News Bulletin

July 2, 2012

Living Wills: The First Submissions

Last Friday, June 29, 2012, the Federal Deposit Insurance Corporation (the "FDIC") and the Federal Reserve Board (the "Board") announced the process for their receipt and review of the first wave of resolution plans to be provided by nine of the largest banking organizations operating in the United States. These plans are due today, July 2, 2012.

Ultimately, all U.S. and foreign banking organizations with total consolidated assets of $50 billion or more will be required to file such plans (or, as they are popularly known, living wills). According to the regulators, 124 banking institutions in total are subject to the living will requirements. The governing regulation places these organizations into three groups, each with a different deadline: (i) those with $250 billion or more in total nonbank assets, which are subject to the July 2, 2012, deadline; (ii) those with $100 billion or more but less than $250 billion in total nonbank assets, which are subject to the July 1, 2013 ; and (iii) those with $50 billion or more but less than $100 billion in nonbank assets, which must file by December 31, 2013. The FDIC and the Board have the authority to re-assign banking organizations to different tiers; we understand anecdotally that one group 1 organization may have been moved to group 2. Nonbank financial institutions designated as systemically important by the Financial Stability Oversight Council (the "Council") will also be required to submit resolution plans, but the Council has not yet made any designations. For more on the required substance of a living will and the submission process, please refer to our user guide issued in November 2011, which may be accessed at http://www.mofo.com/files/Uploads/Images/110905-Living-Wills.pdf.

The process identified by the FDIC and the Board largely repeats the schedule set forth in the regulation: the two agencies will have 60 days after submission to determine whether a filer must provide additional information, and the agencies will then review each plan for compliance with the requirements of the regulation.

Living wills must include both confidential and public portions. The agencies will make the public portions available on Tuesday, July 3, 2012. These public portions will have to balance two competing instructions from the regulators: that there be a "high level" discussion of resolution strategy and that the discussion describe how particular material entities and core business lines may be sold off and to whom. The public portions may be valuable in at least two respects:

- Because the plans presumably are the results of discussions between the banks and the agencies, the public portions should reflect the agencies' views on the management of a distressed institution and the optimal form of a resolution by the bank itself.

- The regulation designs the plans in part to provide a roadmap for the FDIC about how it might deal with a bank that is placed in receivership under the Orderly Liquidation Authority ("OLA"). The FDIC has recently suggested that its role will be limited to acting as receiver for the top-tier

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holding company and managing the liquidity of operating subsidiaries to support their continued operations. This approach would differ from a traditional liquidation. The public portions of the plans may suggest the preferential approach in an OLA receivership.

Two items relating to the living will process still require clarification or finalization. First, in addition to the living wills that will be filed at the holding company level, the FDIC requires separate living wills from insured depository institutions with $50 billion or more in consolidated assets. Such plans appear to be due at the same time as the holding company-level plans, i.e., according to the same groupings used for holding companies, but the FDIC has been silent about the submission or review process for the bank-level plans. Since some banking organizations move from their originally assigned tier 1, their subsidiary banks have presumably made (or will make) the corresponding moves. Second, the Dodd-Frank Act calls for credit exposure reports as a companion to living wills; the federal banking agencies have not completed rulemaking on this issue.

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