

FDIC final resolution planning rule increases requirements on large insured depository institutions

By Kathryn Wellman, Esq., Moore & Van Allen PLLC

AUGUST 12, 2024

On June 20, 2024, the Federal Deposit Insurance Corporation (**FDIC**) issued a final rule (**Final Rule**) which will significantly increase the resolution planning requirements under 12 CFR § 360.10 on covered insured depository institutions with \$50 billion or more in total assets (**CIDIs**).

The Final Rule responds to the FDIC's experience in the 2023 bank failures and is largely unchanged from the FDIC's September 2023 proposal (**Proposed Rule**), with limited revisions to the frequency and required content of submissions. The few changes and FDIC's responses to comments received on the Proposed Rule indicate it is preserving the flexibility to further develop its resolution planning expectations based on its review of submissions beginning in 2025 and engagement with CIDIs.

Background

Since 2012, CIDIs have been subject to the FDIC's rule requiring periodic submission of resolution plans that provide information on how they could be resolved in an orderly and timely manner under an FDIC receivership. Many of the current group of CIDIs with assets at or above \$50 billion and under \$100 billion (**Group B CIDIs**) have never submitted a plan, as this category has been subject to a moratorium on resolution plan submissions since November 2018.

CIDIs with \$100 billion or more in total assets (**Group A CIDIs**) have been submitting plans every three years under a June 2021 policy statement by the FDIC (**2021 Policy Statement**) that also exempted Group A CIDIs from certain requirements under the 2012 rule.

As detailed below, the Final Rule lifts the moratorium on Group B CIDIs' submissions, increases the frequency of Group A CIDIs' submissions, codifies certain exemptions in the 2021 Policy Statement, and imposes additional requirements intended to mitigate the challenges the FDIC faced in the 2023 bank failures.

Submissions every year for most CIDIs and every other year for affiliates of U.S. GSIBs

Through a rotating cycle of full and interim submissions, CIDIs other than affiliates of U.S. Globally Systemically Important Banks (**U.S. GSIBs**) will be required under the Final Rule to provide information to the FDIC at least annually. U.S. GSIBs will be subject to a less frequent cadence of every other year consisting exclusively of full submissions.

Full plans and informational filings: The Proposed Rule would have established an every-other-year cycle for Group A CIDIs to submit full resolution plans and Group B CIDIs to submit informational filings including certain content required from Group A CIDIs.

The Final Rule responds to the FDIC's experience in the 2023 bank failures and is largely unchanged from the FDIC's September 2023 proposal, with limited revisions to the frequency and required content of submissions.

The FDIC reverted the timing to every three years for most CIDIs in the Final Rule, with only CIDI affiliates of the U.S. GSIBs now required to file every other year. Submissions by these CIDIs will fall in the year between the resolution plan submissions by their top-tier holding companies under section 165(d) of the Dodd-Frank Act (**165(d) Plan**).

Interim supplements: All CIDIs, other than CIDI affiliates of U.S. GSIBs, also must submit a limited interim supplement, focused on specific quantitative information required by the rule, in the years in which they do not make a full plan submission or informational filing.

Notice of extraordinary events: The FDIC retained the requirement from the Proposed Rule for CIDIs to notify it within 45 days of certain events in between full and interim submissions but changed the triggering event standard from a "material change" to an "extraordinary event," covering material mergers and similar transactions and changes, in response to comments requesting alignment with the rule covering 165(d) Plans.

Significant informational requirements for all CIDIs

While Group A CIDIs bear the heavier burden under the Final Rule, all CIDIs must include wide-ranging information on the CIDI and its capabilities in their full submissions and interim supplements.

Franchise components: Most notably, all CIDIs must submit information on currently separable franchise components that are marketable in a timely manner in resolution. Franchise components,

a concept introduced in the 2021 Policy Statement, are specific business segments, regional branch networks, major assets, material asset portfolios, or other key components of a CIDI's franchise that could be separated from the CIDI in stress.

While the required information for Group A CIDs is largely unchanged from the Proposed Rule, the FDIC eliminated in the Final Rule requirements for Group B CIDs to identify prospective bidders and describe their marketing capabilities, key assumptions underlying each divestiture, and significant obstacles to execution.

While Group A CIDs bear the heavier burden under the Final Rule, all CIDs must include wide-ranging information on the CIDI and its capabilities in their full submissions and interim supplements.

The Final Rule also eliminates the Proposed Rule's requirement for all CIDs to demonstrate capabilities to ensure franchise components are separable in resolution, focusing instead on whether they are currently separable, but adds a requirement for capabilities demonstrating separability of the IDI franchise as a whole.

Qualified financial contracts: The Final Rule replaces the current rule's Trading, derivatives and hedges subpart with a broader requirement to provide information about a CIDI's qualified financial contracts (**QFCs**). The FDIC declined to exempt any CIDs from this requirement based on the size of their portfolio, indicating in the Proposed Rule that this information would help it make decisions regarding transferring QFCs to a bridge depository institution (**BDI**).

This focus comes as the FDIC and Federal Reserve recently found weaknesses in certain 2023 165(d) Plans related to capabilities for unwinding derivatives, which Ed Ivey of Moore & Van Allen commented (<https://bit.ly/4fkysAt>) to American Banker suggests the regulators are looking for banks to show a broader approach and/or options in resolution than transferring the entire (or majority) of the book of derivatives to a BDI. "Derivatives pose thorny problem for banks, regulators in resolution plans," American Banker, June 25, 2024.

More onerous requirements on Group A CIDs

While most of the content requirements apply equally to all CIDs, there are a few limited to Group A CIDs.

Specification of identified strategy: Group A CIDs are required to include an identified resolution strategy in their full plan filings, with the default strategy being the establishment and stabilization of a BDI and strategy for exit.

The strategy must also include "meaningful optionality," meaning it is flexible enough to react to a change in the failure scenario or unexpected obstacles. Notably, the strategy cannot be based on a sale of substantially all assets and liabilities over resolution weekend, which the 2023 bank failures proved could be difficult to accomplish given the size and complexity of those banks and the limited universe of potential acquirers.

Failure scenarios and valuation analysis: The Final Rule codifies the exemptions under the 2021 Policy Statement to (i) limit the failure scenario to be addressed to severely adverse economic conditions alone and (ii) eliminate the requirement to demonstrate the identified strategy is the least costly to the Deposit Insurance Fund.

However, Group A CIDs still must describe their valuation analysis and include in an appendix a range of quantitative estimates of value. The FDIC clarified in response to comments that it will focus in assessing valuations on whether the analysis is comprehensive, supported by data, and capable of being refreshed in a timely manner, as well as whether the CIDI's assumptions and approaches are reasonable.

Expanded credibility criteria and enforcement power

The Final Rule adopts the Proposed Rule's two-pronged credibility standard unchanged. The second prong incorporates the current standard focused on whether there is reasonable and verifiable support for the CIDI's full submission and adds a ground if the CIDI does not materially comply with any of the content requirements. The first prong adds an alternate basis for the FDIC to find a lack of credibility for Group A CIDs only, based on the sufficiency of the CIDI's identified strategy.

The Final Rule adds a distinction between a material weakness and a significant finding, with a material weakness being an aspect of the submission that does not meet the credibility criteria and a significant finding being a weakness or gap that raises questions about the submission's credibility.

CIDs will generally have 90 days to submit a revised full resolution submission in response to a material weakness, while the FDIC may require a project plan from the CIDI to address a significant finding. A CIDI's failure to timely or adequately address a material weakness may lead to enforcement action.

Increased engagement and capabilities testing

The provisions of the Proposed Rule related to engagement and capabilities testing are also largely unchanged in the Final Rule. The FDIC may require testing by the CIDI of any capability covered by the rule, rather than only the capability to produce underlying information and data promptly, as was required under the 2021 Policy Statement.

Although the FDIC declined to provide a list of expected capabilities in the Final Rule, it referred CIDs to the rule's requirements of key elements that must be supported by capabilities, as well as to the Proposed Rule's preamble for context on capability expectations that "can reasonably be inferred," such as mapping capabilities.

The FDIC indicated it expects to conduct engagement and capabilities testing concurrently with its review of full resolution submissions, across a cohort of CIDs, and at least once in every three-year cycle for most Group B CIDs.

Specific enforcement authority covering engagement and capabilities testing was removed in the Final Rule, with the FDIC indicating it would rely on the rule's overall enforcement provision.

About the author



Kathryn Wellman, financial regulatory advice and response member at Moore & Van Allen PLLC, represents clients in government investigations and regulatory compliance matters. She manages large-scale regulatory compliance projects for financial institutions, including those related to development of state and federal law inventories, LIBOR transition, recovery and resolution planning, and compliance with global shareholding related requirements. She is based in Charlotte, North Carolina, and can be reached at katewellman@mvalaw.com.

This article was first published on Reuters Legal News and Westlaw Today on August 12, 2024.