

Key Takeaways from Guidance to First-Round Filers on 2013 Resolution Plan Submissions: Deadline Extended, Significant Additional Content and Revised Format Requested

Overview

On April 15, 2013, the Federal Reserve Board and the Federal Deposit Insurance Corporation (“FDIC”) released long-awaited guidance on the 2013 Dodd-Frank Section 165(d) resolution plan submissions for institutions that filed their first resolution plans in 2012.¹ The guidance represented the first significant formal feedback on the resolution plans that first-round filers submitted in July 2012. In addition to providing brief guidance on how institutions should address the addition of “adverse” and “severely adverse” economic scenarios required by the Dodd-Frank Section 165(d) resolution planning rule,² the guidance spells out significant additional content requirements based on the regulators’ review of the initial plan submissions. To provide first-round filers time to address the new guidance, the regulators extended the filing deadline for these 2013 submissions from July 1 to October 1, 2013. Plans may be submitted beginning on September 3, 2013, but for purposes of the commencement of the 60-day completeness review period, all plans will be deemed received on October 1, 2013. This extension is applicable to only the 2013 submissions; subsequent annual plans remain due on July 1 of each year.

The regulators have indicated that the guidance does not apply to second- and third-round filers filing their initial plans in 2013. Nevertheless, the guidance provides significant insights into the regulators’ concerns and priorities, both in terms of the contents of the plans and the form in which the regulators would prefer they be presented.

Separate guidance was issued for U.S. and foreign-based filers, but the guidance is substantially the same.

¹ The guidance is available at <http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20130415c2.pdf> (guidance for domestic covered companies) and http://www.federalreserve.gov/newsevents/press/bcreg/joint_resolution_plans_foreign-based_guidance_20130415.pdf (guidance for foreign-based covered companies).

² See 12 C.F.R. Parts 243 and 381.

Key Takeaways

This memorandum does not summarize every aspect of the guidance, but instead highlights key points of interest in the release, including its potential implications for second- and third-round filers.

- Significant Additional Work Required in a Short Timeframe. Given the absence of feedback or guidance from the regulators, most first-round filers had anticipated that their 2013 submissions would be a refresh of their 2012 submissions, with some additional analysis regarding the addition of the adverse and severely adverse scenarios. Many institutions had largely completed their updates in light of the need to obtain board approvals in advance of the July 1 deadline. Based on the guidance, however, first-round filers will now be required to address significant new content requirements that will likely entail substantial additional work. Some institutions may also reorganize parts of their plan to address the regulators' preferences for the presentation of information. Although the guidance extended the filing deadline by three months, institutions are likely to be pressed to complete the additional work required within that timeframe.
- Expansion of Permissible Resolution Strategies. First-round filers will be permitted to base their 2013 resolution plan on scenarios other than the failure of all material entities, a required assumption in the initial plans.³ Instead, the regulators will now also permit first-round filers to assume only the failure of the parent holding company (or top U.S. holding company, as applicable), or to assume that some but not all material entities fail. The guidance also allows filers to simply submit a "modified version" of their 2012 plan.
 - The first new option reflects the regulators' focus on "single-point-of-entry" resolution strategies. Resolution strategies that focus on a failure of just the top-level holding company are likely to be most useful to regulators in developing the regulators' strategies if Orderly Liquidation Authority ("OLA") under Title II of Dodd-Frank were ever invoked. However, the resolution plan submissions still must assume resolution under the Bankruptcy Code (or other ordinary insolvency law) rather than OLA. Under that assumption, there remain significant challenges to the implementation of a single-point-of-entry approach in areas such as cross defaults and the treatment of qualified financial contracts.
 - The primary significance of the second new option is likely that it enables first-round filers to demonstrate why appropriately structured service companies

³ However, companies with an insured depository institution ("IDI") that must file a resolution plan under the FDIC's IDI resolution planning rule must still assume the failure of the IDI. See 12 C.F.R. § 360.10.

(e.g., those structured to be bankruptcy remote) would not fail when affiliates enter resolution.

- Of particular import for foreign banks, the guidance for the first time recognizes the different approaches that some home authorities may take to resolving SIFIs. The guidance allows “a supplemental analysis” that includes support after resolution by the home government so long as the filer supports the reasonableness of the scenario of such support being provided.
- Obstacles that Must be Addressed. The regulators have set forth five obstacles to resolution that all first-round filers must address in their second resolution plans. These illustrate the impediments to resolution that are of greatest concern to the regulators. The guidance specifies information regarding each of the five obstacles that must be included in the strategic narrative, as well as extremely detailed information that must be provided in appendices to the plan. The obstacles include:
 - Multiple competing insolvency proceedings (under different U.S. insolvency regimes or in different jurisdictions);
 - A potential lack of global cooperation among resolution authorities;
 - Operational interconnectedness, including shared services;
 - Counterparty actions with respect to derivative trades and collateral; and
 - Maintaining funding and liquidity, including addressing the possibility that they would be trapped in other jurisdictions.

There is significant emphasis on addressing reliance on access to financial market utilities and on shared services and interconnections across affiliated companies and the parent company. This appears to reflect a view that the operational obstacles related to maintaining market access and assuring that critical shared services, such as management information systems, may require additional analysis or explanation in the next plans.

- Emphasis on Critical Operations. Throughout the guidance, there is a notable emphasis on critical operations in areas such as the strategic narrative, the designation of material entities, and the interconnections analysis. The guidance indicates that, with respect to foreign-based filers, the regulators will require discussion of critical operations based outside of the United States.
- Reassessment of Material Entities. Filers are asked to “reassess” their material entity designations. The guidance implicitly suggests that the regulators believe that filers did not focus enough on whether entities were significant to a critical

operation. It also suggests that more attention will need to be paid to non-U.S. entities as potential material entities.

- Emphasis on a Concise, Readable Narrative. The guidance reiterates in several places informal feedback regarding the regulators' preference for the plan to provide a concise, readable narrative describing the resolution strategy and how key obstacles would be addressed. Detail and analysis supporting the narrative is to be provided in appendices. The guidance states that the form of the strategic analysis should enhance the "readability" of the strategy.
 - The regulators have previously told second- and third-round filers that they need not follow the table of contents prescribed for first-round filers as long as plans meet the rule requirements. Cleary Gottlieb, in cooperation with counsel for other filers, developed a strategy-focused table of contents in which the strategic resolution analysis is included at the beginning of the plan and then followed by the supporting data and analysis in subsequent chapters or appendices. Many second- and third-round filers plan to adopt this strategy-focused approach for the structure of their plans. First-round filers will have to make a judgment as to the extent to which they will reorganize their 2013 plans in light of this new focus on a readable strategy narrative.
- Detailed Plans for Remediation of Impediments. The guidance requires detailed project plans regarding ongoing or planned remediation of weaknesses or impediments to resolution, including specific information regarding budget, staffing, and timelines.
- Additional Information Regarding Bankruptcy Proceedings. The guidance requires filers to provide an "indicative description of the process the Covered Company would undertake to identify the need to commence a Bankruptcy case and a general description of the steps it could be expected to take to progress through Bankruptcy." This section of the guidance requires filers to address specific aspects of the expected bankruptcy process, including a description of the likely progress of the bankruptcy, the steps needed to facilitate continuity for critical services, the effects on counterparties and existing agreements, the availability of funding, and the expected strategy for exiting bankruptcy. While this may appear almost to require a virtual pre-packaged bankruptcy plan, subsequent informal guidance from the Federal Reserve Board has emphasized that this level of detail is not required and that a "high-level" description of the bankruptcy steps is all that is sought.

Implications for Second- and Third-Round Filers.

While filers submitting their initial resolution plans in 2013 are not required to comply with the guidance, the guidance provides insights into the regulators' priorities and concerns and

thus should be considered in preparing initial 2013 submissions. In particular, second- and third-round filers should consider the:

- Regulators' focus on a concise, readable strategic narrative, with supporting information in subsequent chapters or appendices. While it is necessary to provide the material required by the rules, filers should avoid inclusion of extraneous data that does not support the analysis in the plan. Information that supports multiple sections of a plan need not be duplicated;
- Five obstacles highlighted by the guidance. Second- and third-round filers should ensure that their plans provide reasonable coverage of each of the specified obstacles since these are obviously the issues that the regulators believe typically present significant impediments to resolution. The detail regarding each of these obstacles and potential mitigants should reasonably be varied based on the significance of the particular obstacle to any material entity, critical operation or core business line;
- Flexibility to deviate from assuming that all material entities fail. The guidance allows first-round filers to submit a plan that does not envision all material entities failing. In the case of a service company or other material entity that, in fact, is not likely to fail contemporaneously with the rest of the group, second- and third-round filers may want to pursue with the regulators whether it would be permissible not to assume failure of such entities if appropriate supporting analysis is provided; and
- Focus on critical operations and non-U.S. material entities. Filers should ensure that any designated critical operations receive proper emphasis in the plan, and that non-U.S. entities are sufficiently covered in material entity designations and interconnections analysis.

While it is possible that the guidance will apply to the 2014 submissions of second- and third-round filers, and this may influence decisions on the margins about the structure or content of 2013 submissions, it is premature to suggest that filers assume that all of the guidance's detailed requirements will apply to them next year. It is possible that the regulators will require more detailed information from first-round filers due to their greater size and complexity. In addition, the regulators' views may evolve over the coming months based on the initial 2013 submissions they review and the responses they receive to the guidance.

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Please feel free to address any questions to [Michael H. Krimminger](#), [Derek M. Bush](#) or [Katherine Mooney Carroll](#) in Washington D.C. (202-974-1500) or [Seth Grosshandler](#), [James L. Bromley](#), [Sean A. O'Neal](#), [Knox L. McIlwain](#) or [Melissa M. Ruth](#) in New York (212-225-2000); or any of your regular contacts at the firm.

NEW YORK

One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999

WASHINGTON

2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: +1 202 974 1500
F: +1 202 974 1999

PARIS

12, rue de Tilsitt
75008 Paris, France
T: +33 1 40 74 68 00
F: +33 1 40 74 68 88

BRUSSELS

Rue de la Loi 57
1040 Brussels, Belgium
T: +32 2 287 2000
F: +32 2 231 1661

LONDON

City Place House
55 Basinghall Street
London EC2V 5EH, England
T: +44 20 7614 2200
F: +44 20 7600 1698

MOSCOW

Cleary Gottlieb Steen & Hamilton LLC
Paveletskaya Square 2/3
Moscow, Russia 115054
T: +7 495 660 8500
F: +7 495 660 8505

FRANKFURT

Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

COLOGNE

Theodor-Heuss-Ring 9
50688 Cologne, Germany
T: +49 221 80040 0
F: +49 221 80040 199

ROME

Piazza di Spagna 15
00187 Rome, Italy
T: +39 06 69 52 21
F: +39 06 69 20 06 65

MILAN

Via San Paolo 7
20121 Milan, Italy
T: +39 02 72 60 81
F: +39 02 86 98 44 40

HONG KONG

Cleary Gottlieb Steen & Hamilton (Hong Kong)
Bank of China Tower, 39th Floor
One Garden Road
Hong Kong
T: +852 2521 4122
F: +852 2845 9026

BEIJING

Twin Towers – West (23rd Floor)
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
T: +86 10 5920 1000
F: +86 10 5879 3902

BUENOS AIRES

CGSH International Legal Services, LLP-
Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
Argentina
T: +54 11 5556 8900
F: +54 11 5556 8999

SÃO PAULO

Cleary Gottlieb Steen & Hamilton
Consultores em Direito Estrangeiro
Rua Funchal, 418, 13 Andar
São Paulo, SP Brazil 04551-060
T: +55 11 2196 7200
F: +55 11 2196 7299

ABU DHABI

Al Sila Tower, 27th Floor
Sowwah Square, PO Box 29920
Abu Dhabi, United Arab Emirates
T: +971 2 412 1700
F: +971 2 412 1899

SEOUL

Cleary Gottlieb Steen & Hamilton LLP
Foreign Legal Consultant Office
19F, Ferrum Tower
19, Eulji-ro 5-gil, Jung-gu
Seoul 100-210, Korea
T: +82 2 6353 8000
F: +82 2 6353 8099