

## A Non-U.S. Bank's Guide to U.S. Resolution Plans

Marking the first major milestone in U.S. regulators' implementation of systemic risk requirements under the Dodd-Frank Act, the Federal Deposit Insurance Corporation ("FDIC") recently approved two rules setting forth requirements for U.S. resolution planning. One rule, approved jointly with the Federal Reserve Board, requires systemically important financial institutions ("SIFIs"), including certain non-U.S. banking groups, to prepare resolution plans for their U.S. operations (the "SIFI Rule").<sup>1</sup> The other rule approved by the FDIC requires certain large FDIC-insured banks ("IDIs") to prepare bank resolution plans (the "IDI Rule").<sup>2</sup> As a result, non-U.S. banking groups subject to the SIFI Rule will have to prepare resolution plans for their U.S. operations as a whole and for any FDIC-insured bank subsidiaries subject to the IDI Rule.

This memorandum provides a high-level overview of the rules, with a focus on those aspects most likely to be of interest to the head offices of non-U.S. banking organizations (foreign banking organizations or "FBOs") subject to the rules.<sup>3</sup>

### *Key Highlights*

- While the rules cast a wide net and apply to many FBOs with limited U.S. operations, the vast majority of FBOs will be eligible to submit "tailored" plans with significantly reduced informational and analytical requirements. These plans would be focused on how the non-bank operations of the FBO can be resolved in a way that does not threaten the financial stability of the United States. FBOs whose only U.S. footprint is a branch with less than \$50 billion in assets and no "critical operations" in the United States should be able to file especially streamlined plans. These accommodations reflect the reality that the U.S. operations of most FBOs do not pose a systemic risk to the U.S. financial system.
- The rules provide for staggered submission deadlines for initial resolution plans, with a deadline of July 1, 2012 for FBOs with the largest U.S. nonbanking

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<sup>1</sup> Full text of the pre-publication draft of the SIFI rule is available at <http://fdic.gov/news/board/Sept13no4.pdf>.

<sup>2</sup> Full text of the pre-publication draft of the IDI rule is available at <http://fdic.gov/news/board/Sept13no6.pdf>. By adopting the IDI Rule as an interim final rule, the FDIC is providing an opportunity for further public comments, which will be due 60 days after publication of the IDI Rule in the Federal Register.

<sup>3</sup> A more detailed analysis of these rules is available in our Alert Memo dated September 19, 2011, available at [http://www.cgsh.com/cgsh/SIFI\\_and\\_IDI\\_Resolution\\_Plan\\_Rules.pdf](http://www.cgsh.com/cgsh/SIFI_and_IDI_Resolution_Plan_Rules.pdf).

operations; initial plans for SIFIs with smaller U.S. nonbanking operations are delayed until July 1, 2013 or December 31, 2013. These deadlines bring the U.S. requirements into closer alignment with the deadlines called for by the Financial Stability Board.

- The scope of these rules is generally limited to U.S. entities and operations, though information about non-U.S. entities and operations could be required where there are material dependencies of U.S. entities on non-U.S. affiliates. In addition, the rules require a description of how an FBO's U.S. resolution planning fits into its global contingency and resolution planning.
- The interplay between resolution plans required by U.S. regulators and those required by home country regulators remains unclear. For SIFIs with a Crisis Management Group, it appears likely that home and host country resolution plans will be shared with member regulators. SIFIs without Crisis Management Groups will want to consider and discuss with both U.S. and home country regulators the extent to which plans will be shared.
- The preambles to the rules describe an "iterative" approach to developing resolution plans and encourage an active dialogue between regulators and resolution plan filers.
- Confidentiality protection remains a key concern, including in the context of cross-border information sharing among regulators.

### *Scope of the Rules*

- The following entities are required to submit resolution plans:
  - FBOs and U.S.-headquartered bank holding companies ("BHCs") with at least \$50 billion in total global consolidated assets ("Covered Companies") must prepare resolution plans under the SIFI Rule;<sup>4</sup> and
  - All IDIs (i.e., U.S. subsidiary banks, not U.S. branches of an FBO) with at least \$50 billion in total consolidated assets ("CIDIs") are required to prepare resolution plans under the IDI Rule.
- For FBOs that maintain intermediate U.S. bank holding companies, only the top-tier FBO is required to submit a plan under the SIFI Rule.

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<sup>4</sup> In addition to U.S. bank holding companies and non-bank SIFIs, the rules apply to any "foreign bank or company that is a bank holding company or is treated as a bank holding company under section 8(a) of the International Banking Act of 1978 (12 U.S.C. 3106(a)), and that has \$50 billion or more in total consolidated assets, as determined based on the foreign bank's or company's most recent annual or, as applicable, the average of the four most recent quarterly Capital and Asset Reports for Foreign Banking Organizations as reported on the Federal Reserve's Form FR Y-7Q."

- The preamble to the SIFI Rule estimates that it applies to 124 banking groups, 98 of which are FBOs. Many of these FBOs have significantly less than \$50 billion in U.S. assets and are unlikely to pose a risk to U.S. financial stability, though are nonetheless required to submit resolution plans. The preamble to the IDI Rule estimates that it applies to 37 IDIs.

### ***Timing of Required Filings***

- The rules provide for staggered deadlines for the submission of initial resolution plans, with the largest institutions required to file first. For FBOs, the deadline is based on an institution's U.S. nonbank assets, as follows:
  - July 1, 2012, for Covered Companies with total U.S. nonbank assets of \$250 billion or more;
  - July 1, 2013, for Covered Companies with total U.S. nonbank assets of \$100 billion or more and less than \$250 billion; and
  - December 31, 2013, for all other Covered Companies.
  - *Although the SIFI Rule does not define “nonbank assets”, our understanding is that assets of a U.S. branch, agency or IDI subsidiary should be counted as bank assets for purposes of these thresholds.*
- The SIFI and IDI plan deadlines are intended to be harmonized so that an FBO parent and its CIDI subsidiary would file their resolution plans on the same dates. Because these deadlines are keyed off of nonbank assets, FBOs with substantial bank assets but small non-bank operations in the United States will not have to file their SIFI or IDI plans until the second or third round.
- Subsequent plans are due on each anniversary of the initial submission date.
- Resolution plan filers must notify the regulators within 45 days of any events or changes that would have a “material effect” on their resolution plan.
- The regulators retain discretion to accelerate, extend or change the deadlines for submission of a resolution plan or to require interim updates addressing particular topics.

- *The introduction of staggered deadlines beginning in July 2012 brings the U.S. timeline into closer alignment with the Financial Stability Board’s proposals and related initiatives in other jurisdictions.*<sup>5</sup>

### ***Contents of a Resolution Plan***

- The SIFI resolution plan for an FBO Covered Company must provide the information described below with respect to subsidiaries, branches, agencies, critical operations and core business lines that are domiciled in the United States or conducted “in whole or material part” in the United States.
  - A “critical operation” is defined as an activity that is “critical” to the financial stability of the United States.
    - *It is likely that very few FBOs or their subsidiaries conduct critical operations.*
  - A “core business line” is defined as a line of business whose failure the Covered Company believes “would result in a material loss of revenue, profit, or franchise value.”
    - *The SIFI Rule does not specify whether “core business lines” should be determined with respect to the FBO’s U.S. or global operations. Based on the context of the rule and its purpose, we believe that core business lines should be determined based on their significance to an FBO’s global operations. However, this view should be confirmed in an institution’s discussions with U.S. regulators regarding the plan.*
    - *Regardless of how the term is defined, “core business lines” are likely to span national borders. An FBO’s resolution plan will clearly need to address those aspects of any core business lines conducted in material part in the United States. The extent to which any non-U.S. aspects of core business lines would need to be addressed in an FBO’s resolution plan will likely depend on the particular circumstances of an FBO’s structure and operations.*

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<sup>5</sup> The FSB’s *Consultative Document on Effective Resolution of Systemically Important Financial Institutions* (July 2011) called for first drafts of resolution plans to be submitted by June 2012, with complete drafts due in December 2012, available at [http://www.financialstabilityboard.org/publications/r\\_110719.pdf](http://www.financialstabilityboard.org/publications/r_110719.pdf). The UK Financial Services Authority published for consultation a package of documents relating to its proposed rules for recovery and resolution plans, which calls for firms to prepare their initial recovery and resolution plans by June 2012. The package was published August 9, 2011 and is available at [http://www.fsa.gov.uk/pages/Library/Policy/CP/2011/11\\_16.shtml](http://www.fsa.gov.uk/pages/Library/Policy/CP/2011/11_16.shtml).

- Rather than requiring information and analysis with respect to all U.S. entities, many aspects of the SIFI Rule are limited to only “material entities”—those entities that are “significant” to the activities of a critical operation or core business line.
  - *For FBOs, these could include U.S. branches and agencies,<sup>6</sup> broker-dealer subsidiaries, service companies or other U.S. subsidiaries.*
- SIFI resolution plans must include the following information:
  - an executive summary;
  - a description of how the U.S. resolution plan is integrated with the FBO’s overall resolution and contingency planning process;
  - a strategic analysis describing the Covered Company’s plan for rapid and orderly resolution of its material entities, critical operations and core business lines in the event of material financial distress or failure of the Covered Company;
    - This strategic analysis must be conducted under ordinary insolvency law and may not assume a resolution under the Orderly Liquidation Authority provisions of the Dodd-Frank Act (“OLA”), the special resolution regime under U.S. law for certain systemically significant financial companies. This requirement may pose a challenge to the largest U.S. banks and those FBOs with the largest U.S. operations, but is unlikely to be an issue for most FBOs.
    - Certain smaller material entities with total assets less than \$50 billion may be excluded from this analysis if they are not significant to a critical operation. Material entities eligible for such exclusion include the U.S. branches of FBOs and insurance, broker-dealer, and IDI subsidiaries.
      - *These material entities are only excluded from the strategic analysis section; information regarding these excluded material entities still must be provided for each of the items below. Further, any material support such excluded material entities provide to other material entities would have to be discussed in the context of analyzing those entities’ resolution.*

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<sup>6</sup> Under the SIFI Rule, “material entity” is defined as a “subsidiary or foreign office” of the Covered Company. While on its face this definition appears to exclude an FBO’s U.S. branches, based on the intent of the rule and requirements elsewhere that an FBO’s plan include its U.S. branches, we believe that branches that otherwise satisfy the definition of “material entity” should be treated as such in an FBO’s plan.

- a description of corporate governance structures, policies, procedures and internal controls relating to resolution planning;
- detailed organizational and financial information regarding the Covered Company's material entities, critical operations and core business lines, including a mapping of such critical operations and core business lines to material entities, detailed descriptions of material on- and off-balance sheet exposures, financial positions, booking and hedging practices, major counterparties and trading, payment, clearing and settlement systems;
- an inventory and description of management information systems, including a description of capabilities to collect, maintain and report information and data underlying the resolution plan to the regulators; and
- a mapping of various interconnections and interdependencies between the Covered Company's material entities, critical operations and core business lines.
  - FBOs must also map material dependencies of its material entities, critical operations and core business lines on non-U.S. affiliates.<sup>7</sup>
- In order to fully address the resolution of U.S. material entities or operations, it may become necessary to discuss non-U.S. entities that provide material support to such U.S. entities or operations, e.g., a non-U.S. service company that plays a significant role in the operations of a U.S. material entity. In such cases, we believe that the insolvency of such non-U.S. entities under applicable law would not need to be included in the U.S. plan, though, if relevant, cross reference may need to be made to the global or other resolution plan addressing such entity. The focus of the U.S. plan should be the U.S. entities and operations and their effect on financial stability in the United States.
- Each CIDI subsidiary of an FBO is also required to file a bank resolution plan under the IDI Rule containing substantially the same information as described above, only with respect to the CIDI.

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<sup>7</sup> The SIFI Rule's mapping requirement with respect to non-U.S. affiliates is somewhat unclear, requiring a mapping of "interconnections and interdependencies among the U.S. subsidiaries, branches and agencies, and critical operations and core business lines of the [FBO] and any foreign-based affiliate." We believe that it was not the intention of regulators to require an FBO's resolution plan to detail every connection between its U.S. and non-U.S. operations, and that a materiality threshold should be read into this provision.

***Tailored Resolution Plans for FBOs with Limited U.S. Nonbank Assets***

- In response to industry comments that the previously proposed resolution plan requirements were excessive when applied to FBOs with a limited presence in the United States and certain smaller U.S. banking groups, the SIFI Rule provides that certain Covered Companies may submit more narrowly tailored resolution plans.
- Tailored plans may be submitted by FBOs:
  - with less than \$100 billion in U.S. nonbank assets; and
  - whose U.S. IDIs, branches and agencies have assets comprising at least 85% of the FBO's total U.S. consolidated assets.
- The principal advantage of a tailored plan is that it limits the information that must be provided regarding U.S. banking operations under the SIFI Rule.
  - Specifically, a tailored plan would need to address the following elements with respect to the FBO's nonbanking material entities and operations: organization structure; strategic analysis addressing the failure of entities and operations; resolution planning corporate governance; management information systems; and identification of applicable regulators and supervisors. Further, the mapping of interconnections and interdependencies may be more limited for FBOs filing a tailored plan.
  - Those material entities with assets of less than \$50 billion eligible to be excluded from a resolution plan's strategic analysis as described above may also be excluded under a tailored plan.
  - *While the application of the tailored plan requirement to FBOs is not entirely clear, we believe that most informational requirements would only apply to an FBO's nonbanking material entities and nonbanking core business lines that are domiciled or conducted in whole or material part in the United States. As a result, neither the non-U.S. parent (whose resolution is addressed in its home country plan) nor its U.S. branches or subsidiary banks would need to be covered in detail.*<sup>8</sup>
- An FBO that qualifies for a tailored plan is still required to provide information regarding the interconnections and interdependencies between its U.S. nonbanking operations and any U.S. bank and, presumably, between its U.S. material entities and non-U.S. affiliates.

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<sup>8</sup> A U.S. subsidiary bank with more than \$50 billion in assets would still be required to submit a separate bank resolution plan under the IDI Rule, even if its parent SIFI qualified for a tailored plan.



- *The language of the tailored plan provision requires a Covered Company to provide the interdependency information with respect to “all” of its U.S. IDIs, branches and agencies, whereas the standard (i.e., non-tailored) plan provision regarding interdependencies refers to providing such information with respect to material entities, critical operations and core business lines. As it would be illogical to require those eligible for a tailored plan to provide a broader discussion of interdependencies than those filing a standard plan, we believe that the interdependency discussion in a tailored plan should only need to address an IDI, branch or agency if it is a material entity.*
- The regulators retain express authority to expand the scope of tailored plans on a case-by-case basis.

***Resolution Plans May Not Rely on “Extraordinary Support”***

- Under the SIFI Rule, a Covered Company may not rely on any “extraordinary support by the United States or any other government to the [Covered Company] or its subsidiaries to prevent the failure of the [Covered Company].” The IDI Rule does not include such a prohibition.
  - *Extraordinary support is not defined in the SIFI Rule and it is not clear whether assumptions regarding funding from the Federal Reserve’s discount window or similar funding from the European Central Bank or other central banks are permissible.*
  - *It is also unclear how the U.S. regulators would address a situation where an FBO’s home country plan assumed extraordinary assistance from a home country government in accordance with home country rules for resolution plans.*

***Regulators’ Review of the “Credibility” of Resolution Plans***

- The regulators will evaluate resolution plans on the basis of whether they provide a “credible” plan for the entity’s resolution. Specifically:
  - The FDIC and Federal Reserve will each evaluate an FBO’s resolution plan for whether the plan credibly facilitates the orderly resolution under the insolvency regimes ordinarily applicable to its U.S. entities.<sup>9</sup>

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<sup>9</sup> While the Dodd-Frank Act and the SIFI Rule require that the credibility of resolution plans be determined “under the Bankruptcy Code”, we assume that regulators will review FBO plans under the insolvency regimes actually applicable to the FBO’s branches and subsidiaries, which, in many cases, would not be the Bankruptcy Code but other applicable insolvency regimes.



- As discussed above under *Contents of a Resolution Plan*, the regulators will review SIFI plans under ordinary insolvency law only, and not under OLA.
- The FDIC will evaluate the resolution plan of an IDI subsidiary of an FBO for whether the plan credibly maximizes the protection of depositors, creditors and the FDIC's Deposit Insurance Fund.<sup>10</sup>
- *The preambles to the rules helpfully indicate that the regulators do not expect to find the initial resolution plans deficient. Rather, while the initial resolution plans will need to be informationally complete, they should be seen as foundations on which to build more robust plans in subsequent iterations. Communication, cooperation and an iterative, evolutionary approach to resolution planning are stressed throughout the SIFI Rule preamble. This approach is more closely aligned with that of the U.K.'s Financial Services Authority, which has articulated (and engaged in) a process of working collaboratively with industry to evolve an effective approach to resolution planning.*
- The regulators have indicated that they expect the resolution plans of FBOs with limited U.S. operations to be “significantly limited” in scope and complexity, with the focus on how the plan for resolution of the U.S. operations fits within the FBO's global resolution plan.
  - More generally, the preambles to the rules stress repeatedly that, when reviewing resolution plans, the regulators will take into account the great variety in size, structure and operations of resolution plan filers. Resolution plans for more complex resolution plan filers are expected to be more complex and voluminous, while plans for simpler filers are expected to be more straightforward and streamlined. To the extent that an informational element is inapplicable or not material to a resolution plan, the preamble states that the element can be omitted.

### ***Consequences of a Deficient Plan***

- The SIFI Rule explicitly provides the Federal Reserve and the FDIC with the authority to impose additional capital, leverage or liquidity requirements on, or

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<sup>10</sup> Pursuant to the IDI Rule, the IDI resolution plan “should enable the FDIC, as receiver, to resolve the institution ... in a manner that ensures that depositors receive access to their insured deposits within one business day of the institution's failure (two business days if the failure occurs on a day other than Friday), maximizes the net present value return from the sale or disposition of its assets and minimizes the amount of any loss realized by the creditors in the resolution.”

restrict the growth, activities or operations of, a Covered Company or its subsidiaries if its resolution plan is determined to be not credible.

- A Covered Company whose plan is determined by the regulators to be deficient will have an opportunity to remedy the specified deficiencies.
- If a Covered Company fails to remedy a deficient plan within two years of having been subjected to such heightened regulatory requirements or restrictions, the Federal Reserve and the FDIC may jointly require the company to divest assets or operations as necessary to facilitate orderly resolution.
- While the IDI Rule does not specify any consequences with respect to a deficient IDI plan, the FDIC could seek to impose comparable remedial measures under its general supervisory and enforcement authority.
- The Federal Reserve and FDIC generally must make determinations and take actions jointly under the SIFI Rule, while the FDIC has sole authority to do so under the IDI Rule.

### ***Confidentiality***

- Resolution plans must contain a public section addressing specified topics, including a high-level description of the resolution strategies to be employed and the range of potential purchasers of lines of business.
  - *While this public portion need only be prepared at a “high level”, it may still present challenges for institutions seeking to maintain the confidentiality of sensitive strategic information. As a result, this is an area that would benefit from practical guidance from the regulators.*
- The preamble to the rules indicate that the regulators expect much of the information in the confidential section to be eligible for protection from disclosure under the U.S.’s “freedom of information” laws, which require regulators generally to disclose to the public most materials that are not confidential. However, resolution plan filers will need to justify requests for confidential treatment, and the regulators will determine whether this justification is acceptable.
  - The IDI Rule preamble refers to the potential difficulties of segregating confidential information exempt from disclosure from information that is publicly available or not sensitive, and suggests that the division of plans into public and confidential sections was intended to reduce uncertainty regarding such segregability determinations. Although this would signal that the regulators will be receptive to arguments that the entire confidential section

should be exempt from the disclosure under U.S. “freedom of information” laws, they did not go so far—as they arguably could have done—as to provide that the entire confidential section represents confidential supervisory information exempt from public disclosure.

- *Recently, there have been examples of regulators setting a very high bar for justifying the confidential treatment of applications and other materials submitted to a regulator. At least until the agencies’ approach to confidential treatment requests regarding resolution plans is established in practice, FBOs and their IDI subsidiaries should submit substantial confidential treatment requests with their resolution plans and consider discussing confidentiality concerns with the regulators in advance of formal submission.*
- *The rules do not address the significant confidentiality issues associated with cross-border sharing of resolution plans among regulators. It remains uncertain to what extent U.S. regulators will seek access to an FBO’s home-country resolution plans or home-country regulators will seek access to U.S. plans and what confidentiality protections would apply under such circumstances.*

#### ***Board Approval of a Resolution Plan***

- Under the SIFI Rule, resolution plans must be approved by a delegee of the FBO’s board of directors acting under express authority of the board to provide such approval.
  - *This accommodation—permitting delegee approval rather than requiring the approval of the FBO’s board—was advocated by FBOs and is similar to approaches taken by the Federal Reserve in other contexts (such as anti-money laundering programs) where board approval is required. The informal guidance and practice developed in those contexts is likely to be instructive as FBOs plan for approval of the U.S. resolution plan under delegated authority.*

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If you have any questions, please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed under “Banking and Financial Institutions” or “Bankruptcy and Restructuring” in the “Practices” section of our website ([www.clearygottlieb.com](http://www.clearygottlieb.com)).

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