November 30, 2023

Ann E. Misback, Secretary
Attention: Docket No. OP–1816
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551

James P. Sheesley, Assistant Executive Secretary
Attention: Comments-RIN 3064–ZA37
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Re: Guidance for Resolution Plan Submissions of Domestic Triennial Full Filers; Board Docket No. OP–1816; FDIC RIN 3064–ZA37; 88 FR 64626 (Sep. 19, 2023)

Dear Ladies and Gentlemen:

Better Markets[1] appreciates the opportunity to comment on the above-captioned guidance ("Proposal") issued by the Board of Governors of the Federal Reserve System ("Fed"), and the Federal Deposit Insurance Corporation ("FDIC") (collectively, "the Agencies").[2] The Proposal sets forth the Agencies' expectations for resolution plans submitted under Section 165(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") by Category II and III banking organizations[3] with domestic operations only that are required to submit a resolution plan every three years ("domestic triennial full filers" or "covered firms").

The Proposal describes the Agencies' expectations for resolution plan content, based on reviews of the plans that covered firms submitted in 2021. Those submissions had several

[1] Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies – including many in finance – to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans' jobs, savings, retirements, and more.

[2] Guidance for Resolution Plan Submissions of Domestic Triennial Full Filers, Board Docket No. OP–1816, FDIC RIN 3064–ZA37, 88 FED. REG. 64626 (Sept. 19, 2023), https://www.federalregister.gov/documents/2023/09/19/2023-19267/guidance-for-resolution-plan-submissions-of-domestic-triennial-full-filers.

[3] Category II and III banking organizations generally have more than $700 billion in total assets but are not considered global systemically important bank holding companies ("GSIBs"). Category III banking organizations generally have between $250 billion and $700 billion in total assets. 12 CFR § 252.5, Categorization of banking organizations, https://www.ecfr.gov/current/title-12/section-252.5.

deficiencies, including inconsistent information on critical plan elements and excessively optimistic assumptions for the financial resources that would be available to a covered firm and its ability to access financial assistance at the time of bankruptcy. Furthermore, even though Silicon Valley Bank ("SVB"), Signature Bank, and First Republic Bank were not required to file resolution plans under section 165(d) of the Dodd-Frank Act and the current rule, the Agencies' experience with these failures and their implications for financial stability and systemic risk motivated and informed this Proposal.

We support several aspects of the Proposal, but also urge the Agencies to make some necessary and meaningful changes to strengthen it before finalization. First and most importantly, the proposed guidance should be changed to a legally enforceable rule, wherever practicable. The covered firms that are subject to this Proposal are large enough and pose a severe enough threat to the financial system that their resolution planning must be enforceable. Additionally, the full resolution plans should be updated more frequently than the proposed three-year cycle, and expectations should be better aligned for both single point of entry ("SPOE") and multiple point of entry ("MPOE") filers. Finally, we agree that there may not be clarity on key aspects in time for incorporation in the next scheduled filings that are due July 1, 2024. Therefore, we support a one-time extension for the 2024 filers to allow for the inclusion of new and modified components resulting from this Proposal, with the goal of improving resolution planning and preparedness at covered firms as soon as possible.

BACKGROUND

At its core, the Dodd-Frank Act's objective was to eliminate too-big-to-fail and the need for taxpayer-funded bailouts. The large bank failures that occurred in the spring of 2023 demonstrated, among other things, that resolution planning by the banks themselves and the Agencies' process for assessing these plans both need improvement. Clearly, too-big-to-fail is alive and well.[4] Large and systemically important banks need more capital to improve their financial resilience during times of stress and support lending.[5] They also must engage in more

[4] *See, e.g.*, Dennis Kelleher & Frank Medina, *Ending Too-Big-to-Fail by Breathing Life into "Living Wills"* (Jan. 2016), https://bettermarkets.org/wp-content/uploads/2021/07/Breathing-Life-Into-Living-Wills_0.pdf; *see also* Better Markets, *Banking Regulators' Pre-Thanksgiving Announcement Passing Living Wills for the Largest Banks Shows Some Progress but Falls Well Short of Addressing Too-Big-To-Fail* (Nov. 23, 2022), https://bettermarkets.org/newsroom/banking-regulators-pre-thanksgiving-announcement-passing-living-wills-for-the-largest-banks-shows-some-progress-but-falls-well-short-of-addressing-too-big-to-fail/; Better Markets, *The Too Big to Fail Problem Is Alive, Well and Getting Worse: Presentation to a Financial Stability Board* (Sept. 16, 2019), https://bettermarkets.org/sites/default/files/documents/Better_Markets_Too-Big-To-Fail_FSB_Conference-9-16-2019.pdf; Better Markets, *Can Too Big To Fail Be Ended? And, If So, How?* (Sept. 13, 2023), https://bettermarkets.org/analysis/15th-anniversary-lehman-collapse-conference/.

[5] *See e.g.*, Dennis Kelleher, *Well-Capitalized Banks Are Good For Everyone, Except Wall Street CEOs*, AM. BANKER (Aug. 9, 2023), https://www.americanbanker.com/opinion/well-capitalized-banks-are-good-for-everyone-except-wall-street-ceos; *see also* Better Markets, *Fact Sheet: Ten False Claims About Bank Capital* (July 25, 2023), https://bettermarkets.org/wp-content/uploads/2023/07/Better_Markets_Capital_Fact_Sheet-7.25.23.pdf; Board of Governors of the Federal Reserve System, *Capital Supports Lending* (Oct. 9, 2023), https://www.federalreserve.gov/newsevents/speech/barr20231009a.htm; Federal Deposit Insurance Corporation, *Remarks by Chairman Martin J. Gruenberg on the Basel III Endgame at the Peterson Institute for International Economics* (June 22, 2023), https://www.fdic.gov/news/speeches/2023/spjun2223.html.

robust resolution planning and preparation to protect the financial system and taxpayers from the burden of more and more bailouts.

Recent crisis periods have demonstrated that the larger and more complex a failing bank is, the more problematic its failure can be. Not only are there fewer potential acquirers that have the financial capability and size to take on the deposits and other operations of large banks, but large banks are also often much more intertwined with the broader financial system. Acting Comptroller of the Currency Michael Hsu highlighted this problem in advance at a speech in 2022 with his comment that, "if a large regional bank were to fail today, the only viable option would be to sell it to one of the [global systemically important banks] GSIBs."[6] Large banks also commonly have a wide range of complex activities, in addition to traditional banking operations. Technological advancements and new communication channels have complicated and challenged the FDIC's execution of a smooth resolution process. As demonstrated in spring 2023, social media messages can reach millions of users instantaneously and can contribute to rapid deposit outflows and loss of franchise value. Ultimately, that can contribute significantly to the likelihood and speed of a bank's failure. To be successful, the resolution of a large bank requires significant, careful, and comprehensive preparation ***before problems arise*** if a bank has any chance of being successfully resolved without sparking widespread financial instability.

The Dodd-Frank Act's[7] requirement for large bank holding companies to develop "living wills" that would guide a financial institution's failure through a bankruptcy proceeding, similar to other businesses in America, was intended to address this problem.[8] While the filing of resolution plans is legally required by Section 165(d) of the Dodd-Frank Act, the specific content of these plans and other details such as their frequency is not specified in the Act. The Agencies have issued guidance to U.S. GSIBs[9] and certain large foreign banking organizations that are triennial full filers,[10] but they have not done so for domestic triennial full filers that are covered by this Proposal. Therefore, this Proposal fills an important gap by providing clear expectations to these covered firms.

---

6 Acting Comptroller Michael Hsu, Office of the Comptroller of the Currency, *Financial Stability and Large Bank Resolvability* (Apr. 1, 2022), https://www.occ.gov/news-issuances/speeches/2022/pub-speech-2022-33.pdf.

7 12 U.S.C. 5365(d), https://www.govinfo.gov/link/uscode/12/5365.

8 *See, e.g.*, Kelleher & Medina, *Ending Too-Big-to-Fail by Breathing Life into "Living Wills"*, *supra* note 4.

9 Guidance for § 165(d) Resolution Plan Submissions by Domestic Covered Companies Applicable to the Eight Largest, Complex U.S. Banking Organizations, 84 FED. REG. 1438 (Feb. 4, 2019), https://www.federalregister.gov/documents/2019/02/04/2019-00800/final-guidance-for-the-2019.

10 Guidance for Resolution Plan Submissions of Certain Foreign-Based Covered Companies, 85 FED. REG. 83557 (Dec. 22, 2020), https://www.federalregister.gov/documents/2020/12/22/2020-28155/guidance-for-resolution-plan-submissions-of-certain-foreign-based-covered-companies.

SUMMARY OF THE PROPOSAL

The Proposal provides guidance to covered firms on resolution plans that will be submitted in 2024 and beyond. It covers a range of topic areas that the Agencies believe would be important to a covered firm's resolution strategy, including:

- **Capital**: The ability of the covered firm to provide capital to all material entities to maintain operations in bankruptcy, which is known as resolution capital adequacy and positioning ("RCAP") and expectations regarding a methodology for periodically estimating the amount of capital that may be needed to support each material entity after the bankruptcy, known as resolution capital execution need ("RCEN").

- **Liquidity**: The ability of the covered firm to measure the stand-alone liquidity position of each material entity and ensure that liquidity is available to meet deficits in bankruptcy, known as resolution liquidity adequacy and positioning ("RLAP"), and reliably estimate and meet liquidity needs prior to and in resolution, known as resolution liquidity execution need ("RLEN").

- **Governance Mechanisms**: The ability of the covered firm to inform boards of directors and senior management of critical information on a timely basis and implement methods and strategies that achieve timely execution of the pre-determined resolution strategy, including an assessment of potential legal challenges that could be brought against the firm and defenses or mitigants to these challenges.

- **Operational**: The ability of the covered firm to successfully continue key functions without disrupting financial stability, including payment, clearing, and settlement; managing, identifying, and valuing collateral; managing information systems; and continuing shared and outsourced services.

- **Legal Entity Rationalization & Separability**: The ability of the covered firm to plan and arrange its legal entities and business lines such that it documents and has a complete understanding of services and operations, to facilitate the potential sale or transfer of material entities during periods of stress.

- **Insured Depository Institution ("IDI") Resolution**: The ability of the covered firm to implement a strategy to sell or transfer the IDI's assets and deposit liabilities to one or more other entities without negatively impacting economic conditions or financial stability. As

described earlier, the FDIC currently has a separate rule[11] as well as a proposed rule[12] with specific informational expectations for IDI resolution planning.

- **Derivatives and Trading Activities**: The ability of the covered firm to stabilize and control the risk within the derivatives and trading portfolios without disrupting financial markets.

For each area, the Proposal provides instructions for information that covered firms should include in a resolution plan. The Agencies do not state a preference for a specific resolution strategy; instead, they outline different expectations for submissions in each component area based on whether the firm has selected an SPOE or MPOE strategy. As we explain in detail later in this letter, expectations for firms that select an MPOE strategy are lacking in some areas. We recommend that the expectations for firms that select an MPOE strategy be better aligned with those for firms that select an SPOE strategy.

Finally, the Proposal explains that the Agencies want the covered firms' 2024 resolution plans to include the components in the proposed guidance and to consider lessons learned from the 2023 bank failures. The 2024 plans are due on July 1, which may not allow covered firms adequate time to adjust plan submissions after the guidance is finalized. The Agencies are therefore considering a short extension for the 2024 plan submissions, not to exceed one year after the proposed guidance is published in final form. We support this extension and recommend that it be 6 months in length.

This Proposal is one of several current proposals on the resolution process that are being considered and on which the banking regulatory agencies have requested comment. The Fed and FDIC have a complementary proposal regarding the process and expectations for resolution plans for banking organizations with parent companies located in other countries.[13] Better Markets has addressed this proposal in a separate comment letter.[14] The FDIC also has a proposed rule related

---

[11] 12 CFR 360.10, Resolution Plans Required for Insured Depository Institutions With $50 Billion or More in Total Assets, https://www.ecfr.gov/current/title-12/section-360.10.

[12] *Resolution Plans Required for Insured Depository Institutions With $100 Billion or More in Total Assets; Informational Filings Required for Insured Depository Institutions With at Least $50 Billion But Less Than $100 Billion in Total Assets*, 88 FED. REG. 64579, FDIC RIN 3064–AF90 (Sept. 19, 2023), https://www.federalregister.gov/documents/2023/09/19/2023-19266/resolution-plans-required-for-insured-depository-institutions-with-100-billion-or-more-in-total.

[13] Guidance for Resolution Plan Submissions of Foreign Triennial Full Filers, Board Docket No. OP–1817, FDIC RIN 3064–ZA38, 88 FED. REG. 64641 (Sept. 19, 2023), https://www.federalregister.gov/documents/2023/09/19/2023-19268/guidance-for-resolution-plan-submissions-of-foreign-triennial-full-filers.

[14] Better Markets Comment Letter, *Guidance for Resolution Plan Submissions of Foreign Triennial Full Filers* (Nov. 30, 2023), https://bettermarkets.org/wp-content/uploads/2023/11/Better_Markets_Comment_Letter_Guidance_Resolution_Plan_Submissions_Foreign_Triennial_Full_Filers.pdf.

to insured depository institution resolution plans,[15] which Better Markets has addressed in a separate comment letter.[16]

SUMMARY OF COMMENTS

We applaud the Agencies' efforts with the Proposal, as it provides much needed-clarity and transparency on expectations for resolution plans. We are pleased to see that some of the comments that we provided in response to the advanced notice of proposed rulemaking were incorporated.[17] In particular, we explained in prior comments that there should be guidance on the separability of material entities, which is now part of the Proposal.

However, several aspects of the Proposal must be improved to achieve the desired financial stability outcomes in the event of the failure of a covered firm. Our specific comments are summarized as follows:

- As much of the Proposal as practicable should be incorporated in rules, not continued as guidance, so that it is legally binding and enforceable. In 2018, the federal banking regulators issued a joint statement on guidance that undermined the effectiveness of banking supervision and highlighted the limited authority supporting supervisory guidance. This was made into a rule in 2021, further weakening the important role that guidance should play in the supervision process.[18] Given the Agencies' recent focus on weakening the role of guidance; the importance of resolution planning; and the size, scope, and financial stability implications that are involved, guidance is simply inadequate.

- The frequency of resolution plan submissions should be increased. The banking regulators have emphasized that having current information in a resolution plan is critical to a plan's success. Furthermore, the covered firms that will create resolution plans guided by the expectations in this Proposal are large and interconnected within the financial system. The risk that these firms present to the financial system, economy, and American people, and the likelihood that components of the plans could materially change within three years, requires a schedule of more frequent updates. The growth and increased risk profile at both Lehman Brothers ("Lehman") and SVB, for example, in the years leading up to their failures clearly illustrate how quickly large banks can change. Therefore, we believe that an update once every two years would be reasonable and prudent and would also align with

---

15 *Supra* note 12.

16 Better Markets Comment Letter, *Resolution Plans Required for Insured Depository Institutions With $100 Billion or More in Total Assets; Informational Filings Required for Insured Depository Institutions With at Least $50 Billion But Less Than $100 Billion in Total Assets* (Nov. 30, 2023), https://bettermarkets.org/wp-content/uploads/2023/11/Better_Markets_Comment_Letter_FDIC_Resolution_Plans.pdf.

17 Better Markets Comment Letter, *Advance Notice of Proposed Rulemaking and Request for Comment Regarding Resolution-Related Resource Requirements for Large Banking Organizations* (Jan. 23, 2023), https://bettermarkets.org/wp-content/uploads/2023/01/Better_Markets_Comment_Letter_Resolution_Related_Resource_Requirements_Large_Banking_Organizations.pdf.

18 Board of Governors of the Federal Reserve System, *Role of Supervisory Guidance*, 86 FED. REG. 18173 (Apr. 8, 2021), https://www.federalregister.gov/documents/2021/04/08/2021-07146/role-of-supervisory-guidance.

the FDIC's proposed two-year cycle for updates to IDI resolution plans. The Agencies should also consider key information for which even more frequent updates are needed.

- The transparency of resolution plans must be increased by making more elements public. Currently, the public versions of resolution plans are sparsely populated and generally provide less information than already-public 10-K or quarterly Call reports. By increasing public disclosure, financial market participants and the American public will have the information required to exert appropriate market discipline on CIDIs and independently assess the regulators' determination of plan credibility. In particular, we recommend increased public disclosure on resolution plans related to potential acquirers. This advance planning would reduce the reliance on GSIB acquisitions, especially in situations with unexpectedly short preparation times such as SVB.

- The Agencies should reconsider expectations for covered firms that select an MPOE strategy and align them with expectations for firms that select an SPOE strategy. For some components of the resolution plans—specifically, capital and governance mechanisms—the Proposal does not provide expectations for covered firms that select an MPOE strategy. We disagree with this approach. The Dodd-Frank Act states that the resolution plans shall facilitate a rapid and orderly resolution of the covered firm, without distinguishing between MPOE and SPOE scenarios. It is not prudent or in the best interest of financial stability to simply assume that material entities within a holding company structure can be discontinued in a failure situation, especially if the failure occurs during a period of distress in the broader economy or financial system and be orderly. At a minimum, capital and governance mechanisms are needed for each material entity to preserve its value until it can be sold or closed in an orderly way. Therefore, we recommend that the Agencies reconsider the assumptions underlying the Proposal and align the expectations both for SPOE and MPOE firms for ***each plan component***. Additionally, we urge that direction be developed by the Agencies for derivatives and trading activity ***at both SPOE and MPOE firms***.

- The Agencies should develop an independent committee to advise and support resolution efforts. A resolution planning advisory committee could consist of bankruptcy scholars, lawyers, and judges who provide valuable expertise and guidance, complementing the expertise at the Agencies to enhance and strengthen the resolution planning process.

- The submission date for covered firms' 2024 resolution plans should be extended to 6 months after the Proposal's finalization date. We support honoring the process for plan development and allowing a reasonable time for submission after finalization, but this must also be balanced with the need for plans to be completed in a timely manner to support financial stability. Six months is therefore preferable to the 12 months under consideration.

COMMENTS

I. AS MUCH OF THE PROPOSAL AS PRACTICABLE SHOULD BE INCORPORATED IN RULES, NOT CONTINUED AS GUIDANCE, SO THAT IT IS LEGALLY BINDING AND ENFORCEABLE.

In 2021, the federal banking regulators—at the urging of the banking industry—adopted a final rule that sought to clarify the distinctions between rules and guidance. In the process, that rule severely undermined the value of supervisory guidance by providing that it can only be used to "advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power" and does not create binding legal obligations.[19] Better Markets strongly opposed that final rule, stating that it would "make it more difficult for bank supervisors to hold banks—including the largest banks, which can pose a direct threat to financial stability and the economic wellbeing of the public when badly managed—accountable for dangerous practices, poor management, and ineffective oversight by bank boards of directors."[20] In fact, these concerns materialized in the supervisory actions that preceded the failure of SVB. As detailed in the Fed's review of supervision and regulation at SVB, the delays and lack of action by supervisors are directly attributed to the shift in supervisory culture following the adoption of the "principle that supervisory guidance does not have the force and effect of law."[21]

For this Proposal, considering the size, scope, and financial stability implications that are involved, guidance is simply inadequate, particularly now that the value of guidance has been explicitly undermined by the Agencies. The concerns that Better Markets expressed during the comment period for the rule on the role of supervisory guidance are directly applicable to resolution plans. These plans are vitally important and consequential for the protection of the American people and financial stability. Supervisory processes for promoting credible and workable resolution plans through assessments of banks' practices have been weakened when they are framed in guidance. Consequently, the contents of firms' resolution plans, and the expectations of the Agencies for resolution preparedness, should be implemented as a rule, so that it will be legally binding and enforceable.

II. THE FREQUENCY OF RESOLUTION PLAN SUBMISSIONS SHOULD BE INCREASED.

Currently, covered firms are required to submit a resolution plan to the Fed and FDIC once every three years. The content of these documents alternates between a "full" resolution plan in

---

19 *Id*.

20 Better Markets Comment Letter, *Role of Supervisory Guidance, Notice of Proposed Rulemaking* (Jan. 4, 2021), https://bettermarkets.org/wp-content/uploads/2021/07/Better-Markets-Comment-Letter-on-Notice-of-Proposed-Rulemaking-Role-of-Supervisory-Guidance.pdf.

21 Board of Governors of the Federal Reserve System, *Review of the Federal Reserve's Supervision and Regulation of Silicon Valley Bank* 35–36 (Apr. 2023), https://www.federalreserve.gov/publications/files/svb-review-20230428.pdf.

one three-year cycle and a "targeted" resolution plan, containing less information, in the next three-year cycle. In other words, covered firms only file a full resolution plan ***once every six years***.

We recommend that at a minimum the filing cycle be increased to once every two years, alternating between a full resolution plan in one two-year cycle and a reduced "targeted" resolution plan in the next two-year cycle. This would match the current FDIC proposal for resolution plans for covered insured depository institutions with $50 billion in total assets or more. In addition, the agencies should undertake an evaluation of key information that is needed even more frequently, such as annually, to maximize the usefulness of the resolution plans, and modify the expectations accordingly.

Clearly, current information in a resolution plan is essential. The covered firms creating resolution plans are large and interconnected, and it is critical that these plans be as up to date as possible. Furthermore, given the often-rapid pace of growth and change at covered firms, information that is at least three years old (and could be up to six years old) is almost presumptively useless to the Agencies in the event of a resolution.

To illustrate, the Fed's Office of the Inspector General ("OIG")[22] detailed how SVB's asset size ***doubled twice*** in just a 5-year period, growing from about $50 billion in 2018 to more than $100 billion in 2020, and exceeded $200 billion in 2022. SVB's concentrations of funding and investments also increased rapidly, including a more than 400 percent jump in the bank's securities portfolio. While the OIG's report focused on ineffective day-to-day management of new activities, growth, and increasing complexity, it also clearly shows a need for updated assessments of the implications of SVB's rapid change for its resolution plan. Similarly, Lehman[23] grew rapidly and significantly in just a few years prior to its failure, aggressively expanding into new and risky business lines and relying on unstable short-term funding sources – all factors that should certainly be included in a resolution plan but could be missed with longer filing cycles.

III. THE TRANSPARENCY OF RESOLUTION PLANS MUST BE INCREASED BY MAKING MORE ELEMENTS PUBLIC.

In addition to providing critical information to the FDIC, the resolution planning process serves an important function of contributing to public confidence in the health of the banking system. However, the current public versions of resolution plans[24] are very sparsely populated and generally provide less information than already-public 10-K or quarterly Call reports.

---

22 Office of Inspector General Board of Governors of the Federal Reserve System, *Material Loss Review of Silicon Valley Bank* (Sept. 25, 2023), https://oig.federalreserve.gov/reports/board-material-loss-review-silicon-valley-bank-sep2023.pdf.

23 Rosalind Z. Wiggins, Thomas Piontek & Andrew Metrick, *The Lehman Brothers Bankruptcy A: Overview*, Yale Program on Financial Stability Case Study 2014-3A-V1, YALE SCHOOL OF MANAGEMENT (Oct. 1, 2014), https://ssrn.com/abstract=2588531.

24 FDIC and Financial Regulatory Reform – Title I and IDI Resolution Plans, https://www.fdic.gov/resources/resolutions/resolution-authority/resplans/index.html.

By increasing public disclosure, financial market participants and the American public will have the information required to exert appropriate market discipline on firms. Academics and former government officials have made similar recommendations to make living wills public. For example, economists at the Federal Reserve Bank of New York state,

> By collecting and publicly revealing elements of these ["living wills"], regulators are likely to have a marked effect on information production and security prices. Market participants will have an increased ability to understand the losses they potentially face if their borrowers and counterparties fail—and thus will have an increased incentive to push for changes that make the firm less likely to fail in the first place.[25]

Former FDIC Vice Chairman Tom Hoenig also supported making living wills public.[26] Increased transparency would give all market participants an opportunity to be informed and as a result increase financial stability.

We also recommend increased public disclosure related to covered firms' plans for a viable resolution strategy, including a description of potential acquirers. The Proposal accurately states that the group of potential acquirers becomes smaller as the size of an IDI increases. Furthermore, potential market concentrations and antitrust concerns, operational complexities, and the need to maintain the continuity of banking activities that are critical to financial stability can all complicate the resolution process and limit the pool of viable acquirers. Therefore, it is critical that the covered firms provide enough detail to clarify the robustness of their resolution plan so that a default to a GSIB acquisition is not assumed.

IV. THE AGENCIES SHOULD RECONSIDER EXPECTATIONS FOR COVERED FIRMS THAT SELECT AN MPOE STRATEGY AND ALIGN THESE WITH EXPECTATIONS FOR COVERED FIRMS THAT SELECT AN SPOE STRATEGY.

For each component within a firm's resolution plan, the Proposal provides specific expectations for firms that select an SPOE strategy and for firms that select an MPOE strategy. In several cases, however, the expectations for firms that select an MPOE strategy are considerably lighter or nonexistent. We believe that this approach is misguided and not aligned with the overall goal of having credible resolution plans that support financial stability. The Dodd-Frank Act specifically states that resolution plans shall result in a rapid and orderly resolution for the covered firms. With the current Proposal, it appears that the Agencies are favoring the MPOE strategy over the SPOE strategy with lighter requirements, which are often also less costly for the firm. Indeed,

---

[25] Hamid Mehran & Lindsay Mollineaux, *Corporate Governance of Financial Institutions*, Federal Reserve Bank of New York Staff Report no. 539 (Jan. 2012), http://www.newyorkfed.org/research/staff_reports/sr539.pdf.

[26] Mayra Rodriguez Valladares, *Living Wills Still Alive for Regulators*, NY TIMES DEALBOOK (Nov. 6, 2014), http://dealbook.nytimes.com/2014/11/06/living-wills-still-alive-for-regulators/.

every covered firm that submitted a resolution plan in 2021 selected an MPOE strategy.

We urge the Agencies to reconsider their assumptions about the limited disruptions that will be caused by the closure of a covered firms' material entities using an MPOE strategy and better align expectations for SPOE firms with ***each plan component*** of MPOE firms. For example:

- **Capital**: The Proposal contains several expectations related to RCAP and RCEN for firms that select an SPOE strategy. However, for firms selecting an MPOE strategy, the Proposal states, "The agencies do not propose issuing guidance on this topic to firms whose Plans contemplate a MPOE resolution strategy." The reason given for a lack of guidance for MPOE firms is that an "MPOE strategy assumes most material entities do not continue as going concerns upon entry into resolution." However, we believe that is not prudent to assume that entities within a holding company structure can simply be immediately discontinued as going concerns in a failure situation with no capital support without causing harm to the economy and financial system, especially if the failure occurs during a period of distress in the broader economy or financial system.

- **Governance Mechanisms**: The Proposal contains several expectations related to Playbooks and Triggers as well as Pre-Bankruptcy Parent Support for SPOE firms. However, for firms selecting an MPOE strategy, the Proposal states, "The agencies do not propose issuing guidance on this topic to firms whose Plans utilize a MPOE resolution strategy." The reason given for the lack of guidance is that "entry of many types of material entities, including IDIs, into resolution would be determined by criteria prescribed in statute or dependent to some extent on actions taken by regulatory authorities in implementing a statute." While it may be true that the governance of entities that are sold is guided by other statutes, information should still be required to be included in the resolution plan so that it can be evaluated for completeness and accuracy, and to maintain order during the transition period.

Regarding **Derivatives and Trading Activities**, the Proposal states that covered firms engage in less activity than U.S. GSIBs, which we agree is generally true at this time. The Proposal states that guidance similar to that which is applicable for U.S. GSIBs may be adopted for firms that select an SPOE strategy. However, for firms that select an MPOE strategy, it states that the Agencies do not anticipate providing any guidance. While covered firms' exposure to derivatives and trading activity is currently low, it may not stay low in the future. Therefore, irrespective of whether a firm elects an SPOE or MPOE strategy, the Agencies should include an expectation that resolution plans contain an orderly wind-down analysis if the net derivative position exceeds a threshold amount, with the goal of maintaining stability and public confidence.

V. THE AGENCIES SHOULD DEVELOP AN INDEPENDENT COMMITTEE TO ADVISE AND SUPPORT RESOLUTION EFFORTS.

As Better Markets has proposed in prior work,[27] the Agencies should consider developing a resolution planning advisory committee consisting of independent bankruptcy scholars, lawyers, and judges to provide expertise and guidance to enhance and strengthen the resolution planning process. This committee would not replace the responsibilities and expertise at the Agencies; instead, it would complement and strengthen it.

Similar to the FDIC's other advisory committees[28] focusing on key areas such as economic inclusion, community banking, systemic risk, and state regulations, an advisory committee on resolution would make the resolution plan assessment process more robust. In turn, this would increase the credibility of and public confidence in the plans themselves.

VI. THE SUBMISSION DATE FOR COVERED FIRMS' 2024 RESOLUTION PLANS SHOULD BE EXTENDED TO 6 MONTHS AFTER THE PROPOSAL'S FINALIZATION DATE.

The current due date for the next set of resolution plans for covered firms is July 1, 2024. While it is crucial for the Agencies to receive and be able to assess resolution plans for all covered firms, we believe that the expectations provided in this Proposal represent significant changes and improvements relative to the current state and therefore we support allowing a reasonable time for submission of 2024 plans after the Proposal becomes final.

We believe that six months after the Proposal becomes final is a reasonable time for this extension, balancing the need for plans to be completed in a timely manner to support financial stability and the need for firms to prepare any new information.

An extension of any more than six months is excessive for multiple reasons. Most, if not all, covered firms have submitted resolution plans in the past and received feedback, so this process is not new, and firms are not starting from scratch with their resolution plans. In addition, this Proposal is public information, so covered firms that desire to prepare ahead of time for changes can assess the Proposal and begin to work on any additions that may be necessary in the next plan.

---

[27] Kelleher & Medina, *Ending Too-Big-to-Fail by Breathing Life into "Living Wills"*, *supra* note 4.

[28] FDIC Advisory Committees, https://www.fdic.gov/about/advisory-committees/.

CONCLUSION

We hope these comments are helpful for finalizing the Proposal.

Sincerely,

Dennis Kelleher
Co-founder, President and CEO

Better Markets, Inc.
2000 Pennsylvania Avenue, NW
Suite 4008
Washington, DC 20006
(202) 618-6464
dkelleher@bettermarkets.org
http://www.bettermarkets.org