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Ms. Jennifer J. Johnson
Secretary
Board of Governors of the
Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, D.C. 20551
regs.comments@federalreserve.gov

Mr. Robert E. Feldman
Executive Secretary
Attention: Comments/Legal ESS
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, D.C. 20429
comments@FDIC.gov

Re: Federal Reserve Board and FDIC Joint Notice of Proposed Rulemaking Regarding Resolution Plans and Credit Exposure Reports (Board Docket No. 1414; FDIC RIN 3064-AD77)

Dear Ms. Johnson and Mr. Feldman:

The Institute of International Bankers appreciates the opportunity to comment on the joint notice of proposed rulemaking by the Board of Governors of the Federal Reserve System (the "Federal Reserve") and the Federal Deposit Insurance Corporation (the "FDIC") to implement the provisions of section 165(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") requiring periodic submission of resolution plans and credit exposure reports (the "Proposal").[1] The Institute's membership consists principally of banking organizations headquartered outside the United States which conduct banking activities in the United States through branches or agencies that are licensed under state or federal law and/or FDIC-insured bank subsidiaries. Virtually all such members have $50 billion or more in total (worldwide) consolidated assets and therefore would be subject to the Proposal's requirements as Covered Companies.[2]

[1] *See* 76 Fed. Reg. 22648 (April 22, 2011). Hereinafter, we will refer to the Federal Reserve and the FDIC collectively as the "Agencies." Capitalized terms used in this letter that are defined in the Proposal have the meanings given in the Proposal. Except where otherwise indicated, statutory citations refer to the Dodd-Frank Act.

[2] *See* 76 Fed. Reg. at 22661 (section 252.2(d)(1)(iii) of the Federal Reserve's proposed new Regulation YY and proposed new section 381.2(e)(1)(iii) of the FDIC's regulations).

The Institute and its members believe that resolution planning by systemically important financial institutions can play an important role in reducing risks to financial stability. We share the Agencies' goal of enabling both financial institutions and regulators to be better prepared to manage potential or actual failures in a future crisis to avoid or mitigate such risks. Resolution planning also has potential to serve as a valuable risk management tool for institutions.

Designing appropriate resolution planning requirements presents many novel and complex challenges, especially for the cross-border operations of internationally active banks. We believe that certain aspects of the Proposal provide a solid grounding for addressing these challenges in a constructive and cooperative supervisory dialogue between the Agencies and Covered Companies as implementation proceeds. At the same time, we have significant concerns about certain aspects of the Proposal that we believe require further consideration and revision.

The Institute submits these comments on the Proposal in the spirit of developing an effective, efficient and administrable resolution planning regime for large, international banking organizations. The Institute is a co-signatory to the comment letter submitted on the Proposal and also signed by The Clearing House Association, the Securities Industry and Financial Markets Association, the American Bankers Association, the Association for Financial Markets in Europe and The Financial Services Roundtable (the "Joint Trade Association Letter"). This separate comment letter specifically addresses issues of unique relevance to banking organizations headquartered outside the United States.

I. Executive Summary

Pursuant to section 165(d), bank holding companies "with total consolidated assets equal to or greater than $50,000,000,000" (the "$50 Billion Asset Threshold") and nonbank financial companies that are designated for supervision by the Federal Reserve must periodically submit resolution plans and credit exposure reports to the Agencies and the Financial Stability Oversight Council (the "Council"). Congress intended this requirement to reduce risks to the financial stability of the United States by enabling financial institutions and their regulators to understand more fully the organizational structures, interconnectedness, and key exposures of systemically important financial institutions and to plan for the safe and orderly resolution of such institutions in the event of failure.

The application of these requirements to foreign banking organizations ("FBOs") with U.S. banking operations[3] raises complex issues that require a deliberative, cross-jurisdictional

[3] For these purposes, an FBO is a "bank holding company" if it (i) has a U.S. bank subsidiary, and therefore is itself a bank holding company, or (ii) maintains a federal- or state-licensed branch or agency (or has a commercial lending company subsidiary in the United States) and therefore is treated as a bank holding company for purposes of the Bank Holding Company Act pursuant to section 8(a) of the International Banking Act of 1978 (12 U.S.C. § 3106(a)). *See* section 102(a)(1).

approach. In this letter, we respectfully recommend several changes to the Proposal designed to enhance the effectiveness of the resolution planning process in addressing U.S. systemic risks, to avoid unnecessary duplication and potential conflicts between resolution planning requirements in different jurisdictions, and to ensure appropriate coordination between home and host country supervisors.

First, we strongly recommend that the $50 Billion Asset Threshold be applied to FBOs on the basis of the assets of their U.S. operations, rather than their worldwide assets. The Dodd-Frank Act does not prescribe how the $50 Billion Asset Threshold should be applied to FBOs. Calculating the $50 Billion Asset Threshold on the basis of an FBO's worldwide assets would result in approximately 98 out of an estimated 124 Covered Companies being FBOs ("Covered FBOs") – many with relatively small U.S. operations – an anomalous result that Congress surely did not intend. This approach would impose an undue burden on FBOs that do not pose any systemic risk in the United States, would make ineffective use of the Agencies' limited resources, and would be inconsistent with the principles of national treatment and deference to home country supervisors. By contrast, application of the $50 Billion Asset Threshold based on the assets of FBOs' U.S. operations would be consistent with Congressional intent and more effectively address U.S. systemic risks.

Second, we recommend that the final rule and the Agencies' implementation of resolution planning requirements recognize that information requirements and plans should be highly tailored to a particular institution rather than relying on a "one size fits all" approach. Such tailoring should occur in the context of a cooperative, iterative dialogue between institutions and supervisors, and take into account an individual institution's systemic significance in the U.S. and the structure of its U.S. operations. For example, a Covered FBO whose U.S. operations consist primarily of one or more uninsured branches or agencies would have a significantly simpler resolution plan than one with multiple material and interconnected U.S. subsidiaries. This tailoring of resolution plan requirements will be especially important if the Agencies adhere to the Proposal's approach of defining the $50 Billion Asset Threshold based on worldwide rather than U.S. assets.

Third, we believe it will be critical for the U.S. to align its resolution plan requirements with ongoing related cross-border initiatives and initiatives in other countries in order to avoid unnecessary burdens and duplicative, potentially conflicting requirements. In this respect:

- The Agencies should not accelerate finalization of a rule months ahead of the January 2012 deadline set by Congress. Rushing to finalize a rule this summer would be unnecessary and counter-productive in light of the complexity of the issues and the need for consultation and coordination with related international initiatives.

- The Agencies should work with their international counterparts to develop mechanisms for information sharing between home and host country supervisors, and for coordinated reviews of, and responses to, resolution plans.

- Pursuant to section 165(b)(2), to the extent a Covered FBO has prepared plans, reports or other information for home country supervisors that are comparable to information sought under U.S. resolution planning requirements, U.S. supervisors should accept such comparable information as fulfilling the Covered FBO's U.S. requirements.

- For Covered FBOs that have a Crisis Management Group (a "CMG") that includes the Agencies, the development of a resolution plan through the CMG process (which will include a U.S. "chapter" dealing with the Covered FBO's U.S. operations) and approved by the Agencies as part of that process should be considered compliance with Section 165(d), including with respect to content, timing and supervisory review and approval.

Fourth, the Institute shares the general concerns regarding confidentiality expressed by other commenters (see, for example, Part IV of the Joint Trade Association Letter), concerns which are especially acute when considering the confidentiality of information relating to home country resolution plans. The Institute urges the Agencies to affirm that resolution plans represent confidential supervisory information and to coordinate with home country supervisors to develop international mechanisms to preserve confidentiality of such plans.

Fifth, the Institute expects that the Agencies' regulations implementing Section 165(d) will necessarily be limited in their ability to address the many complex issues that arise in connection with the development of a resolution planning regime, including issues of scope, content, timing and governance. Clear guidance from the Agencies regarding their basic expectations in this area will be critical. At the same time, we expect that, as a practical matter, further definition of the key terms, concepts and requirements of the Proposal, especially as they apply to FBOs' U.S. operations, will need to occur as part of the supervisory process. Greater clarity can be expected as institutions apply the Proposal's requirements to their individual circumstances in consultation with their home and host country supervisors. Consequently, while several of the defined terms and concepts in the Proposal raise significant interpretive questions for FBOs, we believe that these questions will more effectively be addressed over time as institutions and the Agencies gain practical experience with resolution planning.[4]

[4] In Part VI.A of this letter we make two specific recommendations to clarify the language of the Proposal.

Lastly, given the need for credit exposure reporting to be coordinated with other related regulations that are still pending, we suggest that the credit exposure reporting requirement be taken up in a separate rulemaking. As with resolution plans, the credit exposure reporting requirement should take into account comparable home country requirements and rely as much as possible on reporting that the FBO provides under the requirements of its home country regulator.

II. Application of the $50 Billion Asset Threshold To FBOs

A. Applying Section 165(d) to FBOs Based on Worldwide Assets Will Sweep in FBOs That Pose No Systemic Risks in the United States

Under the Proposal, an FBO would be a Covered Company if it is a "bank holding company" (as described above[5]) and it has $50 billion or more in total consolidated assets based on the worldwide consolidated assets reported by the FBO to the Federal Reserve in its "Capital and Asset Report for Foreign Banking Organizations" (Federal Reserve Form FR Y-7Q). A U.S.-headquartered bank holding company is a Covered Company if it has $50 billion or more in total consolidated assets as determined based on the "Consolidated Financial Statements for Bank Holding Companies" it periodically files with the Federal Reserve on Form FR Y-9C.[6]

We estimate that approximately 26 U.S.-headquartered bank holding companies would be Covered Companies under the Proposal.[7] The Proposal estimates that there would be 124 Covered Companies in total, which means that approximately 98 Covered Companies would be FBOs.[8] As it is expected that the list of firms that will be designated as nonbank financial companies supervised by the Federal Reserve will not be a lengthy one,[9] it is readily apparent that once the regulatory regime under section 165(d) is fully implemented, the substantial majority of Covered Companies subject to the Proposal would be FBOs.

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[5] *See supra*, note 3.

[6] *See* 76 Fed. Reg. at 22661 (proposed Section 252.2(d)(1)(ii) of the Federal Reserve's proposed new Regulation YY and proposed Section 381.2(e)(1)(ii) of the FDIC's regulations).

[7] Our estimate is based on the total assets reported in the list of the top 50 bank holding companies in the United States as of March 31, 2011 prepared by the National Information Center. *See* http://www.ffiec.gov/nicpubweb/nicweb/Top50Form.aspx.

[8] *See* 76 Fed. Reg. at 22654. Our derivation of the number of Covered FBOs is based on the assumption that none of the 124 estimated Covered Companies are nonbank financial companies supervised by the Federal Reserve, since none have been designated by the Council under section 113.

[9] *See* Governor Tarullo's Remarks on "Regulating Systemic Risk" at the 2011 Credit Markets Symposium, Charlotte, N.C. at 6 (http://www.federalreserve.gov/newsevents/speech/tarullo20110331a.pdf).

On the basis of publicly available information, we estimate that of these 98 Covered FBOs, less than 25 percent—approximately 20 institutions—have U.S. operations with total consolidated assets of $50 billion or more. Of the remaining 78 Covered FBOs, we estimate that almost all have U.S. operations whose total consolidated assets are less than $25 billion (and of these approximately 20 have less than $1 billion in assets). Typically, these operations are considerably less diversified than those of the larger institutions, with many limited to conducting wholesale banking activities through uninsured U.S. branches and agencies.

Of the approximately 20 Covered FBOs whose combined U.S. operations have assets of $50 billion or more, we expect that few would be considered systemically significant in the United States or sources of significant risk to U.S. financial stability. Nonetheless, we appreciate that Congress set the $50 Billion Asset Threshold conservatively with the expectation that heightened prudential standards such as the resolution plan requirement would be scaled according to an institution's actual systemic risk profile. By extending the resolution planning requirement beyond these 20 Covered FBOs, however, to include FBOs whose U.S. assets are less than $50 billion, the Proposal would expand the scope of the resolution plan requirement of section 165(d) to reach FBOs that plainly are not systemically significant in the United States.

B. Applying Section 165(d) to FBOs That Pose No Systemic Risks in the United States is Not Required by the Dodd-Frank Act and is Contrary to Congressional Intent

As a general matter, neither section 165 nor any other provision of the Dodd-Frank Act prescribes a specific means for measuring the $50 Billion Asset Threshold. Instead, Congress left this question to the Federal Reserve's discretion in connection with the regulatory implementation of section 165's enhanced prudential standards. In the case of the Proposal, the Agencies are jointly required to interpret and implement the $50 Billion Asset Threshold in the context of section 165(d).

As expressed in the plain language of section 165(a), the Congressional intent underlying the resolution plan requirement and other enhanced prudential standards under section 165 is to "prevent or mitigate risks to the *financial stability of the United States* that could arise from the material financial distress or failure, or ongoing activities, of large, interconnected financial institutions" (emphasis added).

Consistent with this intent, section 165(a) applies enhanced prudential standards to nonbank financial companies supervised by the Federal Reserve – *i.e.*, those nonbank financial companies which the Council determines should be subject to the enhanced prudential standards precisely because they could pose a threat to the financial stability of the United States.[10] By adopting the $50 Billion Asset Threshold, Congress avoided requiring that any particular bank holding company be designated as systemically significant. But read in the context of section 165, it is evident that Congress intended that the enhanced prudential standards be

[10] *See* section 113(a)(1) and (b)(1).

focused on those banking organizations that could pose a threat to the financial stability of the United States.

The Agencies' press releases announcing the Proposal reflect Congress's intent in this regard. The Federal Reserve press release explained that the Proposal would require the submission of resolution plans and credit exposure reports by "large, systemically significant bank holding companies and nonbank financial companies." Similarly, the FDIC's press release explained that the Proposal focuses on "systemic institutions" and is directed at limiting the "systemic ripple effect" in the event of their resolution.

The Agencies should apply the $50 Billion Asset Threshold to FBOs in a manner consistent with the Congressional intent to impose enhanced prudential requirements on only institutions with systemically significant operations in the United States. Implementing section 165(d) in a manner such that the nearly 80% of the banking organizations subject to its enhanced prudential requirements would be institutions headquartered outside the United States cannot be what Congress intended. It would be more consistent with Congressional intent, and would enable the more efficient and effective implementation of section 165(d), to base the $50 Billion Asset Threshold for FBOs on the total, consolidated assets of an FBO's U.S. operations instead of its worldwide consolidated assets. We urge the Agencies to adopt this approach in connection with finalizing rules under section 165(d).

The issue of how to apply the $50 Billion Asset Threshold will also arise in connection with the Federal Reserve's implementation of the other enhanced prudential standards provided for in section 165. In our view, using a worldwide assets test is especially inappropriate in the context of the resolution planning requirement of section 165(d), where the point of the resolution plan is to address the liquidation and winding up of the U.S. operations of the international bank. We are therefore concerned that use of a worldwide asset test in implementing section 165(d) will set a troubling precedent for defining the scope of other section 165 requirements. As a general matter, we believe that such heightened requirements should be applied to FBOs based on their U.S. assets and the risks they pose to U.S. financial stability, and any exception to this approach should be based on the particular type of requirement.

C. Applying the $50 Billion Asset Threshold Based on the Assets of an FBO's Combined U.S. Operations Would More Effectively Achieve the Statutory Purpose of Section 165(d)

The new resolution planning regime that the Agencies are developing under section 165(d) will require not only affected institutions but also the staffs of the Agencies to dedicate substantial time and resources. Focusing those resources on areas of true systemic risk will be critical, especially in light of the many competing demands on the Agencies' resources as they implement the Dodd-Frank Act. To the extent that Agency resources are diverted to the review and evaluation of, and responses to, resolution plans of FBOs that are not systemically significant in the United States, the effectiveness of the new resolution planning regime will be diminished.

In our view, there is already a real risk that the sheer logistics of the demands imposed on the Agencies by the reporting regime contemplated by the Proposal would—as a general matter—undercut both its administrability and effectiveness. The Proposal would require all Covered Companies to submit their initial resolution plan within 180 days after the effective date of the final rule. Thereafter, annual resolution plans would be due within 90 days after the end of each calendar year. In both instances, within 60 calendar days of receiving a resolution plan from a Covered Company, both the Federal Reserve and FDIC would be required to make a joint determination and inform the Covered Company either that the plan is informationally complete and therefore has been accepted for review or that the plan is informationally incomplete (or substantial additional information is necessary to facilitate review of the plan), in which case the Agencies are required to specify the nature of the informational deficiencies. Covered Companies would be required to submit credit exposure reports within 30 days after the end of each calendar quarter.

Without considering the challenges posed to Covered Companies in attempting to submit compliant resolution plans and credit exposure reports within these deadlines (as discussed in the Joint Trade Association Letter), and focusing only on the capacity of the Agencies to accept, process, analyze and act upon reports from 124 Covered Companies, we have serious concerns that the proposed reporting schedules will not be feasible in practice. Moreover, even if, as recommended below, the resolution plan reporting process were revised to (i) more closely align the timing of its implementation with the various resolution planning initiatives underway internationally and (ii) replace the Proposal's "report and respond" model with an approach that is more consultative and iterative in nature, we believe that the sheer magnitude of the task presented by undertaking such efforts with respect to 124 Covered Companies would require the Agencies to commit substantially greater resources to its achievement than they realistically can be expected to have at their disposal. Diverting the Agencies' limited resources to address resolution planning at institutions with a relatively small U.S. presence that do not pose systemic risks in the U.S. would undermine the policy goals of section 165. Those goals would be more effectively advanced by focusing resources on the institutions that would be more likely to present such risks.

To the extent that the Agencies have a concern that applying the $50 Billion Asset Threshold based on U.S. assets could in the future exclude an FBO that threatens U.S. financial stability (there not being a current example of which we are aware), the Federal Reserve retains extensive supervisory discretion to monitor such institutions and could require the development of a resolution plan or other appropriate information as part of their ongoing supervision. Such monitoring and information requirements would not depend on section 165(d). The same would be true for a U.S.-headquartered bank holding company with less than $50 billion in consolidated assets that—through its particular activities or role in the U.S. financial system—presented significant risks to U.S. financial stability.[11]

D. Applying the $50 Billion Asset Threshold to FBOs Based on the Assets of Their Combined U.S. Operations Would Be Consistent with National Treatment and Avoid Certain Adverse Policy Consequences

Focusing the Agencies' resolution planning regime on FBOs whose systemic significance in the United States more closely resembles that of U.S.-headquartered bank holding companies that are Covered Companies would be consistent with the requirement in the Dodd-Frank Act that, when applying enhanced prudential standards to FBOs, due regard be given to the principle of national treatment (the "National Treatment Requirement").[12] On the other hand, even if a graduated, tailored approach is taken to applying the section 165(d) requirements, applying those requirements to FBOs with U.S. operations that are clearly not comparable to those of U.S.-headquartered Covered Companies would be contrary to national treatment and deference to home country supervision.

FBOs, U.S.-headquartered institutions, and supervisors in the United States and abroad all share an interest in fair and coordinated application of resolution planning requirements. Unwarranted application of host country requirements would lead to unnecessary burdens on institutions and regulators, as well as application of potentially inconsistent requirements to institutions operating in multiple countries. FBOs, and in particular those with only a modest U.S. footprint, reasonably would not expect to be subject to the same type of enhanced prudential requirements in the United States as systemically-significant U.S.-headquartered institutions simply by virtue of the size of their global operations. U.S. institutions similarly would be troubled if their overseas operations were treated in this manner by non-U.S. supervisory authorities. As reflected in the Joint Trade Association Letter, a diverse group of trade associations representing (among others) U.S.-headquartered bank holding companies support limiting the $50 Billion Asset Threshold to U.S. assets.[13]

The prospect of triggering significant additional prudential requirements, including application of U.S. resolution planning rules, on the basis of only a limited U.S. presence would also discourage FBOs that currently maintain only a representative office (and therefore are not "bank holding companies" for purposes of section 165), or do not have any banking presence in the United States, from expanding in or entering the U.S. market. In evaluating whether to establish a small branch or agency in the United States, an international bank in that position with $50 billion in worldwide assets would evaluate the regulatory burdens associated with such

[11] *See* Ben S. Bernanke, Statement before the Senate Committee on Banking, Housing and Urban Affairs (May 12, 2011), at p. 3.

[12] *See* section 165(b)(2).

[13] *See* Part II.F of the Joint Trade Association Letter.

an expanded operation. If even a small branch would trigger automatic application of a U.S. resolution planning regime (and potentially other heightened prudential standards applicable to systemically significant institutions in the United States), such a disproportionate regulatory requirement could become a real deterrent to entry or expansion in the U.S. market.

III. The Requirements of Section 165(d) Should be Applied in a Tailored, Graduated Manner and Should be Developed Through an Iterative, Consultative Process

A. Tailored Application of Section 165(d) to Covered FBOs

The Dodd-Frank Act directs the Federal Reserve to take a graduated approach in applying section 165's enhanced prudential standards.[14] In doing so, the Federal Reserve may differentiate among companies on an individual basis or by category based on various listed considerations, including capital structure, riskiness, financial activities and complexity.[15]

This graduated approach is an essential element of the Dodd-Frank Act's framework for systemic risk supervision, and we urge the Agencies to adopt such an approach for the requirements of section 165(d). The Institute recommends that resolution plan requirements be tailored to take into account the risk a Covered FBO presents to the financial stability of the United States; the structure, complexity and size of its U.S. operations; and the extent and nature of the Covered FBO's interconnectedness in U.S. financial markets.

Tailoring requirements to fit the risk profiles of Covered Companies will help ensure that the resources of both the Agencies and Covered Companies are focused where most needed. It will be especially important if the Agencies choose to apply the $50 Billion Asset Threshold on the basis of a Covered FBO's worldwide assets. If the final rules under section 165(d) are based on the approach taken in the Proposal, the Agencies should commit to apply the requirements on a graduated basis and should clearly set forth how the Agencies will mitigate the rules' impact on FBOs with a smaller U.S. footprint that do not present systemic risks in the United States.

In addition, tailoring resolution plan periodic reporting requirements to each Covered FBO's circumstances provides a particularly effective means to address a unique aspect of a Covered FBO's U.S. operations – almost all Covered FBOs, regardless of the basis on which the $50 Billion Asset Threshold is measured, conduct a significant part of their banking activities in the United States through uninsured wholesale branches or agencies.[16] In many cases, uninsured wholesale branches or agencies account for the great bulk of a Covered FBO's U.S. operations. Whether licensed under federal law or state law, these branches and agencies, like U.S. insured

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14 *See* section 165(a)(1)(B).

15 *See* section 165(a)(2)(A).

16 Certain FBOs operate grandfathered insured branches in the United States, but the total assets held in such branches are small (approximately $30 billion), and irrelevant to considerations of U.S. financial stability.

depository institutions, are subject to an insolvency regime that is significantly different from the Bankruptcy Code. Indeed, an FBO with a U.S. branch or agency is not eligible for relief under the Bankruptcy Code.[17] Therefore, a resolution plan based solely on section 165(d) – which is limited to the Bankruptcy Code – would not apply to these branches.

The insolvency regime applicable to branches and agencies licensed by the New York State Banking Department illustrates branch insolvency law.[18] Section 606.4 of the New York Banking Law ("NYBL") provides the New York Superintendent of Banks (the "Superintendent") with extraordinary powers over branches and agencies of FBOs licensed in New York. Pursuant to section 606.4(a), the Superintendent has the discretion to take possession of the property and business of an FBO that has a New York-licensed branch or agency upon a finding that circumstances that would constitute "material financial distress" under the Proposal exist.[19] Section 606.4(a) provides that title to all business and property of the FBO in New York, not just the business of the New York-licensed branch or agency,[20] vests by operation of law in the Superintendent at that time. Thereafter, the Superintendent is directed to "liquidate or otherwise deal with such business and property" and to accept for payment out of such business and property only the claims of third-party creditors that arise out of their transactions with the New York-licensed branch or agency. Only after payment in full of the expenses of the liquidation and the accepted claims of third-party creditors of the branch or agency may the Superintendent turn over the remaining assets to either the FBO's head office or, as the case may be, the duly appointed liquidator or receiver of the FBO in its home country.[21]

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17 *See* Bankruptcy Code sections 109(b)(3) and 1501(c)(1).

18 The overwhelming majority of assets held by Covered FBOs in their U.S. branches and agencies are held in uninsured branches and agencies licensed in New York under New York State law.

19 The grounds on which the Superintendent may take possession of such a branch or agency include the initiation of liquidation proceedings with respect to the bank in its home jurisdiction or elsewhere or a finding that there is reason to doubt the branch or agency's ability or willingness to pay its creditors in full, in addition to the grounds set forth in section 606.1 by which the Superintendent may take possession of any other banking organization under its jurisdiction.

20 The phrase "business and property in [New York]" includes, "but is not limited to, all property of the foreign corporation, real, personal or mixed, whether tangible or intangible, (1) wherever situated, constituting part of the business of the New York agency or branch and appearing on its books as such, and (2) situated within this state whether or not constituting part of the business of the New York agency or branch or so appearing on its books." NYBL section 606.4(c).

21 *See* NYBL section 606.4(b). The recently enacted legislation in New York merging the Banking Department and the New York Insurance Department into a new Department of Financial Services will not affect the key features of the New York ring-fence regime. For "federal" branches of FBOs licensed under the International Banking Act of 1978, a similar ring-fence insolvency regime applies, only with national scope: all of the assets of the branch and all of the assets of the FBO in the United States, including all of the assets of any state or federally licensed branch or agency, become part of the liquidation estate. Such assets are applied first to claims of third-party creditors of the federal branch and then to creditors of any other state licensed branches; any

The Proposal notes that if a Covered Company is subject to an insolvency regime other than the Bankruptcy Code, then it should incorporate that other regime into its resolution plan,[22] but it is unclear from the Proposal how such considerations are relevant to the analysis called for under the statute itself – *i.e.*, determining that a resolution plan is credible and would result in an orderly resolution under the Bankruptcy Code and, on the basis of the plan, assessing whether divestiture of certain assets or operations would facilitate an orderly resolution under the Bankruptcy Code.[23] To permit the Agencies to address more effectively the unique circumstances of Covered FBOs, we recommend that the Agencies clarify through the supervisory process the relationship that regimes other than the Bankruptcy Code – such as "ring-fencing" of uninsured branches and agencies – bear to the preparation and assessment of resolution plans. We would expect that the resolution plans developed by means of this supervisory process would be very simple for those Covered FBOs the great bulk of whose U.S. business is conducted through a branch or agency, while those Covered FBOs with more extensive and diverse operations would require more sophistication and detail.

B. An Iterative and Consultative Supervisory Approach to Section 165(d)

By its very nature, resolution planning cannot be undertaken on a "one size fits all" basis. A supervisory approach is better suited to resolution planning than a prescriptive regulatory approach. This is especially the case in the context of cross-border operations of internationally active banks, where coordination between home and host country supervisors will be critically important. Accordingly, we recommend that the approach to resolution planning under section 165(d) be revised so that it is explicitly required to be conducted as an iterative, consultative process by which generally prescribed principles are applied to the particular circumstances of each Covered Company.[24]

The Institute strongly believes that this iterative, consultative approach—one that involves the Covered Company and each appropriate supervisory authority and tailors resolution plan requirements to the individual institution—is the best means to achieving robust, effective resolution plans for all Covered Companies, foreign and domestic. It will be especially important for Covered FBOs, because, as described above, significant portions of a Covered FBOs' U.S. operations are likely to operate under an insolvency regime not applicable to domestic Covered Companies, and because the scope of Covered FBOs' reporting requirements under section 165(d) will generally, and appropriately, be limited to their U.S. operations.

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remaining assets are turned over to the FBO or the liquidation or administration proceedings in respect thereof. 12 U.S.C. § 3102(j).

22 *See* 76 Fed. Reg. at 22649 note 7.

23 *See* subparagraphs (4)(B) and (5)(B) of section 165(d).

24 The recommended approach is further discussed in Part II.D of the Joint Trade Association Letter.

IV. Cross-Border Aspects of the Proposed Resolution Plan and Credit Exposure Periodic Reporting Requirements

A. Coordination and Consultation Are Critical

Resolution planning involving internationally active banks does not occur in isolation. It involves processing considerable amounts of information and the rendering of often difficult judgments, and it requires a thorough comprehension of organizational arrangements involving a variety of structures operating in multiple jurisdictions around the world. Close coordination among these institutions' home and various host country authorities is essential to avoid redundancies, conflicts and inconsistencies, which would diminish the benefits of resolution planning, needlessly increase its costs and impede its effective implementation.

As the supervisory body principally responsible for an institution's overall safety and soundness, the home country authority is ideally suited to take the lead with respect to the institution's resolution planning. To the maximum extent feasible, the goal should be to develop a Group-level plan which takes into account the structure of the institution's operations in various host countries as well as relevant host country legal regimes. Further, host country authorities should retain their supervisory prerogatives over the institution's operations within the host country, but exercise them with respect to resolution planning in close coordination with, and, wherever possible, by giving due deference to, those aspects of the Group plan which address the institution's operations in the host country.

The development of CMGs for systemically significant cross-border institutions, and their role with respect to the development of recovery plans, illustrates the important benefits of this type of coordination. We expect the CMGs will continue to play a key role in facilitating home-host coordination as attention now turns to resolution planning. In light of the Agencies' participation in the CMGs for several of the largest Covered FBOs, we would urge that the Agencies' rulemaking implementing section 165(d) explicitly acknowledge the role of CMGs for institutions that have them. Specifically, as described below, the regulations should provide that a resolution plan that is developed through the CMG process (which would have a U.S. "chapter" addressing a Covered FBO's U.S. operations) and approved by the Agencies as part of that process would be treated as compliance with the requirements of section 165(d), including with respect to timing, content and supervisory review and approval.[25]

A number of important initiatives currently are underway at the international level to promote closer coordination on resolution planning. These include initiatives by the Financial Stability Board, the Basel Committee, the European Commission and, at the national level, several non-U.S. bank supervisors. We have included a brief description of many of these

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[25] For most Covered FBOs that already have a CMG, both of the Agencies are participants. Even if an FBO's CMG includes only one of the Agencies, however, the resolution plan developed through the CMG should be given the same effect for purposes of section 165(d), bearing in mind that the Agency that does not participate in the CMG may wish to consult with the Agency that does.

initiatives in Appendix A. These efforts are well-advanced and are key to developing an international consensus on the details of resolution planning in order to achieve a coherent cross-border framework that will maximize the benefits of resolution planning, both as a risk management tool and as a means to facilitate an orderly resolution process in the event of a future crisis.

The United States has expressed its support for these initiatives and has emphasized the need to develop "cooperative frameworks . . . among supervisors consistent with firm specific resolution and recovery plans."[26] However, the Proposal provides relatively little guidance regarding the relationship between its requirements and those that might be prescribed by a Covered FBO's home country authority, and in our view the Proposal does not adequately address the risks of duplication, inconsistencies and outright conflicts as a result of subjecting internationally active firms to multiple resolution plan reporting requirements.[27] As discussed below, the Agencies have ample authority under section 165(d) to address these issues in connection with the current rulemaking.

B. Factoring the International Dimension into Implementation of Section 165(d) – The Home Country Comparability Requirement

Deference to comparable home country requirements should be a key guiding principle for Covered FBOs' resolution planning under section 165(d). Pursuant to section 165(b)(2), when applying the section 165 enhanced prudential standards to "foreign-based bank holding companies," the Federal Reserve is required to take into account the extent to which a foreign-based bank holding company is subject on a consolidated basis to home country standards that are comparable to those applied to financial companies in the United States (the "Home Country Comparability Requirement"). The Proposal recites the provisions of the Home Country Comparability Requirement,[28] but the Proposal does not explain how the Home Country Comparability Requirement will operate in practice, or how it will inform the requirements in the Proposal as they are applied to Covered FBOs. We respectfully request that these implications be addressed in the Agencies' final regulations under section 165(d).

Covered FBOs should be permitted to satisfy their obligations under section 165(d) by utilizing portions of their Group resolution plans or other similar reports that provide information

26 Remarks by Undersecretary of Treasury Lael Brainard, at the Institute's Breakfast Regulatory Dialogue with Government Officials (Oct. 11, 2010), *available at* http://www.treasury.gov/press-center/press-releases/Pages/tg903.aspx.

27 Likewise, as further discussed below in Part VII.A, the Proposal does not address the relationship between the proposed credit exposure reporting requirements and the existence of comparable (not necessarily identical) requirements imposed by other countries (such as large exposure reports).

28 *See* 76 Fed. Reg. at 22649.

comparable to what is required under section 165(d).[29] For this reason, in the case of institutions with a CMG, a resolution plan developed through a CMG process involving the Agencies and approved by the Agencies as part of that process should be viewed as compliance with section 165(d). For other institutions, determinations regarding comparability can be made on a case-by-case basis as part of the pre-submission consultations between the Covered FBO, the Agencies and the Covered FBO's home country authority that are discussed below.

C. Implications of the Foregoing Considerations for Rulemaking under Section 165(d)

We believe that such considerations should be factored directly into the regulatory reporting framework under section 165(d), and we provide below suggestions on how that can be accomplished in a manner that ensures that the Agencies receive the information required to enable them to discharge their responsibilities under section 165(d), improves the efficiency and effectiveness of the reporting process and better aligns the cross-border dimensions of the rules to developments outside the United States. In addition, we urge the Agencies, consistent with Congress's mandate in section 175(c), to undertake further consultations with their counterparts outside the United States and align the final rulemaking under section 165(d) with the various international initiatives underway in this area as described in Appendix A in order to achieve maximum consistency between the timing and content of requirements in the United States and those in other countries.

1. Implications for Timing

(a) Adoption of Final Rules

Given the magnitude and complexity of the undertaking required by section 165(d), as well as the multiple related international initiatives underway and the fact that the Agencies have until January 2012 to adopt final rules under section 165(d), we believe it is essential that the Agencies take a most deliberate approach to their rulemaking. The Proposal reflects considerable thoughtfulness on the part of the Agencies in seeking to apply the requirements of the statute. At the same time, as evidenced by this letter and the Joint Trade Association Letter, the Proposal raises a host of very difficult and complex issues that merit serious consideration. We respectfully suggest that action on a final rule in July would be premature and provide inadequate time for the Agencies to consider comments on the Proposal or to appropriately coordinate with other international initiatives, many of which are expected to reach significant milestones in the next several months.

We appreciate the Agencies' openness to the industry's comments and look forward to continuing dialogue on these matters. Ultimately, the final rules will be judged not by the

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[29] The ability to utilize home country plans will be especially important with respect to information required under the Proposal with respect to a Covered FBO's U.S. branch/agency operations, especially with regard to interconnections and interdependencies between a U.S. branch or agency and the Covered FBO's operations outside the United States, but they are also relevant to information required from a Covered FBO's U.S. subsidiaries.

promptness with which they were adopted, but by the extent to which they establish a regime that is reflective of Congressional intent, is efficient in its administrability, and is successful in enhancing not only the Agencies' ability to address in a timely and effective manner the consequences of another financial crisis, but also institutions' ability to recover, and forestall a resolution, in the first instance.

(b) Submission of Initial and Annual Plans

Similar considerations call for reconfiguration of the timeframes governing the implementation of resolution planning requirements under section 165(d) contemplated by the Proposal. The Proposal would establish a process whereby all of the estimated 124 Covered Companies would submit their initial and annual resolution plans at the same time, with the submission dates for annual plans based on a calendar year-end reporting cycle. We anticipate that this process could overwhelm the Agencies, and result in a highly inefficient process in which feedback to some institutions would be significantly delayed, possibly affecting their ability to prepare the following year's plan as required. The quality of the plans submitted under these time constraints likely would suffer, which in turn would increase the likelihood that the plans would be found to be deficient, thereby potentially triggering application of the various sanctions provided for in section 165(d). Ultimately, such an artificially forced process risks converting what is intended to be a means to better enable the Agencies and institutions to address a future financial crisis into a "check-the-box" regime driven on both sides – at Covered Companies and at the Agencies – more by a regulatory enforcement mentality and less by a desire to encourage and facilitate the establishment of resolution plans that would provide the Agencies the type of information that would strengthen their ability to discharge their statutory responsibilities.

The timeframes contemplated by the Proposal are not required by section 165(d). Section 165(d) requires that resolution plans and credit exposure reports be provided to the Agencies on a "periodic" basis. We believe that the Congressional intent underlying section 165(d) would be better served by scaling the timing of resolution planning and credit exposure reporting to the circumstances of each Covered Company, rather than applying a "one size fits all" requirement that mandates submissions by all Covered Companies on the same timetable.

We refer to the Joint Trade Association Letter for specific suggestions regarding the generally applicable timetables for the submission of resolution plans to the Agencies. In addition, with respect to Covered FBOs, we would urge the Agencies to incorporate appropriate mechanisms to coordinate the timing of the U.S. resolution plans with the timing of home country requirements. Without adequate home-host coordination on timing, the resulting resolution plans will be less effective and will create unnecessary burdens for international banks. Achieving coordinated timetables may require a degree of flexibility on the part of both home and host country supervisors, but we believe it should be possible to achieve a workable approach without sacrificing the legitimate supervisory interests of the home and host country supervisors. This is especially true for the resolution plans developed by institutions with a

CMG, where home and host country supervisors are already coordinating on a timetable for the development and review of recovery and resolution plans.

2. Implications for Content of FBO Resolution Plans

As discussed above, the Institute strongly supports implementing the section 165(d) requirements through an iterative, consultative supervisory process in which generally prescribed principles are applied to the particular circumstances of each Covered Company. With respect to Covered FBOs, it is critical that this approach include consultation by the Agencies with appropriate home country authorities, including discussions in the context of a CMG where applicable. Reaching agreement on the contents and structure of resolution planning at the CMG level ahead of a crisis would ease information sharing, decision making and burden sharing agreements within the CMG in a crisis and hence allow for decisive coordinated global action preventing contagion spreading across borders.[30]

To facilitate such consultation, efforts directed at establishing robust cross-border information sharing should be accelerated and strengthened, including by entering into memoranda of understanding governing such exchanges.

Consistent with the Home Country Comparability Requirement, resolution planning under section 165(d) should be aligned closely with the requirements to which Covered FBOs are subject in their home countries. This approach would mitigate the prospect that a Covered FBO would be required to develop two separate sets of management information systems, information reporting processes and internal controls within its U.S. operations in order to comply with requirements under section 165(d) and home country requirements. Many of the concepts underlying the proposed section 165(d) requirement are common to resolution planning in general and, in the case of Covered FBOs, are likely to be reflected in their home country resolution plans. Specifically, any significant U.S.-based legal entities, businesses, staff, governance, risk and control, and key systems and processes likely will be analyzed in a Covered FBO's Group plan. Even more important, critical economic functions, the separation of which and transfer to a third party may be a very relevant consideration for U.S. resolution planning purposes (*e.g.*, USD clearing activities, processes, linkage to market infrastructure and unplugging mechanisms), also likely will be analyzed in the Group plan.

The benefits of coordinating U.S. and home country requirements (and conversely, the risks of failing to do so) would be especially pronounced with regard to complying with the required reporting on "the interconnections and interdependencies among the U.S. subsidiaries, branches and agencies, and critical operations and core business lines of the foreign-based Covered Company and any foreign-based affiliate", as well as providing the "detailed explanation" of how the U.S.-focused resolution plan is integrated into the Covered FBO's

[30] The importance of cross-border cooperation and information sharing is highlighted by Recommendation 7 of the Basel Committee on Banking Supervision's Report and Recommendations of the Cross-border Bank Resolution Group of March 2010.

overall resolution plan.[31] Those aspects of the Proposal most directly implicate considerations regarding the contents of a Covered FBO's home country resolution planning and create the greatest potential for conflict, inconsistency and needless duplication between the resolution planning undertaken pursuant to section 165(d) and home country requirements.

In particular, depending on the complexity of a Covered FBO's operations, the requirement to map cross-border interconnections and interdependencies to "any foreign-based affiliate" may be an especially daunting undertaking. We believe that requiring such reporting on any and all foreign affiliates is overly broad, not required by the statute and unnecessary to accomplish the Agencies' supervisory purposes. This aspect of the Proposal is especially well-suited to reconsideration in light of the Home Country Comparability Requirement, coupled with a requirement to consult with a Covered FBO's home country authority in developing the resolution plan. We recommend that the Agencies revise the Proposal accordingly.

3. <u>Review of Resolution Plans</u>

The Agencies have broad discretion under section 165(d) and the Proposal when assessing the informational sufficiency and credibility of a Covered FBO's resolution plan. However, because that resolution plan necessarily addresses aspects of the Covered FBO's operations outside the United States, including significant cross-border interconnections and interdependencies, that are integrally related to resolution planning in the home country, we recommend that the final rules provide for consultation by the Agencies with the appropriate home country authority prior to making their determination on the credibility of a Covered FBO's resolution plan. In the case of Covered FBOs without a CMG, such consultation would not bind the Agencies, but it would enable the Agencies to make a more informed assessment of the credibility of a Covered FBO's U.S. resolution plan.[32] For those Covered FBOs with a CMG, we believe that the approval by the CMG of the FBO's Group resolution plan should be deemed a finding of credibility under section 165(d), so long as the Agencies participated in the CMG and approved the plan.

4. <u>Supervisory Actions in Response to Resolution Plans</u>

It will also be critical that any U.S. supervisory actions taken in response to deficiencies in a U.S. resolution plan follow appropriate consultation and coordination with an international banks' home country supervisory authorities. Section 165(d) provides for substantial sanctions to ensure compliance with its requirements. The Proposal contemplates that the Federal Reserve would consult with certain other U.S. functional regulators prior to (i) the issuance of a notice of deficiency against a Covered Company, (ii) deciding whether to impose on a Covered Company

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[31] *See* proposed common rules section __.4(a)(2)(i) and (ii).

[32] Consultation by the Agencies with a Covered FBO's home country authority would be solely for the purpose of facilitating their assessment of the U.S. resolution plan in its larger, cross-border context and would not, of course, extend to any assessment of the Covered FBO's Group plan itself.

requirements or restrictions for its failing to have addressed identified deficiencies on a timely basis or (iii) deciding to impose a forced divestiture of assets or operations on a Covered Company, if such action "is likely to have a significant impact on a functionally regulated subsidiary or a depository institution subsidiary of the Covered Company."[33] Even then, prior consultation is mandatory only with a Council member that primarily supervises the relevant subsidiary. Consultation with other federal, state or non-U.S. supervisors is left to the discretion of the Federal Reserve.

In the case of a Covered FBO, sanctions under section 165(d) could be imposed on the Covered FBO's U.S. operations if warranted under the standards articulated in the Proposal. In such cases, the final rules should provide for prior consultation with the appropriate home country authority inasmuch as, depending on their scope and the significance of the United States to the Covered FBO's global operations, actions taken by the Agencies against the Covered FBO's U.S. operations may materially affect the Covered FBO and its Group resolution plan. For this reason, any sanctions against an institution with a CMG should be vetted and considered through the CMG coordination process.

As we understand the Proposal, sanctions under section 165(d) would not be imposed on a Covered FBO's non-U.S. subsidiaries, non-U.S. branches or any other operation maintained by the Covered FBO outside the United States, and we request confirmation of this understanding in the final rules. We also request confirmation of a corollary to this reading of section 165(d): any limit imposed on a Covered FBO's growth, activities, or operations, and any required divestiture of assets or operations, would apply only to the Covered FBO's activities or operations in the United States and, in the case of a forced divestiture, only to assets of the Covered FBO's U.S. operations. Similarly, the Agencies should clarify in the final rules that any capital, leverage or liquidity restrictions imposed pursuant to section 165(d) are likewise restricted to U.S. operations and do not extend to the Covered FBO itself. Capital, leverage and liquidity of a Covered FBO itself are fundamental to home country supervisory requirements, including resolution planning, and are properly within the purview of the home country authority.

D. <u>Access To Information</u>

Proposed common rules __.3(d) would require a Covered Company to provide the Agencies in connection with their review of the Covered Company's resolution plan such further information, and access to personnel of the Covered Company, as the Agencies jointly determine is necessary to assess the credibility of the resolution plan and the Covered Company's ability to implement the plan. For these purposes, the Agencies will rely "to the fullest extent possible on examinations conducted by or on behalf of the appropriate Federal banking agency for the relevant company."

[33] 76 Fed. Reg. at 22660 (proposed common rules section __.8).

In connection with applying these provisions to Covered FBOs, we recommend that the Agencies limit such inquiries to the greatest extent possible to the Covered FBO's U.S. operations and personnel and that requests relating to information or personnel located outside the United States be coordinated with the Covered FBO's home country authority. In addition, we recommend that the final rules provide that the Agencies will rely to the fullest extent possible on consultations with appropriate home country authorities and reference to a Covered Company's home country resolution plan before requesting further information or access to personnel outside the United States in connection with their review of the Covered FBO's resolution plan under section 165(d).

E. Application to FBOs Without Home Country Resolution Plan Requirements

The Proposal poses a question about how a resolution plan for U.S. operations should be linked to the contingency planning process of a Covered FBO if the Covered FBO is not subject to a home country recovery or resolution plan requirement. We expect that all or virtually all systemically significant institutions will be required to prepare a global resolution plan driven by home country requirements. If there are institutions that are systemically significant in the United States that do not have a home country resolution plan requirement, the Agencies can address those on a case-by-case basis. The Agencies should have discretion to factor the extent of home country crisis management planning and related requirements into the tailoring of the U.S. resolution plan requirements.

V. Confidentiality

The Institute shares the concerns expressed by other commenters regarding the need for greater confidentiality protections for resolution plans and credit exposure reports.[34] Information provided to supervisors in connection with section 165(d)'s requirements should be treated as confidential supervisory information. The final rule should be more explicit about the confidential nature of resolution plans and credit exposure reports and the applicability of the FOIA "examination exemption".[35] In addition to the existing protections afforded confidential supervisory information, we suggest that special controls be put in place to protect against leaks or inadvertent disclosures in light of the extreme sensitivity of the information contained in resolution plans.

Confidentiality concerns are especially acute for Covered FBOs because they may be required to provide the Agencies with access to portions of their home country resolution plans, which will almost certainly be considered confidential by an FBO's home country supervisor. Certain data may also be subject to legal limitations on cross-border disclosure. We urge the Agencies to coordinate with other supervisors to develop international mechanisms to preserve

34 *See, e.g.,* Part IV of the Joint Trade Association Letter.

35 *See* 5 U.S.C. § 552(b)(8).

confidentiality. This could involve, for example, home country supervisors sharing home country resolution plans with host country supervisors in the context of international supervisory dialogue in the home country, rather than a Covered FBO actually filing a portion of the home country plan with the Agencies.

VI. Comments on Other Aspects of the Proposal As Applied to FBOs

A. Definition of Key Terms in the Proposal

The Proposal has taken an important first step towards defining some of the key terms necessary to implement section 165(d), and requests comments on which terms should be further defined or clarified. Despite the Proposal's definitions, many ambiguities remain. The practical application of many of these terms remains unclear in the context of Covered FBOs, where the Proposal must be interpreted or adapted to take into account the structures of FBOs' U.S. operations. Assessment of these terms – for example, "core business lines," "critical operations," "material entity" and "material financial distress"—is an inherently subjective and case-specific process, and is especially difficult in the context of the U.S. operations of a Covered FBO.

Rather than attempt to place precise definitions on the meaning of these key terms necessary to evaluate each Covered Company's resolution plan, the Institute recommends that the Agencies develop their meaning over time through the supervisory process, by issuing revised regulations, supervisory letters or other written guidance such as FAQs. Such an approach would give the Agencies the opportunity to understand, and the flexibility to accommodate, the complexities and practical obstacles that will inevitably arise while working with Covered Companies and, in the case of Covered FBOs, their home country authorities to develop effective resolution plans. For example, in some cases defined terms may be based on concepts that overlap or are inconsistent with those on which a Covered FBO's home country resolution plan is based.

In some cases, it will be appropriate for a Covered FBO, the Agencies and the Covered FBO's home country authority to consult and come to a consensus regarding the application of these concepts to the Covered FBO at the outset of the resolution planning process and well in advance of the formal submission of the resolution plan to the Agencies. Such a process would help the Agencies, Covered Companies and home country regulators to collectively delineate what entities, operations, etc. should be encompassed by certain defined terms in the first instance, rather than creating an environment of conflict, disagreement and second-guessing. Such consultations would helpfully reflect that there is an inherent cross-border dimension to a Covered FBO's resolution planning.

Notwithstanding this general approach, two terms used in the Proposal are central to defining the scope of its application to FBOs, and we recommend that the Agencies clarify their meaning in the final rule:

1. Definition of Covered Company

As discussed above, under the Proposal, an FBO is a Covered Company if it is a bank holding company and it has $50 billion or more in total consolidated assets based on the worldwide consolidated assets reported by the FBO in its “Capital and Asset Reports for Foreign Banking Organizations” (Federal Reserve Form FR Y-7Q). A U.S.-headquartered bank holding company is a Covered Company if it has $50 billion or more in total consolidated assets as determined based on the “Consolidated Financial Statements for Bank Holding Companies” it files with the Federal Reserve on Form FR Y-9C. Read literally, this definition could mean that both a Covered FBO that reports $50 billion or more in worldwide assets in its Form FR Y-7Q and any U.S. bank holding company subsidiary thereof that reports $50 billion or more in consolidated assets on Form FR Y-9C would be "Covered Companies,” with the U.S. bank holding company subsidiary required to prepare and submit a resolution plan in accordance with section 165(d) separately from the plan submitted by the Covered FBO parent.

Nothing would be gained by requiring both a Covered FBO and its top-tier U.S. bank holding company subsidiary to file a resolution plan. If the principal objective of a resolution plan is to ensure that the U.S. insured depository institution subsidiary is insulated from the effects of financial distress at its affiliates, or even if an additional objective is to insulate the overall U.S. financial system from the effects of a Covered Company’s financial distress, these objectives are realized most effectively in the case of Covered FBOs through the filing of a single resolution plan by the Covered FBO with respect to its U.S. operations as a whole. Moreover, all of the core business lines and critical operations of a top-tier U.S. bank holding company subsidiary would be within the umbrella of the Covered FBO, but not all of the Covered FBO’s U.S. core business lines and critical operations would be within the umbrella of the top-tier U.S. bank holding company subsidiary. Finally, it would be unreasonable to expect that a top-tier U.S. bank holding company subsidiary’s resolution plan would be inconsistent with the plan adopted by its Covered FBO parent – providing little, if any, benefit from the extra work required to prepare a separate plan for the top-tier U.S. bank holding company subsidiary.

This duplication of effort and expense would be exacerbated if the FDIC were to require insured depository institutions to prepare their own living wills. In that case, a Covered FBO with a U.S. bank holding company subsidiary could be required to prepare four living wills covering its U.S. operations: its home country plan, its plan for U.S. operations outside its top-tier U.S. bank holding company subsidiary, its top-tier U.S. bank holding company subsidiary’s plan, and its U.S. insured depository institution subsidiary’s plan.

There is nothing in section 165(d) to suggest Congress intended this result, and we would object strongly to any requirement to file separate resolution plans. Applying section 165(d) in this manner not only would impose wasteful and duplicative additional burdens on FBOs without serving any policy purpose, but also would violate the National Treatment Requirement (*i.e.*, since U.S.-headquartered institutions would not be subject to similar requirements at the intermediate bank holding company level).

While we assume that the Agencies do not intend to require separate resolution plans, the final rule should clarify that a single filing by a Covered FBO encompassing all of its U.S. operations satisfies the requirements of section 165(d). This could be accomplished, for example, by exempting from the definition of Covered Company any bank holding company whose financial results are consolidated into the financial reports of another Covered Company.

2. "Foreign-based Covered Companies"

In delineating the scope of resolution plans and credit exposure reports required of Covered FBOs, the Proposal refers to companies that are "incorporated or organized in a jurisdiction other than the United States (other than a bank holding company) or that is a foreign banking organization."[36] We believe the intention of this delineation is evident from the context, but deriving the meaning from the language is complicated by the parenthetical exclusion of "bank holding company" and the inclusion of both a company "incorporated or organized in a jurisdiction outside the United States" and a "foreign banking organization", perhaps suggesting that a "foreign banking organization" might not be incorporated or organized in a jurisdiction outside the United States, a construction that we think is not intended.[37] Reflecting our understanding of what is intended, we suggest that the introductory provisions of proposed common rules __.4(a)(2) be revised to read as follows (with a corresponding revision made to proposed common rules __.5(a)(2)):

> "The Resolution Plan of a Covered Company that is a foreign nonbank financial company supervised by the Board or a foreign banking organization shall include:".

B. Approval and Submission of Reports

Proposed common rules section __.3(e) requires a Covered Company's board of directors to approve the Company's initial and annual resolution plans, but in the case of a Covered FBO permits such approval by a delegee expressly authorized by the board. We agree it is appropriate in the case of a Covered FBO to enable approval of the plan by a duly authorized delegee of the board and appreciate the Agencies taking into account the circumstances of Covered FBOs in this manner. We also agree it is appropriate to define the scope of the board's/delegee's

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36 Quoting proposed common rule section __.4(a)(2) with respect to resolution plans. The corresponding provision with respect to credit exposure reports (proposed common rules section __.5(a)(2)) is identically phrased, except the words "organized" and "incorporated" are transposed, a difference that we do not consider to be substantive.

37 The FDIC defines "foreign banking organization" in its proposed regulation, but the Federal Reserve does not. The FDIC's definition is identical to the definition in section 211.21(o) of the Federal Reserve's Regulation K, and we suggest that the Federal Reserve conform its definitions in 12 C.F.R. Part 252 by adding a cross-reference to Regulation K definition.

responsibility as approving the plan.[38] At the same time, it would be helpful to provide further clarification and confirmation in connection with the adoption of the final rules of the following:

- Whether exercised by a board of directors or its duly authorized delegee, approval of a resolution plan requires only that level of review that is consistent with a board of directors' general oversight responsibilities and does not entail having a comprehensive understanding of the operational and informational details of the plan.[39]

- A Covered FBO's board of directors would have discretion in identifying the delegee (which, for example, may be a named individual, a specified titleholder or a designated group or committee) and in prescribing the terms of the delegation.

C. Organizational Structure Reporting

The Proposal would permit Covered FBOs to rely on information regarding the structure of their U.S. operations provided to the Federal Reserve in their annual reports on Form FR Y-7 and the periodic reports regarding changes to their U.S. organizational structure on Form FR Y-10 to satisfy the Proposal's information requirements regarding organizational structure.[40] We support this approach to satisfying such information requirements and request confirmation in the final rules that such incorporation by reference is sufficient for these purposes.

VII. Credit Exposure Reports

A. General Comments

The proposed credit exposure periodic reporting requirement calls for the compilation, analysis and production of a substantial amount of information on a quarterly basis. By its very nature, much of the required information is dynamic, such that there is an increased likelihood that the information already would be stale by the time it is reported. The utility and supervisory benefit of requiring such reporting on a quarterly basis is not clear, and there is no indication in the legislative history of section 165(d) that such granular and frequent reporting is required by section 165(d). As in the case of resolution plans, section 165(d) requires only that credit exposure reports be submitted on a "periodic" basis.

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38 In contrast, the FDIC's May 2010 proposed rule that would mandate resolution plans for certain large depository institutions would have required board attestation, which would be inconsistent with the general oversight role of a board of directors. *See* FDIC, Special Reporting, Analysis and Contingent Resolution plans at Certain Large Insured Depository Institutions, 75 Fed. Reg. 27464, 27470 (proposed May 17, 2010) (to be codified at 12 C.F.R. Part. 360).

39 *See* Part II.D.2 of the Joint Trade Association Letter.

40 *See* 76 Fed. Reg. at 22654.

Although it appears in the same section of the Dodd-Frank Act as the resolution plan requirement, the credit exposure periodic reporting requirement is not itself a part of the resolution planning process. Consequently, we recommend that the rulemaking to implement section 165(d)'s credit exposure reporting requirements be undertaken separately from the current rulemaking, which should be focused exclusively on resolution planning. The Proposal itself acknowledges the need to coordinate and harmonize credit exposure reporting requirements under section 165(d) with other requirements under section 165, including the application of single counterparty credit exposure limits and stress testing.[41] We believe the most efficient and effective means to assure such coordination and harmonization is to address these issues at the same time instead of through a series of separate rulemakings.

Moreover, the development of U.S. credit exposure reporting requirements for Covered FBOs will likely raise issues similar to those discussed above regarding how best to factor in comparable home country requirements. For example, to the extent that a Covered FBO, as part of its reporting requirements under other applicable law, compiles information relevant to the credit exposures of its U.S. operations (for example, large exposure reporting), the Agencies, in accordance with the Home Country Comparability Requirement, should consider and factor into the final rules the extent to which a Covered FBO may use such reports to fulfill section 165(d)'s requirements. The contexts in which such issues will arise in connection with these other initiatives are sufficiently different from resolution planning under section 165(d) to merit their consideration as part of a separate rulemaking.

B. Importance of the Relationship Between the Definition of Covered FBO and "Significant Bank Holding Company" for Purposes of Implementing Credit Exposure Reporting Requirements under Section 165(d)

The Proposal would incorporate by reference the definition of "significant bank holding company" adopted by the Federal Reserve under section 102(a)(7). As applied to FBOs, the definition proposed by the Federal Reserve in its recent rulemaking under section 102(a)(7)[42] would apply the same $50 billion worldwide assets test as would apply under the Proposal. Consequently, every Covered FBO also would be a significant bank holding company.

As a general matter, we believe that, if the same $50 billion asset test is applied for purposes of both section 102(a)(7) and section 165(d), it should be applied to FBOs on the basis of total consolidated assets of only their U.S. operations.[43] As discussed above in Part II, we estimate that this approach would reduce the number of Covered FBOs, and therefore "significant bank holding companies" that are FBOs, from 98 to approximately 20. As in the

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41 *See id.* at 22652.

42 *See* 76 Fed. Reg. 7731 (Feb. 11, 2011).

43 *See* Institute Comment Letter on Docket No. R-1405 (definitions of "predominantly engaged in financial activities" and "significant" nonbank financial companies and bank holding companies) (March 30, 2011).

case of resolution planning, the resulting reduction in the number of FBOs subject to section 165(d)'s requirements would eliminate the over-inclusiveness that is inherent in the worldwide assets test as applied to FBOs and is more consistent with the Congressional intent to apply credit exposure reporting requirements to those institutions whose credit exposures pose risks to the financial stability of the United States.[44]

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The Institute appreciates the opportunity to comment on the Proposal. Please contact the undersigned or our General Counsel Richard Coffman (646-213-1149; rcoffman@iib.org) if we can provide any additional information or assistance.

Very truly yours,

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[44] Additional concerns regarding the feasibility of the proposed credit exposure reporting regime arise from the Proposal's definitional cross-reference to the definition of "significant nonbank financial company" proposed by the Federal Reserve under section 102(a)(7). As discussed in footnote 13 of the Institute's March 30, 2011 comment letter on that proposal, expanding the definition of significant nonbank holding company to include nonbank financial companies other than those that are nonbank financial companies supervised by the Federal Reserve would require Covered Companies to make determinations regarding whether such a nonbank financial company is "predominantly engaged" in financial activities, thereby substantially increasing the burdens associated with credit exposure reporting under section 165(d) without any evident countervailing benefit to the implementation of section 165(d)'s requirements.

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APPENDIX A

RESOLUTION PLANNING: CROSS-BORDER INITIATIVES

In the aftermath of the financial crisis, considerable attention has been devoted to enhancing regulatory authorities' ability to deal with the consequences of the material financial distress or failure of systemically significant institutions in ways that avoid taxpayer bailouts and do not imperil the financial system. Putting in place an effective recovery and resolution planning regime is a critical part of these efforts, and several key initiatives in this area are underway outside the United States, including the following:

- The "Recovery and Resolution Plans" pilot program developed by the United Kingdom's Financial Services Authority ("FSA"), working with the Bank of England, to review comprehensive plans by the 6 major U.K. banks as a means of gaining experience prior to finalizing the requirements in a consultation paper. The Financial Services Act of 2010 requires the FSA to issue rules governing the preparation of recovery and resolution plans by U.K.-licensed financial institutions. We understand a consultation paper on these rules is expected to be published this summer.

- The French Prudential Control Authority has been working with France's largest banks to develop credible and effective recovery and resolution programs. National and international crisis management groups have been established, which include the participation of U.S. regulators.

- The Office of the Superintendent of Financial Institutions has been working with Canada's largest banks to ensure that the banks have robust and realistic Crisis Management Plans in place. In Canada, a two-step process has been employed – the first step focusing on the development of a Recovery Plan, the second step on a Resolution Plan. It is intended that a firm's Crisis Management Plan would be reviewed and updated at least annually.

- The consultation paper published by the European Commission on January 6, 2011 entitled "Technical Details of a Possible EU Framework for Bank Recovery and Resolution," Part 2.D of which addresses resolution planning.[45] Responses to the consultation will be used in connection with developing draft legislation for a comprehensive crisis management framework, including with respect to bank recovery and resolution, which is expected in September 2011.

[45] European Commission Consultation IP/11/10, which is available at: http://ec.europa.eu/internal_market/consultations/docs/2011/crisis_management/consultation_paper_en.pdf.

- Initiatives underway by the Financial Stability Board ("FSB"):[46]

    - The FSB has developed a Steering Group that is preparing a proposal on "Key Attributes of Effective Resolution Regimes," which will identify the essential features that national resolution regimes for financial institutions should have, including with respect to recovery and resolution plans. To make resolution possible in a cross-border context, the Steering Group is also considering the essential elements for institution-specific cooperation agreements, which are intended to serve as a benchmark and point of reference to national authorities as they negotiate such agreements (with the goal that they be drawn up by the end of 2011). The FSB plans to discuss the set of draft proposals at its Plenary meeting this July.

    - The FSB Cross-Border Crisis Management Group is monitoring the development of recovery and resolution plans for globally systemically important financial institutions in close cooperation with the institution-specific CMGs, and is expected to consult this July on "Essential Elements of Effective Recovery and Resolution Plans" as well as "Framework for the Assessment of Resolvability of SIFIs."

    - The FSB plans to conduct a public consultation during the second half of 2011 on the measures that it will propose to improve resolution tools and regimes in its final recommendations to the G20 at its November Summit.

- The Basel Committee on Banking Supervision's Cross-border Bank Resolution Group (the "CBRG") conducted a comprehensive survey in the first quarter of 2011 to take stock of existing national resolution regimes and tools and plans to report its findings around mid-2011.[47]

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46 *See Progress in the Implementation of the G20 Recommendations for Strengthening Financial Stability*, Report of the Financial Stability Board to G20 Finance Ministers and Central Bank Governors (April 10, 2011) at page 3, available at: http://www.financialstabilityboard.org/publications/r_110415a.pdf.

47 *Id*. The results of the survey will help assess progress against the CBRG's March 2010 Report and Recommendations on Cross-Border Bank Resolution (http://www.bis.org/publ/bcbs169.htm) and to assess the legislative and other changes to national resolution regimes and policies needed to accomplish effective resolution of systemically important financial institutions.