiary has no value in a reorganization, to liquidate or sell it. Moreover, the degree of protection described in the proposed rule – to ensure that a bank or thrift subsidiary is adequately protected not just from certain consequences of affiliation with, but from the activities of, a Covered Company – is greater than the protection the Bankruptcy Code permits under any circumstances. Just as it is not possible, as discussed in Section 1 of this letter, to ensure that a resolution in bankruptcy will occur in a reasonable period of time, it does not appear that a Covered Company could assure that it could "adequately protect" its bank or thrift subsidiary from all consequences of the Covered Company filing for protection under the Bankruptcy Code, other than perhaps to place its bank or thrift subsidiary into a "silo" with separate and redundant funding, management, records and reporting systems and operational support, as discussed in Section 3.2 of this letter. If "silo-

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33 76 Fed. Reg. at 22658; 12 C.F.R. § _.4(*l*) (proposed).

34 76 Fed. Reg. at 22657; 12 C.F.R. § _.4(c)(1)(vi) (proposed).

ization" is required to achieve the objectives of the proposed rule, the cost of compliance is likely to increase significantly beyond the cost of preparing and revising a Resolution Plan.

3.8. The proposed rule should specifically provide confidential treatment under the FOIA and other provisions of law to a Resolution Plan and all documents submitted to the Agencies in connection therewith

The proposed rule provides that a Covered Company may request confidential treatment of the information submitted in a Resolution Plan under Exemption 4 of the Freedom of Information Act ("FOIA").[35] Exemption 4 applies to matters that are trade secrets and commercial or financial information obtained from a person that are privileged or confidential.[36] The proposed rule and Exemption 4 provide no assurance how the highly sensitive information[37] that is likely to be submitted in or in connection with a Resolution Plan will be treated by the Agencies in response to a FOIA request. The proposed rule does not indicate that the Agencies are committed to giving sufficient protection to this information under Exemption 4. We request that the proposed rule be revised to do so.

We urge the Agencies to revise the proposed rule and take all other appropriate measures to provide the maximum possible protection to a Resolution Plan and all related information submitted to the Agencies under Exemption 8 of the FOIA. Exemption 8 protects matters that are "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions."[38] The courts

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35 76 Fed. Reg. 22660; 12 C.F.R. § _.9(c) (proposed).

36 5 U.S.C. § 552(b)(4). Regulations of the Board and the FDIC provide substantially the same exemption. *See* 12 C.F.R. § 261.14(a)(4) (Board); 12 C.F.R. § 309.5(g)(4) (FDIC).

37 The elements of a Resolution Plan, including a detailed description of a Covered Company's liabilities, funding sources, hedging strategies, core business lines, material entities, major counterparties, and internal and external interconnections and interdependencies, are likely to be among the most sensitive commercial and financial information in a Covered Company's possession.

38 5 U.S.C. § 552(b)(8); *see also* 12 C.F.R. § 261.14(a)(8) and 12 C.F.R. § 309.5(g)(8).

have broadly interpreted the scope of Exemption 8. The Fifth Circuit Court of Appeals, in finding that Exemption 8 should be broadly interpreted, noted that, if Congress intended a narrower interpretation of the exemption's scope, then "it could have easily accomplished that by specifying as much."[39] Similarly, the Court of Appeals for the District of Columbia has declared that "if Congress has intentionally and unambiguously crafted a particularly broad, all-inclusive definition, it is not [the courts'] function, even in the FOIA context, to subvert that effort."[40] As yet another court has stated, "Exemption 8 was intended by Congress – and has been interpreted by courts – to be very broadly construed."[41]

The Resolution Plans and related information that the Covered Companies are required to submit to the Agencies under the proposed rule, in order to assist the Agencies to discharge their responsibilities under Section 165(d) of the Dodd-Frank Act, fall squarely under the "broad, all-inclusive scope" of Exemption 8. We therefore request that the proposed rule be revised to provide that the Agencies will protect the Resolution Plans and all related information submitted to the Agencies under the proposed rule as "confidential supervisory material" under Exemption 8 of the FOIA and the related regulations of the Agencies. We further request, if the Agencies have any concerns regarding their ability to provide confidential treatment to the Resolution Plans and all related information as described above, that they discuss such concerns in detail in the final rulemaking notice and that they request the Congress to take appropriate legislative action to address such concerns.

In view of the sensitive nature of the information included in a Resolution Plan, it is appropriate that the Agencies take additional measures to ensure that such material is protected from unauthorized disclosure. The proposed rule should be further revised to provide that the Agencies will oppose to the maximum extent possible the production of such material in response to third party subpoenas and other requests or demands for production. The Agencies also should institute strict

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39 *Abrams v. Dep't of Treasury*, 2007 U.S. App. LEXIS 13695 (5th Cir. 2007).

40 *Consumers Union of the U.S. Inc. v. Heimann*, 589 F.2d 531, 533 (D.C. Cir. 1978).

41 *Pentagon Fed. Credit Union v. Nat'l Credit Union Admin.*, No. 95-1475, 1996 U.S. District. LEXIS 22841, at 11 (E.D. Va. June 7, 1996).

measures to restrict access to such information to staff members with a specific need for such access.

4. **The Requirement to File Credit Exposure Reports Does Not Adequately Describe the Counterparties for Which the Reports Are to Be Prepared**

The proposed rule requires each Covered Company to submit quarterly reports to the Agencies containing, among other information, the aggregate extensions of credit, undrawn lines of credit, deposits, repurchase agreements, reverse repurchase agreements, securities borrowing, securities lending, guarantees and derivatives transactions by the Covered Company and its subsidiaries to each "significant company" and its subsidiaries, as well as all such credit exposures by each "significant company" and its subsidiaries to the Covered Company and its subsidiaries.[42] A "significant company" is defined by reference to the meaning given to the terms "significant bank holding company" and "significant nonbank financial company" under Section 102(a)(7) of the Dodd-Frank Act.[43] The Board has undertaken rulemaking with regard to these terms, but, as we have previously commented, the proposed definition of "significant nonbank financial company" is flawed and does not delineate a clearly identifiable group of subject companies.[44] The definition of "significant nonbank financial company" should be clarified before it is incorporated in the proposed rule.

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We urge the Agencies to revise the proposed rule in a manner that avoids the imposition of unnecessary costs and burdens on Covered Companies and that does not seek to place responsibility on Covered Companies for resolution outcomes that are beyond their control. We believe that the final form of the rule and the manner in which it is implemented by the Agencies could have a significant adverse impact on

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42 76 Fed. Reg. 22658-22659; 12 C.F.R. § _.5(a) (proposed).

43 76 Fed. Reg. 22662; 12 C.F.R. § 381.2(n)-(p) (proposed).

44 *See* Letter of CCMC to Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System (March 30, 2011).

the competitiveness of Covered Companies and thus must be carefully calibrated. As currently drafted, the proposed rules could have adverse consequences upon business operations and consequently economic growth and job creation. Accordingly, we respectfully request that these concerns be taken into account and that the Agencies engage in a dialogue with all stakeholders to avoid harmful long-term unintended consequences.

Sincerely,

David T. Hirschmann