

# Pratt's Journal of Bankruptcy Law

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# Agencies Adopt Final Guidance for Resolution Plans of Domestic and Foreign Triennial Full Filers

*By Derek M. Bush, Lisa M. Schweitzer, Lauren E. Semrad, Hugh C. Conroy, Jr., Brandon M. Hammer, Deborah North, Patrick Fuller, Richard C. Minott and Sean Kim Kwon\**

*In this article, the authors discuss final guidance for resolution plans adopted recently by the Federal Deposit Insurance Corporation and the Federal Reserve.*

The Federal Deposit Insurance Corporation (FDIC) and the Federal Reserve recently adopted final guidance for resolution plans submitted under Section 165(d) of the Dodd-Frank Act by certain large U.S. and foreign banking organizations (the Triennial Full Filers). The final guidance was adopted largely as proposed, with only a few material changes.

Resolution plan guidance for both domestic and foreign filers has been a work in progress since the passage of the Dodd-Frank Act, but it received increased attention following the March 2023 banking stress. The Agencies have introduced guidance for certain filers over the years, including final guidance following public notice and comment for U.S. G-SIBs who are biennial filers in 2019 and for certain large foreign banking organizations in 2020. The final guidance for domestic Triennial Full Filers is the first generally applicable guidance for non-G-SIB domestic large banking organizations, and the final guidance for foreign Triennial Full Filers updates and expands the application of the 2020 guidance.

Consistent with their prior commitment to endeavor to provide at least one year for firms to implement final guidance, the Agencies further extended the next 165(d) resolution plan submission deadline for Triennial Full Filers from March 31, 2025, to October 1, 2025, to provide sufficient time for firms to reflect the final guidance in their full resolution plans.

## OVERVIEW

On July 30, 2024, the Federal Deposit Insurance Corporation (the FDIC) finalized two sets of guidance for resolution plans under Section 165(d) of the Dodd-Frank Act (Final Guidance), which the FDIC developed jointly with the

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Board of Governors of the Federal Reserve System (the Federal Reserve, and together with the FDIC, the Agencies).<sup>1</sup> On August 5, 2024, the Federal Reserve issued the Final Guidance without an open meeting.<sup>2</sup> The first guidance addresses resolution plan submissions of domestic Triennial Full Filers (the Domestic Guidance),<sup>3</sup> and the second guidance addresses resolution plan submissions of foreign Triennial Full Filers (the Foreign Guidance).<sup>4</sup> The Domestic Guidance marks the first guidance for non-G-SIB domestic large banking organizations, and the Foreign Guidance supersedes and expands the application of the 2020 guidance for certain foreign banking organizations (FBO, and the guidance, the 2020 FBO Guidance).<sup>5</sup>

The FDIC and the Federal Reserve stated that the Final Guidance stemmed from the Agencies' review of 2021 resolution plans submitted by the Triennial Full Filers and the Agencies' experience with bank failures and the use of the systemic risk exception in 2023, drawing upon the existing 2019 guidance for U.S. G-SIBs (the 2019 U.S. G-SIB Guidance)<sup>6</sup> and 2020 FBO Guidance.

The Final Guidance describes the Agencies "expectations and priorities," and notes that it does not have the "force and effect of law," recognizing that the Agencies "may not take enforcement actions or issue findings based on this guidance." As a practical matter, most banking organizations subject to the Final Guidance will still endeavor to comply with all stated expectations, despite this disclaimer.

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<sup>1</sup> Guidance for Resolution Plan Submissions of Domestic Triennial Full Filers is available at <https://www.fdic.gov/system/files/2024-07/fr-guidance-for-resolution-plan-submissions-of-domestic-triennial-full-filers.pdf>. Guidance for Resolution Plan Submissions of Foreign Triennial Full Filers is available at <https://www.fdic.gov/system/files/2024-07/fr-guidance-for-resolution-plan-submissions-of-foreign-triennial-full-filers.pdf>.

<sup>2</sup> The Federal Reserve's press release is available at <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20240805a.htm>.

<sup>3</sup> <https://www.fdic.gov/system/files/2024-07/fr-guidance-for-resolution-plan-submissions-of-domestic-triennial-full-filers.pdf>.

<sup>4</sup> <https://www.fdic.gov/system/files/2024-07/fr-guidance-for-resolution-plan-submissions-of-foreign-triennial-full-filers.pdf>.

<sup>5</sup> <https://www.federalregister.gov/documents/2020/12/22/2020-28155/guidance-for-resolution-plan-submissions-of-certain-foreign-based-covered-companies>.

<sup>6</sup> <https://www.federalregister.gov/documents/2019/02/04/2019-00800/final-guidance-for-the-2019>.

## COVERED ENTITIES

The Final Guidance applies to all “Triennial Full Filers,” i.e., firms in Categories II and III (measured at the combined U.S. operations level for FBOs) under the Federal Reserve’s tailoring framework.

## EXTENDED RESOLUTION PLAN SUBMISSION TIMEFRAME

- The next resolution plan submission deadline for the Triennial Full Filers was originally July 1, 2024. The Agencies previously extended the deadline to March 31, 2025, to facilitate public comments on the proposed guidance,<sup>7</sup> and the Final Guidance further extends the deadline to October 1, 2025, to provide time for the Triennial Full Filers to reflect the expectations in their resolution plans. The FDIC clarified, however, that the following resolution plan for the Triennial Full Filers (which is a targeted resolution plan) would be due July 1, 2028 (as opposed to October 1, 2028), and future resolution plans would be due every three years after the 2028 deadline in an alternating schedule between targeted and full resolution plans.
- For any firm that becomes a Triennial Full Filer at a later date, the Final Guidance will apply to the firm’s next resolution plan submission with a submission date at least 12 months after the firm becomes a Triennial Full Filer. For any firm that ceases to be a Triennial Full Filer, the Final Guidance will no longer be applicable as of that date.

## EXPECTATIONS IN THE FINAL GUIDANCE

- The Final Guidance outlines several key areas and related expectations, including capital, liquidity, governance mechanisms, operational, legal entity rationalization and separability, and insured depository institution (IDI) resolution.
- The expectations for each topic are bifurcated for a single point of entry (SPOE) or multiple point of entry (MPOE) resolution strategy, which differs from the 2019 U.S. G-SIB Guidance and the 2020 FBO Guidance, each of which implicitly assume an SPOE resolution strategy.

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<sup>7</sup> Interagency Announcement, Agencies extend resolution plan submission deadline for some large financial institutions (Jan. 17, 2024), available at <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20240117a.htm>.



- The Domestic Guidance applicable to an SPOE strategy is generally based on the 2019 U.S. G-SIB Guidance.
- The Foreign Guidance applicable to an SPOE strategy is generally based on the 2020 FBO Guidance, with modifications (particularly with respect to capital, liquidity, governance and separability expectations) that generally increase stringency (other than with respect to the removal of derivatives and trading expectations).
- The Final Guidance applicable to an MPOE strategy is generally much more limited than that applicable to an SPOE strategy, with the exception of the addition of expectations around IDI resolution.

### KEY TAKEAWAYS

- *Timing Certainty.* After initially suggesting a possible “short” extension of the resolution plan deadline in the proposed guidance, subsequently providing an extension to March 31, 2025, in January 2024, and sending individual communications to firms in July 2024 stating that staff would recommend an extension to 12 months from finalization of the Final Guidance, the deadline for the next resolution plans of the Triennial Full Filers is likely to stick at October 1, 2025.
- *Unanimity Within the Agencies.* The FDIC and Federal Reserve have seen a number of split votes recently, including with respect to the FDIC’s recently finalized rules on IDI resolution planning. The unanimous vote to adopt the Final Guidance shows that there is broad agreement on the need to ensure strong resolution plans from the largest banking organizations after the March 2023 banking stress. While Vice Chairman Travis Hill and Governor Bowman both expressed some reservation about the Final Guidance, they each voted in favor of finalizing.
- *A Few Significant Changes From the Proposed Guidance.* The Final Guidance was adopted largely as proposed, but there were a few significant changes and clarifications made in response to the comments received on the proposed guidance, including clarification that there is no expectation for foreign firms to provide information about their home country resolution plan and strategy that the firm does not possess, elimination of the separability section for domestic Triennial Full Filers, clarifications around expectations related to operational shared services for firms electing an SPOE strategy and additional detail around the IDI resolution and least-cost analysis expectations for firms electing an MPOE strategy.

- *The Agencies Emphasize That There Is No Preferred Resolution Strategy.* While the Agencies have stated that they do not have a prescribed resolution strategy for any firm, some questioned whether the long-term debt proposal released alongside the proposed guidance, along with the robust expectations for an SPOE resolution strategy in the proposed guidance (including in the Domestic Guidance, where it is currently theoretical as all in-scope firms use an MPOE strategy) evidenced a regulatory preference for an SPOE resolution strategy for Triennial Full Filers. The Agencies emphasized in the Final Guidance that they do not have a preferred strategy, stating in the preamble to the Final Guidance that the Agencies “do not prescribe a specific resolution strategy for any firm” and that the guidance “does not suggest that any firm should change its resolution strategy, nor are the agencies identifying a preferred strategy for a specific firm or set of firms.” FDIC Chair Gruenberg stated that “[t]he attention paid to the [MPOE] strategy in developing this guidance should be understood as a clear statement that selection of the MPOE approach to resolution remains a viable option.” Whether the Agencies adhere to this agnosticism as between SPOE and MPOE strategies in practice remains to be seen.
- *Increased Focus on IDI Resolution.* In a direct response to the March 2023 banking stress, the Final Guidance includes expectations that firms with an MPOE strategy provide more detailed analysis of the resolution of any IDI subsidiary under the Federal Deposit Insurance Act. The interaction of these new expectations with the IDI resolution planning rule should be carefully considered, particularly with respect to any possible areas of overlap or inconsistency. In response to comments on the proposed guidance, the Agencies sought to provide more information on the least-cost analysis in the Final Guidance, including:
  - (i) Various common strategies to resolve an IDI in a manner consistent with the low-cost requirement while avoiding any reliance on extraordinary government support;
  - (ii) Information about calculation of the value of IDI assets and franchise value; and
  - (iii) Clarification that there is no expectation of a complete least-cost analysis under the Final Guidance.
- *Focus on Operational Readiness for Discount Window or FHLB Access.* The revisions to the allowed assumptions in the Final Guidance add the expectation that firms support any assumption of discount window or

Federal Home Loan Bank access with operational testing and placement of collateral, consistent with recent agency guidance on this topic.

- *Materially Increased Requirements for FBOs But Some Recognition of the Unique Application of Resolution Planning Requirements to the U.S. Operations.* In addition to expanding the scope of entities subject to the 2020 FBO Guidance, the Foreign Guidance adopts a number of more stringent expectations than the 2020 FBO Guidance, generally based on the proposed form of such guidance (as opposed to the final). In particular, the Foreign Guidance includes Resolution Capital Adequacy and Positioning and Resolution Liquidity Adequacy and Positioning expectations. However, in three instances, the Agencies, in response to comments, limited the extraterritorial scope of the Foreign Guidance.
  - Derivatives and Trading Activities: The Agencies requested comments on whether to include guidance on derivatives and trading activities in the Final Guidance, including questions with respect to applying such expectations to trades that are booked outside of the United States by foreign firms. The Agencies ultimately did not provide derivatives and trading activities guidance in either the Domestic Guidance or Foreign Guidance, noting that the Triennial Full Filers would have limited derivatives and trading operations as compared to the U.S. G-SIBs.
  - Interaction With Home Country Plan: In response to the comments arguing that FBOs may not have sufficient visibility into the global resolution plan and strategy, the Final Guidance clarifies that there is no expectation for foreign Triennial Full Filers to provide information they do not have.
  - Scope of Material Entity Definition: The Agencies clarified that they did not intend to expand the scope of the material entity definition in the Final Guidance on plan assumptions, and reversed changes to the Foreign Guidance that commenters viewed as introducing uncertainty about the extraterritorial scope of such definition.
- *Resolution Planning, Recovery Planning and Resolvability Continue to Be of Key Interest to Regulators.* To name a few examples in addition to the Final Guidance:
  - In April 2024, the FDIC released a report<sup>8</sup> on how U.S. G-SIBs

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<sup>8</sup> [https://www.fdic.gov/sites/default/files/2024-04/spapr1024b\\_0.pdf](https://www.fdic.gov/sites/default/files/2024-04/spapr1024b_0.pdf).

would be resolved under the FDIC's Orderly Liquidation Authority.

- o On June 20, 2024, the FDIC adopted a final rule<sup>9</sup> on resolution planning requirements for IDIs with total assets of \$50 billion or more, with greater requirements for those with total assets of \$100 billion or more.
- o On June 24, 2024, the Office of the Comptroller of the Currency requested comments on a proposal<sup>10</sup> that would update the Comptroller's enforceable guidelines for large bank recovery planning. The proposal responds<sup>11</sup> to the March 2023 banking stress and would:
  - (i) Expand the guidelines to include banks with at least \$100 billion in average total consolidated assets in addition to banks with at least \$250 billion in average total consolidated assets;
  - (ii) Require banks to test their recovery plans; and
  - (iii) Incorporate assessments of non-financial risk.
- o The Agencies issued the long-term debt proposal<sup>12</sup> for comment in August 2023, regarding a proposed requirement that certain large holding companies, U.S. intermediate holding companies of FBOs and IDIs issue and maintain outstanding a minimum amount of long-term debt (LTD). The LTD proposal has not yet been finalized and the Federal Reserve noted that it would address any resolution planning updates needed to reflect LTD requirements in connection with that rule.

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<sup>9</sup> <https://www.fdic.gov/system/files/2024-07/2024-06-20-notice-dis-a-fr.pdf>.

<sup>10</sup> <https://www.occ.gov/news-issuances/news-releases/2024/nr-occ-2024-69a.pdf>.

<sup>11</sup> <https://www.occ.gov/news-issuances/news-releases/2024/nr-occ-2024-69.html>.

<sup>12</sup> <https://www.federalregister.gov/documents/2023/09/19/2023-19265/long-term-debt-requirements-for-large-bank-holding-companies-certain-intermediate-holding-companies>.