ALERT MEMORANDUM

FDIC Adopts New Final Rule for IDI Resolution Plans

June 28, 2024

On June 20, 2024, in a divided 3-2 vote, the FDIC adopted a revamped rule setting forth resolution planning requirements for insured depository institutions with total assets of $50 billion or more, with greater requirements for those with total assets of $100 billion or more. The final rule increases the requirements that apply to such IDIs, implementing what the FDIC views as "lessons learned" since the original 2012 resolution plan rule, particularly during the bank failures of last year. The final rule was generally adopted as proposed, but there were a few key changes, namely in relation to the timing of required plan filings and FDIC review and feedback.

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Resolution plan requirements for IDIs in the United States have not followed a linear path. In the past decade, the FDIC requirements have gone through a number of iterations based on the FDIC's experiences with resolution plan submissions, as well as changes in presidential administration. Among other developments, in 2018, the FDIC issued a moratorium on the original 2012 resolution plan rule before lifting the moratorium in 2021 in order to apply, via policy statement, certain requirements to IDIs with over $100 billion in total assets. The final rule supersedes the FDIC's original 2012 rule and all subsequent guidance.

The first resolution plans under the final rule will be due sometime after June 30, 2025, with individual IDIs receiving notice from the FDIC of their specific submission dates. This Memorandum provides key takeaways from the final rule.

Overview

On June 20, 2024, the Federal Deposit Insurance Corporation (the "**FDIC**") adopted a final rule (the "**Final Rule**") setting forth resolution plan requirements for insured depository institutions ("**IDIs**") with over $50 billion in total assets ("**Covered IDIs**" or "**CIDIs**"). The Final Rule supersedes both the FDIC's original 2012 rule (the "**2012 Rule**") requiring resolution plans for IDIs with more than $50 billion in total assets as well as any prior IDI-level resolution planning guidance. In response to comments received, the Final Rule also includes several amendments to the proposed rule issued in August 2023 (the "**Proposed Rule**").

Which CIDIs must file resolution plans, and how frequently?

— Under the Final Rule, CIDIs are divided into two groups based on the size of their total assets.

- CIDIs with more than $100 billion in total assets ("**Group A CIDIs**") are required to submit resolution plans ("**Group A Resolution Plans**").
  - Group A CIDIs affiliated with U.S. globally systemic important banking organizations, or "**U.S. GSIBs**", are required to submit resolution plans every two years. According to the FDIC, there are currently nine IDIs in this category.
  - Other Group A CIDIs are required to submit resolution plans every three years. There are currently 24 IDIs in this category.
- CIDIs with at least $50 billion but less than $100 billion in total assets ("**Group B CIDIs**") are required to submit "informational filings" ("**Group B Informational Filings**") every three years. There are currently 12 IDIs in this category.

— Most CIDIs must also submit an "**Interim Supplement**" *each year* that they are not required to file Group A Resolution Plans or Group B Informational Filings.

- The Interim Supplement represents a pared down version of the regular resolution planning requirements.
- Group A CIDIs affiliated with U.S. GSIBs follow a two-year filing cycle and should generally be exempt from the Interim Supplement filing requirement.

When are the first filings due?

— **For Group A CIDIs that *are* associated with U.S. GSIBs:** the FDIC has stated that these CIDIs will file their first Group A Resolution Plans in 2026. This will allow for coordination with the submission cycle for their parent organizations' holding-company level resolution plans (Dodd-Frank Act Resolution Plans, or "**DFA Plans**"). DFA Plans for U.S. GSIBs are next due in 2025.

— **For Group A CIDIs that are *not* associated with U.S. GSIBs:** submissions will be due on June 30, 2025 at the earliest. The Final Rule provides for at least 270 days after the rule's effective date (October 1, 2024) before a Group A CIDI submission is due, and the FDIC will provide written notice to individual IDIs of their submission dates.

- The FDIC has indicated that it expects to require some Group A CIDIs to file full Group A CIDI Resolution Plans and others to file Interim Supplements for this first submission cycle.

— **Group B CIDIs** will be given at least one year from the effective date of the Final Rule for the first submission of Informational Filings. Consequently, the first Group B Informational Filings would be due in October 2025 at the earliest.

What are the content requirements for Group A Resolution Plans, Group B Informational Filings and Interim Supplements?

— **Group A Resolution Plans** must provide a comprehensive "identified strategy" from the point of failure to either liquidation or return to the private sector. Such strategy is expected to use a bridge bank, unless another strategy is specifically justified by the CIDI. The strategy cannot be a closing weekend sale to one or more acquirers.

- The Final Rule provides more specific requirements for the failure scenario than the 2012 Rule does, including: the assumption that the CIDI's failure will take place in severely adverse economic conditions (instead of having severely adverse economic conditions be only one potential scenario), that the CIDI must be experiencing material financial stress, and that any U.S. parent company must be in bankruptcy proceedings. The FDIC may change this failure scenario or provide CIDI-specific assumptions in the future.
- Other informational content requirements are often consistent with the 2012 Rule and guidance, but in some instances have been expanded (e.g., with respect to organizational structure, cross-border activities and deposit structure), and the level of detail that the Final Rule requires from filers is considerable compared to the 2012 Rule. In addition, most of the content requirements that were exempted through the 2021 policy statement (either for all CIDIs or certain CIDIs) have been added back.

— **Group B Informational Filings** are not as limited as they sound. The Group B Informational Filings must include all of the content requirements as Group A Resolution Plans other than (i) an identified resolution strategy (and relatedly, a failure scenario), (ii) an executive summary, (iii) certain information related to franchise components and (iv) information about a CIDI's capabilities to provide valuations related to the FDIC's least-cost determinations.

— **Interim Supplements** must contain a subset of the information required to be in Group A Resolution Plans and Group B Informational Filings. Filers also must either describe material changes to the content required by the Interim Supplement since the last full plan was filed or affirm that there have been no such changes. Filers also must describe the material changes that have resulted from an "extraordinary event" (e.g., a merger that results in a fundamental change to the CIDI's organizational structure).

What else does the Final Rule require?

— **Engagement with the FDIC**: The FDIC expects to actively engage with CIDIs in the FDIC's review of CIDI resolution plans. Under the Final Rule, CIDIs are required to provide the FDIC with necessary information, including access to personnel.

— **Capabilities testing**: Under the Final Rule, the FDIC can require a CIDI to test the capabilities that it describes in its resolution plan. While the Final Rule does not contain a specific list of capabilities requirements, the preamble asserts that these "can reasonably be inferred" from the content requirements of the resolution submission. The preamble provides several examples of this. Among others: "a requirement to map information clearly implies expectation of a mapping capability; and requirements to identify key depositors, critical services support, or key personnel require the capabilities to support that identification."

— For both engagement and capabilities testing, the Final Rule does not provide a set cadence or notice period, but the FDIC will provide CIDIs with timely notice and coordinate around scheduling considerations like other scheduled exams. While the FDIC expects that engagement or capabilities testing will take place no more than once during a two- or three-year submission cycle, it also reserves the right to do so more frequently.

How does the FDIC evaluate resolution plan submissions?

— The FDIC will evaluate Group A Resolution Plans and Group B Informational Filings under a new credibility standard.

- For both types of submissions, the submission must be "supported with observable and verifiable capabilities and data and reasonable projections."
- For Group A Resolution Plans (as only Group A CIDIs need to specify an identified resolution strategy), the identified resolution strategy must "provide timely access to insured deposits, maximize value from the sale or disposition of assets, minimize any losses realized by creditors of the CIDI in resolution, and address potential risk of adverse effects on U.S. economic conditions or financial stability."

— The FDIC will review each Group A Resolution Plan and Group B Information Filing and, in doing so, consult with the CIDI's appropriate Federal banking agency as well as its parent. If the FDIC determines that the submission is not credible, it will issue to the CIDI a notice of each "material weakness" that led to this determination and provide the CIDI with 90 days to address the material weakness and resubmit the filing. If the CIDI cannot do this, the FDIC may pursue an enforcement action.

- The Final Rule's reference to potential enforcement actions is notable, as the 2012 Rule does not explicitly include this as an outcome of the FDIC's review process.

— The FDIC also may make a "significant finding" in connection with a submission. A "significant finding" is a weakness in the submission that is not as serious as a "material weakness", but if it is not addressed before or in the next Group A Resolution Plan or Group B Informational Filing, it may be deemed a material weakness.

— In the preamble, the FDIC indicates that it will aim to give feedback on significant findings and material weaknesses within one year of the submission of the Group A Resolution Plan or Group B Informational Filing. The FDIC also may give informal feedback to filers based on their submissions. The FDIC has further indicated that, to the extent it has any other feedback that may affect a Group A Resolution Plan or a Group B Informational Filing – as an example of where this feedback may arise, the FDIC cites observations stemming from its engagements with CIDIs – it will give the CIDI at least 270 days of notice.

What are some changes from the Proposed Rule?

The Final Rule is generally consistent with the Proposed Rule, with several notable changes.

— **Frequency of submissions:** Under the Proposed Rule, all CIDIs would have been required to submit Group A Resolution Plans or Group B Informational Filings on a two-year cycle. In the Final Rule, the submission frequency has been changed to a three-year cycle, other than for Group A CIDIs that are affiliated with U.S. GSIBs, which will follow a two-year cycle.

- In the preamble, the FDIC suggests that these changes create more time for Group A CIDIs in general to receive feedback and engagement while aligning the submission cycle for affiliates of U.S. GSIBs with the submission cycle for their parent organizations' holding company-level resolution plans (Dodd-Frank Act Resolution Plans, or "**DFA Plans**"). As U.S. GSIBs would submit DFA Plans and Group A Resolution Plans in alternate years, and the FDIC would receive the DFA Plans, such IDIs are exempt from the Interim Supplement requirement.

— **Approach to feedback:** In response to a comment, the FDIC has established the concept of "significant findings" as a middle ground of feedback between informal feedback and a "material weakness" determination (which would require immediate action from the filer). The feedback structure for DFA Plans is similar.

  • The Proposed Rule had explicitly linked a CIDI's failure to comply with engagement and capabilities testing with potential enforcement, but the Final Rule removes this language, stating that "the resolution planning process benefits from ongoing communication between the FDIC and CIDIs, and an interactive and iterative process to improve full resolution submissions and the FDIC's resolution readiness." Like the Proposed Rule, however, the Final Rule contains a general enforcement provision that is applicable to all elements of the rule.

— **Reporting of "extraordinary events":** Under the Final Rule, all CIDIs must notify the FDIC of an "extraordinary event" and its effects on resolvability within 45 days of the event's occurrence. An "extraordinary event" is an occurrence such as a merger or acquisition (or other change) that results in a "fundamental change to the CIDI's organizational structure, core business lines, size, or complexity." This requirement replaces the Proposed Rule's requirement for a CIDI to report "material changes" within 45 days, as the FDIC agreed with comments expressing concerns that reporting any "material changes" within the timeframe could result in the overbroad reporting of information. The "material change" concept in the Proposed Rule would have cast a much broader net with respect to the types of information that must be included, including scoping in "a change in the CIDI's capabilities described in the resolution submission."

What are some key takeaways?

— *Long in the works, but influenced by the March banking stress*: The work on the Proposed Rule and the Final Rule long predates the March 2023 banking stress, but has clearly been influenced by the FDIC's experience resolving Silicon Valley Bank, Signature Bank and First Republic Bank (e.g., with respect to the default strategy for Group A CIDIs being the use of a bridge depository institution, the increased focus on deposit activities and the emphasis on data room capabilities). In recent years, the FDIC placed a 2018 moratorium on IDI resolution planning pending further rulemaking, published an advanced notice of proposed rulemaking, lifted the 2018 moratorium and then tailored the current IDI resolution plan rules through a 2021 statement that applies to certain filers. The Final Rule replaces all current guidance and policy statements and aggregates IDI resolution planning requirements in one location.

— *Dissent within the FDIC:* Both Directors Hill and McKernan voted against the Final Rule, as they did with the Proposed Rule. Among other reasons, Director McKernan argued that the Final Rule goes "far beyond [the] lessons" of March 2023, and states that he "generally support[s] shifting our focus more toward firm engagement and away from increasingly detailed plan submissions."

— *Significant undertaking for the FDIC:* The cadence of CIDI resolution plan submissions – particularly combined with the Interim Supplements and the FDIC's commitment to engagement and capabilities testing under the Final Rule, not to mention its role in reviewing DFA Plans – means that the FDIC is undertaking an ambitious work program relating to resolution planning in the coming years.

— *Significant undertaking for filers*: The Final Rule's requirements for resolution plan content (and related obligations, such as engagement and capabilities testing) impose expanded obligations on Group A CIDIs and Group B CIDIs.

  • Indeed, the Proposed Rule received several comments that the new requirements would be overly burdensome.

- In addition, in practice, CIDIs other than those associated with U.S. GSIBs will have some type of IDI resolution-related filing each year.
- For Group B CIDIs, this burden is exacerbated by the fact that the 2018 moratorium on IDI resolution plans had not been lifted for Group B and therefore, they will be required to file with the FDIC for the first time in over five years.

— *Emphasis on capabilities testing*: The FDIC envisions actively testing the capabilities that a CIDI's resolution plan suggests that the CIDI would have in resolution. One criticism that is sometimes leveled at resolution planning requirements is that, while resolution plans provide a high volume of information, they may be of limited practical utility in an actual resolution scenario. The emphasis on capabilities testing may be a way to bridge that gap and builds upon the 2021 policy statement's focus on such capabilities.

— *The first of the August 2023 proposals to be finalized:* The Proposed Rule was released in August 2023 alongside (i) proposed guidance for DFA Plans for certain foreign banking organizations and certain domestic banking organizations (these were joint proposals with the Federal Reserve) and (ii) proposed long-term debt requirements for certain bank holding companies and IDIs (this was a joint proposal with the Federal Reserve and the Office of the Comptroller of the Currency). These other proposals have yet to be finalized, and unlike the Final Rule, would need to be finalized on an interagency basis.

— *Resolution planning, recovery planning and resolvability continue to be of key interest to regulators.* To name a few examples:

- In April 2024, the FDIC released a report on how U.S. GSIBs would be resolved under the FDIC's Orderly Liquidation Authority.
- On June 24, 2024, the Office of the Comptroller of the Currency requested comments on a proposal that would update the Comptroller's enforceable guidelines for large bank recovery planning. The proposal responds 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. The agency will accept comments within 30 days of the rule's publication in the Federal Register (pending).
- In late June 2024, the U.S. GSIBs received feedback from the FDIC and the Federal Reserve on their 2023 DFA Plans, and the feedback letters from those agencies also focused on these institutions' operational capabilities to execute their resolution strategies, which is consistent with the Final Rule's emphasis on capabilities testing.
- The previously mentioned long-term debt and DFA Plan guidance proposals remain outstanding.

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