

# ClientAlert

## Financial Markets Developments

Bank Advisory

April 2011

### Dodd-Frank Wall Street Reform and Consumer Protection Act: Board of Governors of the Federal Reserve System and Federal Deposit Insurance Corporation Jointly Propose Rules Regarding Resolution Plans and Credit Exposure Reports

On April 12, 2011, the Board of Governors of the Federal Reserve System (the "Board") and the Federal Deposit Insurance Corporation ("FDIC") issued a jointly proposed Notice of Proposed Rulemaking (the "Proposed Rules") intended to implement section 165(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") which requires each nonbank financial company supervised by the Board and each bank holding company with assets of US\$50 billion or more to report periodically to the Board, the FDIC and the Financial Stability Oversight Council (the "Council") (i) the plan of such company for rapid and orderly resolution in the event of material financial distress or failure (a "Resolution Plan"), and (ii) the nature and extent of credit exposures of such company to significant bank holding companies and significant nonbank financial companies and the nature and extent of the credit exposures of significant bank holding companies and significant nonbank financial companies to such company (a "Credit Exposure Report"). The Proposed Rules were approved by the FDIC on March 29, 2011. Comments on the Proposed Rules are due no later than June 10, 2011. The Proposed Rules are required to be finalized no later than January 22, 2012.

The Resolution Plan and Credit Exposure Report requirements are part of the additional regulations and reporting requirements, referred to as prudential standards imposed under the Dodd-Frank Act on companies that "could pose a threat to the financial stability of the United States."<sup>1</sup> The Resolution Plan requirement is intended to provide regulators with the ability to conduct advanced resolution planning for a company by requiring a company to prepare a strategic analysis of how it can be resolved under Title 11 of the Code (the "Bankruptcy Code") in a way that would not pose systemic risk to the financial system. The Credit Exposure Report requirements are intended to provide regulators with important information critical to ongoing risk management and advance planning processes by identifying the company's significant credit exposures and related key information across the entity and its related entities. *Most notably, the Proposed Rules make clear that the Resolution Plan requirement, i.e., the requirement of a plan for the "rapid and orderly resolution in the event of material distress or failure" of a Covered Company (defined below) is not limited to an orderly liquidation under the Bankruptcy Code but can also contemplate a reorganization of the Covered Company under the Bankruptcy Code.*

The Proposed Rules consist of the regulation itself along with the Board and FDIC's commentary thereto, and establish rules and requirements regarding the submission



If you have questions or comments regarding this Alert, please contact one of the lawyers listed below:

Linda Leali  
Associate, Miami  
+ 1 305 995 5285  
lleali@whitecase.com

Gerard Uzzi  
Partner, New York  
+ 1 212 819 8479  
guzzi@whitecase.com

Duane Wall  
Partner of Counsel, New York  
+ 1 212 819 8453  
dwall@whitecase.com

White & Case LLP  
1155 Avenue of the Americas  
New York, NY 10036  
United States  
+ 1 212 819 8200

<sup>1</sup> Dodd-Frank Act § 113(a)(1).

and content of a Resolution Plan and a Credit Exposure Report, along with procedures and standards for review of a Resolution Plan by the Board and the FDIC. Below is an overview of the key provisions of the Proposed Rules.

### Which “Covered Companies” Are Subject to the Proposed Rules?

■ **Covered Companies.** Included among the Covered Companies required to submit a Resolution Plan and Credit Exposure Report are the following:

- Nonbank financial companies supervised by the Board
- Bank holding companies with US\$50 billion or more in total consolidated assets, based on the *average of the company’s four most recent Consolidated Financial Statements for Bank Holding Companies as reported on the Federal Reserve’s FR Y-9C*
- 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<sup>2</sup> and that had US\$50 billion or more in total consolidated assets, based on the *foreign bank’s or company’s most recent annual report 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*<sup>3</sup>
- Title II bridge financial companies are excluded from the definition of Covered Company<sup>4</sup>

■ **Discretion to Raise Asset Thresholds.** The Board may raise the above asset thresholds pursuant to a recommendation of the Financial Stability Oversight Council established by section 111 of the Dodd-Frank Act (the “Council”)<sup>5</sup>.

### When Is a Resolution Plan Required to Be Submitted?

- **Timing.** Covered Companies are required to submit a Resolution Plan to the Board and the FDIC no later than 180 days after the effectiveness of the Proposed Rules or such later date that the company becomes a Covered Company.<sup>6</sup>
- **Updated Resolution Plan Required After Material Events.** Covered Companies are required to submit a revised Resolution Plan no later than 45 days after an event, occurrence, change in

conditions or circumstances or other change which results in, or could reasonably be foreseen to have, a material effect on the company’s Resolution Plan, except when this 45-day period would be within 90 days prior to the date on which the Covered Company is required to file an annual Resolution Plan.<sup>7</sup>

- **More Frequent Submissions or Extensions, Waivers.** The Board and the FDIC can (i) require more frequent reporting of a Resolution Plan; (ii) require submission of an interim report to any Resolution Plan; (iii) extend the deadline to submit a Resolution Plan; (iv) and/or waive the requirement to submit an update to a Resolution Plan.<sup>8</sup>

### Who Must Approve a Resolution Plan Prior to its Submission to the Board and the FDIC?

Prior to submission, Resolution Plans must be approved either by the Covered Company’s board of directors or, for non-US based companies only, a delegee acting under the express authority of the Covered Company’s board of directors. A delegee of the Covered Company’s board of directors may approve updates to a Resolution Plan.<sup>9</sup>

### What Are the Required Contents of a Resolution Plan?

In preparing its Resolution Plan, a Covered Company is required to take into account that the material financial distress or failure of the Covered Company may occur at a time when financial markets, or other significant companies, are also under stress and that the material financial distress of the Covered Company<sup>10</sup> may be the result of a range of stresses experienced by the Covered Company. Furthermore, the Covered Company’s Resolution Plan should not rely on the provision of extraordinary support by the United States or any other government to prevent the failure of the Covered Company.<sup>11</sup>

The Proposed Rules set forth certain minimum requirements for a Resolution Plan’s contents. These same informational requirements are imposed on both US and non-US Covered Companies, subject to certain derivations noted below for non-US Covered Companies. The FDIC and Board can jointly agree to exempt a Covered Company from any of the following Resolution Plan informational requirements summarized below.

---

2 12 USC. 3106(a).

3 Proposed Rule 2(d)(1).

4 Proposed Rule 2(d)(3).

5 Proposed Rule 2(d)(2).

6 Proposed Rule 3(a).

---

7 Proposed Rule 3(b).

8 Proposed Rule 3(c).

9 Proposed Rule 3(e).

10 Proposed Rule 4(a)(3)(i).

11 Proposed Rule 4(a)(3)(ii).

■ **Executive Summary.**<sup>12</sup> The Resolution Plan must include an executive summary that describes:

- The key elements of the Covered Company’s strategic plan for “rapid and orderly resolution”
  - (i) **“Rapid and orderly resolution”** for purposes of the Proposed Rules means a *reorganization or liquidation* of the Covered Company (or, for Foreign Covered Companies, the subsidiaries and operations of such foreign company that are domiciled in the United States) under the Bankruptcy Code that can be accomplished within a reasonable period of time and in a manner that substantially mitigates the risk that the failure of the Covered Company would have serious adverse effects on financial stability in the United States
- Material changes to any previously filed Resolution Plan or update thereto
- Any actions taken since the filing of any previous Resolution Plan to improve the effectiveness of or remediate or otherwise mitigate any material weaknesses or impediments to effective and timely execution of the Resolution Plan

■ **Strategic Analysis.**<sup>13</sup> The Resolution Plan is required to include a strategic analysis describing the Covered Company’s plan for “rapid and orderly resolution” in the event of material financial distress or failure of the Covered Company, which is required to include detailed descriptions of the following:

- Key assumptions and supporting analysis underlying the Resolution Plan, including any assumptions made concerning the economic or financial conditions that would be present at the time of the plan’s implementation
- Range of specific actions to be taken to facilitate a “rapid and orderly resolution” of the Covered Company and its material entities, and its critical operations and core business lines in the event of material financial distress or failure of the Covered Company
  - (i) **Material Entities** for purposes of the Proposed Rules means a subsidiary or foreign office of the Covered Company that is significant to the activities of a critical operation or core business line<sup>14</sup>
  - (ii) **Critical Operations** for purposes of the Proposed Rules means operations of the Covered Company, including associated services, functions and support, that in the view of the Covered Company or as jointly directed by the Board and the FDIC upon a failure of, or

discontinuance of, such operations, would likely result in a disruption to the US economy or financial markets<sup>15</sup>

- (iii) **Core Business Lines** for purposes of the Proposed Rules means business lines of the Covered Company, including associated operations, services, functions and support that, in the view of the Covered Company, upon failure, would result in a material loss of revenue, profit or franchise value<sup>16</sup>
- (iv) **Material financial distress** for purposes of the Proposed Rules occurs when one of the following conditions exists:
  - The Covered Company has incurred, or is likely to incur, losses that will deplete all or substantially all of its capital, and there is no reasonable prospect for the company to avoid such depletion
  - The assets of the Covered Company are, or are likely to be, less than its obligations to creditors and others
  - The Covered Company is, or is likely to be, unable to pay its obligations (other than those subject to a bona fide dispute) in the normal course of business<sup>17</sup>
- Funding, liquidity and capital needs of, and resources available to, the Covered Company and its material entities, which is required to be mapped to its critical operations and core business lines, in the ordinary course of business and in the event of material financial distress at or failure of the Covered Company
- Strategy for maintaining operations of, and funding for, the Covered Company and its material entities, which shall be mapped to its critical operations and core business lines
- Strategy in the event of a failure or discontinuation of a material entity, core business line or critical operation, and the actions that will be taken by the Covered Company to prevent or mitigate any adverse effects of such failure or discontinuation on the financial stability of the United States
- Strategy for ensuring that any insured depository institution subsidiary of the Covered Company will be adequately protected from risks arising from the activities of any nonbank subsidiaries of the Covered Company (other than those that are subsidiaries of an insured depository institution)
- Time period(s) to execute each material aspect and step of the Resolution Plan
- Potential material weaknesses or impediments to effective and timely execution of the plan

---

<sup>12</sup> Proposed Rule 4(b).

<sup>13</sup> Proposed Rule 4(c).

<sup>14</sup> Proposed Rule 2(i).

---

<sup>15</sup> Proposed Rule 2(e).

<sup>16</sup> Proposed Rule 2(b).

<sup>17</sup> Proposed Rule 2(j).

- Actions and steps the Covered Company has taken or proposes to take to remediate or otherwise mitigate the weaknesses or impediments identified, along with a timeline
  - Detailed description of the processes the Covered Company employs for:
    - (i) Determining current market values and marketability of its core business lines, critical operations and material asset holdings of the Covered Company
    - (ii) Assessing the feasibility of the Covered Company's plans (including timeframes) for executing any sales, divestitures, restructurings, recapitalizations or other similar actions contemplated in the Covered Company's Resolution Plan
    - (iii) Assessing the impact of any sales, divestitures, restructurings, recapitalizations or other similar actions on the value, funding and operations of the Covered Company, its material entities and critical operations and core business lines.
- **Information regarding corporate governance relating to resolution planning.**<sup>18</sup> The Resolution Plan is required to include a detailed description of the following:
- How resolution planning is integrated into the corporate governance structure and processes of the Covered Company
  - Internal policies, procedures and internal controls governing preparation and approval of the Covered Company's Resolution Plan
  - Identity and position of the senior management official(s) primarily responsible for overseeing the development, maintenance, implementation and filing of the Covered Company's Resolution Plan and compliance with the Proposed Rules
  - Nature, extent and frequency of reporting to senior executive officers and the board of directors of the Covered Company on the development, maintenance and implementation of the Covered Company's Resolution Plan
  - Description of the capabilities of the Covered Company's processes and systems to collect, maintain and report the information and other data underlying the Resolution Plan to senior executive officers and the board of directors of the Covered Company
  - Description of the nature, extent and results of any contingency planning or similar exercise conducted by the Covered Company since the date of the Covered Company's most recently filed Resolution Plan to assess the viability of or improve the Resolution Plan of the Covered Company
- Identification and description of the relevant risk measures used by the Covered Company to report credit risk exposures both internally to its senior management and board of directors, as well as any relevant risk measures reported externally to investors or to the Covered Company's appropriate Federal regulator
- **Organizational structure and related information.**<sup>19</sup> The Resolution Plan is required to include the following:
- Detailed description of the Covered Company's organizational structure, including:
    - (i) A hierarchical list of all material legal entities, including but not limited to material entities within the Covered Company's organization that:
      - Identifies the direct holder and the percentage of voting and nonvoting equity of each legal entity and foreign office listed; and the location, jurisdiction of incorporation, licensing and key management associated with each material legal entity and foreign office identified
    - (ii) A mapping of the Covered Company's critical operations and core business lines, including material asset holdings and liabilities related to such critical operations and core business lines, to material entities
  - An unconsolidated balance sheet for the Covered Company and a consolidating schedule for all entities subject to consolidation by the Covered Company
  - A description of the material components of the liabilities of the Covered Company, its material entities, its critical operations and core business lines that, at a minimum, separately identifies types and amounts of the short-term and long-term liabilities, the secured and unsecured liabilities and subordinated liabilities
  - An identification and description of the processes used by the Covered Company to:
    - (i) Determine to whom the Covered Company has pledged collateral
    - (ii) Identify the person or entity that holds such collateral
    - (iii) The jurisdiction in which the collateral is located and, if different, the jurisdiction in which the security interest in the collateral is enforceable against the Covered Company

---

<sup>18</sup> Proposed Rule 4(d).

---

<sup>19</sup> Proposed Rule 4(e).

- A description of any material off-balance sheet exposures (including guarantees and contractual obligations) of the Covered Company and its material entities, including a mapping to its critical operations and core business lines
  - A description of the practices of the Covered Company, its material entities and its core business lines related to the booking of trading and derivatives activities
  - An identification of material hedges of the Covered Company, its material entities and its core business lines related to trading and derivative activities, including a mapping to legal entity
  - A description of the hedging strategies of the Covered Company
  - A description of the process undertaken by the Covered Company to establish exposure limits
  - An identification of the major counterparties of the Covered Company and a description of the interconnections, interdependencies and relationships with such major counterparties
  - An analysis of whether the failure of each major counterparty would likely have an adverse impact on or result in the material financial distress or failure of the Covered Company
  - An identification of each system on which the Covered Company conducts a material number or value amount of trades, including mapping membership in each such system to the Covered Company's material entities and critical operations and core business lines
  - An identification of each payment, clearing or settlement-system of which the Covered Company, directly or indirectly, is a member and on which the Covered Company conducts a material number or value amount of transactions, including mapping membership in each such system to the Covered Company's material entities and critical operations and core business lines
- **Management information systems.**<sup>20</sup> Each Resolution Plan is required to include:
- A detailed inventory and description of the key management information systems and applications, including systems and applications for risk management, accounting and financial and regulatory reporting, used by the Covered Company and its material entities, including a mapping to its critical operations and core business lines
- An identification of the legal owner of the systems identified above, service-level agreements related thereto and any software and systems licenses or associated intellectual property, including a mapping thereof to the material entities and critical operations and core business lines of the Covered Company that use or rely on such intellectual property
  - An identification of the scope, content and frequency of the key internal reports that senior management of the Covered Company, its material entities and its critical operations and core business lines use to monitor the financial health, risks and operation of the Covered Company, its material entities, and its critical operations and core business lines
  - A description of the process for the appropriate supervisory or regulatory agencies to access the management information systems and applications identified.
- **Interconnections and interdependencies.**<sup>21</sup> A Covered Company is also required in its Resolution Plan, to the extent not elsewhere provided, to identify and map to the material entities the interconnections and interdependencies among the Covered Company and its material entities, and among the critical operations and core business lines of the Covered Company that, if disrupted, would materially affect the funding or operations of the Covered Company, its material entities, or its critical operations or core business lines. Such interconnections and interdependencies may include:
- Common or shared personnel, facilities or systems (including information technology platforms, management information systems, risk management systems, and accounting and recordkeeping systems)
  - Capital, funding or liquidity arrangements
  - Existing or contingent credit exposures
  - Cross-guarantee arrangements, cross-collateral arrangements, cross-default provisions and cross-affiliate netting agreements
  - Risk transfers
  - Service-level agreements
- **Supervisory and regulatory information.**<sup>22</sup> The Resolution Plan is required to contain:
- Identification (and contact information) for:
    - (i) Federal, state, or foreign agency or authority with supervisory authority or responsibility for ensuring the safety and soundness of the Covered Company, its material entities, critical operations and core business lines

---

<sup>20</sup> Proposed Rule 4(f).

<sup>21</sup> Proposed Rule 4(g).

<sup>22</sup> Proposed Rule 4(h).



(ii) Other Federal, state, or foreign agency or authority (other than a Federal banking agency) with significant supervisory or regulatory authority over the Covered Company, and its material entities and critical operations and core business lines

- Identification of (and contact information for) a foreign agency or authority responsible for resolving a foreign-based material entity and critical operations or core business lines of the Covered Company

■ **Contact information.**<sup>23</sup> The Resolution Plan is required to contain:

- Identification of a senior management official at the Covered Company responsible for serving as a point of contact regarding the Resolution Plan of the Covered Company
- Contact information for the material entities and critical operations and core business lines of the Covered Company

### Special Requirements for Foreign-Based Covered

**Companies.**<sup>24</sup> Foreign-based Covered Companies are required to include all the above information in their Resolution Plan with respect to subsidiaries, branches and agencies, and critical operations and core business lines, as applicable, that are domiciled in the United States or conducted in whole or in material part in the United States. In addition, their Resolution Plans should also:

- Identify, describe in detail and map to legal entity the interconnectedness and interdependencies among the US subsidiaries, branches and agencies, and critical operations and core business lines of the foreign-based Covered Company and any foreign-based affiliate.
- Provide information regarding how its US-based operations (in whole or in part) are integrated into the Covered Company's overall resolution or other contingency planning process.

### How Frequently Are Credit Exposure Reports Required to Be Submitted?

Under the Proposed Rules, a Covered Company is required to submit its Credit Exposure Report no later than 30 days after the end of each calendar quarter, subject to the right of the Board to require more frequent reporting or less reporting, to the Board and the FDIC.<sup>25</sup>

---

23 Proposed Rule 4(i).

24 Proposed Rule 4(a)(2).

25 Proposed Rule 5(a).

### What Are the Required Contents of the Credit Exposure Reports?

Covered Companies are required to include the following information in their Credit Exposure Reports, except that with respect to a company incorporated or organized in a country other than the United States (other than a bank holding company) or that is a foreign banking organization, the Credit Exposure Report is only required to include information relating to the subsidiaries, offices and operations that are domiciled in the United States.

■ The aggregate credit exposure associated with all extensions of credit, including loans, leases and funded lines of credit, by:

- The Covered Company and its subsidiaries to each significant company and its subsidiaries

- Significant company for purposes of the Proposed Rules includes a “significant nonbank financial company” or a “significant bank holding company.” Both of these terms are defined by reference to rules to be promulgated by the Board that were proposed by the Board on February 11, 2011.<sup>27</sup> Under these proposed rules, a “significant nonbank financial company” means (i) any nonbank financial company supervised by the Board and (ii) any other nonbank financial company that had US\$50 billion or more in total consolidated assets as of the end of its most recently completed fiscal year.<sup>28</sup> Furthermore, a “significant bank holding company” includes any bank holding company, or foreign bank that is treated as a bank holding company, that had US\$50 billion or more in total consolidated assets as of the end of the most recently completed calendar year (as reported by the bank holding company or foreign bank on the appropriate Federal Reserved form)<sup>29</sup>

- Each significant company and its subsidiaries to the Covered Company and its subsidiaries

■ The aggregate credit exposure associated with all committed but undrawn lines of credit by:

- The Covered Company and its subsidiaries to each significant company and its subsidiaries

- Each significant company and its subsidiaries to the Covered Company and its subsidiaries

---

26 See generally Proposed Rule 5.

27 See generally 12 CFR 225.

28 12 CFR 225.302(b).

29 12 CFR 225.302(c).

- The aggregate credit exposure associated with all deposits and money placements by:
  - The Covered Company and its subsidiaries with each significant company and its subsidiaries
  - Each significant company and its subsidiaries with the Covered Company and its subsidiaries
- The aggregate credit exposure associated with (on both a gross and net basis) all repurchase agreements between the Covered Company and its subsidiaries and each significant company and its subsidiaries
- The aggregate credit exposure associated with all reverse repurchase agreements (on both a gross and net basis) between the Covered Company and its subsidiaries and each significant company and its subsidiaries
- The aggregate credit exposure associated with all securities borrowing transactions (on both a gross and net basis) between the Covered Company and its subsidiaries and each significant company and its subsidiaries
- The aggregate credit exposure associated with all securities lending transactions (on both a gross and net basis) between the Covered Company and its subsidiaries and each significant company and its subsidiaries
- The aggregate credit exposure associated with all guarantees, acceptances or letters of credit (including endorsement or standby letters of credit) issued by:
  - The Covered Company and its subsidiaries on behalf of each significant company and its subsidiaries
  - Each significant company and its subsidiaries on behalf of the Covered Company and its subsidiaries
- The aggregate credit exposure associated with all purchases of or investments in, as of the last day of the reporting quarter, securities issued by each significant company or its subsidiaries by the Covered Company and its subsidiaries
- The aggregate credit exposure associated with all counterparty credit exposure (on both a gross and net basis) in connection with a derivatives transaction between the Covered Company and its subsidiaries and each significant company and its subsidiaries

- A description of the systems and processes that the Covered Company uses to:
  - Collect and aggregate the data underlying the Credit Exposure Report
  - Produce and file the Credit Exposure Report
- The credit exposure associated with intra-day credit extended by the Covered Company to each significant company and its subsidiaries during the prior quarter.
- Any other transactions that result in credit exposure between a Covered Company and its subsidiaries and each significant company and its subsidiaries that the Board, by order or regulation, determines to be appropriate.

## What Is the Process for Review of Resolution Plans and Deficient Resolution Plans?

### ■ Review of Resolution Plans.

- The Board and FDIC are required within 60 days of receiving a Resolution Plan: (i) to determine whether it satisfies the minimum information requirements discussed herein and (ii) either acknowledge acceptance of the plan for review or return it to the Covered Company if the Board and the FDIC jointly determine that it is incomplete or that substantial information is required to facilitate review of the plan.<sup>30</sup> In reviewing the Resolution Plans, the FDIC and the Board intend to take into account variances among companies in their core business lines, critical operations, foreign operations, capital structure, risk, complexity, financial activities (including the financial activities of their subsidiaries), size and other relevant factors
- The Covered Company is required to resubmit an informationally complete Resolution Plan or any additional information requested by the Board and the FDIC no later than 30 days after receiving the above notification, or other time jointly determined by the Board and the FDIC<sup>31</sup>

### ■ Deficient Resolution Plans.

- The Board and FDIC will *jointly* notify a Covered Company if the Resolution Plan submitted is determined not to be credible or would not facilitate an orderly resolution of the Covered Company under the Bankruptcy Code.<sup>32</sup>

---

<sup>30</sup> Proposed Rule 6(a)(1) and (2).

<sup>31</sup> Proposed Rule 6(a)(2)(ii).

<sup>32</sup> Proposed Rule 6(b).

- Subject to an extension request, upon receipt of such notice, the Covered Company has up to 90 days, unless otherwise determined by the Board and FDIC, to submit a revised Resolution Plan addressing the deficiencies, including any changes to the Covered Company's business operations and corporate structure that the Covered Company proposes to undertake to facilitate implementation of the revised Resolution Plan (including a timeline for the execution of such planned changes) and include an explanation as to why the revised Resolution Plan is credible and would result in an orderly resolution of the Covered Company under the Bankruptcy Code<sup>33</sup>

### What Are the Ramifications to a Covered Company for Failing to Cure Deficiencies Upon the Resubmission of a Resolution Plan?

If a Covered Company or any subsidiary (i) fails to submit a timely revised Resolution Plan or (ii) if the Board and FDIC jointly determines that a Revised Resolution Plan does not remedy identified deficiencies, *then the Covered Company may be subject to more stringent capital, leverage or liquidity requirements, or restrictions on the growth, activities or operations of the Covered Company or subsidiary* until such time that the Resolution Plan adequately remedies the identified deficiencies.<sup>34</sup>

- **Divestiture Possible.** By joint order, the Board and FDIC, in consultation with the Council, may direct the Covered Company to divest certain assets and operations if:
  - The Covered Company or its subsidiary are subject to more stringent capital, leverage or liquidity requirements, or restrictions on the growth, activities or operations of the Covered Company or subsidiary as noted above; **and**
  - The Covered Company fails to resubmit a revised Resolution Plan that remedies the above defects within a two-year period; **and**
  - The Board and FDIC jointly determine that the divestiture is necessary to facilitate an orderly resolution of the Company under the Bankruptcy Code in the event that the company fails<sup>35</sup>

---

33 Proposed Rule 6(c).

34 Proposed Rule 7(a) and (b).

35 Proposed Rule 7(c).

**Consultation Required.** The Board and FDIC are required to consult with each Council member who primarily supervises a regulated subsidiary or a depository institution subsidiary of the Covered Company prior to (i) issuing a notice of deficiency, (ii) determining to impose additional requirements or restrictions or (iii) issuing a divestiture order if such action is likely to have a significant impact on such entity.<sup>36</sup>

### Will the Resolution Plans Be Confidential?

Any Covered Company submitting a Resolution Plan or Credit Exposure Report can request that the information be kept confidential pursuant to the FDIC's Disclosure of Information Rules, the Board's Rules Regarding Availability of Information, and the Council's Rules of Organizations.<sup>37</sup>

### What Legal Impact Will the Resolution Plans Have Outside the Resolution Planning Context?

- **No Private Right of Action.** The Proposed Rules are not intended to create a private right of action based upon a Resolution Plan submitted or any action taken by the Board or FDIC with respect to any Resolution Plan submitted.<sup>38</sup>
- **No Binding Effect.** Resolution Plans will have no binding effect on any of a (i) Court or trustee in a proceeding commenced under the Bankruptcy Code; (ii) the FDIC as receiver under Title II of the Dodd-Frank Act; (iii) Title II bridge financial company established under the Dodd-Frank Act; **or** (iv) any other authority that is authorized or required to resolve a Covered Company (including any subsidiary or affiliate thereof) under any other provision of Federal, state or foreign law.<sup>39</sup>

---

36 Proposed Rule 8.

37 Proposed Rule 9(c).

38 Proposed Rule 9(b).

39 Proposed Rule 9(a).

---

This Client Alert is provided for your convenience and does not constitute legal advice. It is prepared for the general information of our clients and other interested persons. This Client Alert should not be acted upon in any specific situation without appropriate legal advice and it may include links to websites other than the White & Case website.

White & Case has no responsibility for any websites other than its own and does not endorse the information, content, presentation or accuracy, or make any warranty, express or implied, regarding any other website.

This Client Alert is protected by copyright. Material appearing herein may be reproduced or translated with appropriate credit.