BANK POLICY INSTITUTE

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Via Electronic Mail

Board of Governors of the Federal Reserve System 20th Street and Constitution Avenue, NW Washington, D.C. 20551 Attention: Ann E. Misback, Esq., Secretary Docket No. OP-1614	Federal Deposit Insurance Corporation 550 17th Street NW Washington D.C. 20429 Attention: Robert E. Feldman, Executive Secretary

Re: **Resolution Planning Guidance for Eight Large, Complex U.S. Banking Organizations**

Ladies and Gentlemen:

The Bank Policy Institute and the Securities Industry and Financial Markets Association (together, the **Associations**)[1] appreciate the opportunity to comment on the Board of Governors of the Federal Reserve System's (the **Federal Reserve**) and the Federal Deposit Insurance Corporation's (the **FDIC** and, together, the **Agencies**) proposed guidance for the 2019 and subsequent resolution plan submissions by the eight largest, complex U.S. banking organizations (the **Proposed Guidance**).[2] The Associations strongly support the Agencies' decision to make the Proposed Guidance available for public notice and comment. The iterative process put in place by the Agencies seven years ago to develop the complex resolution planning framework was a wise path during the phase of resolution planning when it was new and unknown. The Associations appreciate the Agencies' engagement with the filers over the years, their commitment to developing sophisticated approaches to resolution planning and their participation in international standards-setting bodies. As a consequence, there has been an immense increase in knowledge by, both the **filers**[3] and the Agencies over the last seven years, and tremendous progress has been made

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1 A description of each Association is provided in Appendix B of this letter.

2 Resolution Planning Guidance for Eight Large, Complex U.S. Banking Organizations, 83 Fed. Reg. 32856 (July 16, 2018).

3 The filers referred to in this letter are the eight U.S. banking organizations to which the Proposed Guidance would apply: Bank of America Corporation, The Bank of New York Mellon Corporation, Citigroup Inc., The Goldman Sachs Group, Inc., JPMorgan Chase & Co., Morgan Stanley, State Street Corporation and Wells Fargo & Company. In addition, the following foreign banking organizations (**FBOs**) are signing onto this letter: Barclays PLC, Credit Suisse Group AG, Deutsche Bank AG and UBS Group AG (the **foreign filers**).

towards eliminating obstacles to an orderly resolution of a global systemically important banking organization (**G-SIB**). The time has come to refine, consolidate and rationalize past guidance with current best practices, make the content of the guidance more transparent, streamline and focus the content of the submissions and engage more proactively with non-U.S. regulators to enhance the efficiency of the resolution planning process.

The Associations strongly support the Agencies' intentions to revise the guidance issued in 2016 for the 2017 submissions (the **2017 Guidance**)[4] in order to "streamline the firms' submissions and to provide additional clarity"[5] and believe that this objective should cover the entire resolution planning process and alleviate some of what is now known to be the outsized burdens associated with producing resolution plans. In addition, the Associations welcome the opportunity provided by the Agencies to comment on all aspects of the Proposed Guidance. This letter discusses four principles that the Associations believe should underpin the Final Guidance and any future resolution planning initiatives by the Agencies. Attached to this cover letter are detailed annexes that discuss our specific recommendations relating to consolidation and rationalization of past guidance as well as our recommendations relating to substantive areas of the Proposed Guidance. Each of our recommendations is summarized in Annex 1.

I. Executive Summary

- Reflecting the immense amount of learning that has taken place over the last seven years, the Agencies should explicitly acknowledge that an effective version of a single-point-of-entry (**SPOE**) resolution strategy is a credible means of resolving a G-SIB in an orderly manner.
  - The separate resolution plan requirement for large insured depository institution subsidiaries (the **IDI Plan**) should be eliminated for filers that have adopted SPOE as their preferred resolution strategy in their resolution plan for their U.S. bank holding company (the **165(d) Plan**).
  - Guidance designed to address potential vulnerabilities of multiple-point-of-entry (**MPOE**) resolution strategies should be explicitly removed or made applicable to only those filers not adopting an SPOE resolution strategy.
- The resolution planning submission process as a whole should be streamlined.
  - The Agencies should formalize the two-year submission and review cycle.
  - If the separate IDI Plan requirement is retained, the IDI Plan should also move to a two-year submission and review cycle, with the IDI Plan due in alternating years to the 165(d) Plan.
  - A filer should be allowed to rely on previously submitted materials and provide updates only for quantitative financial analysis important to the execution of the resolution strategy and for material changes in factual and other information.
- All applicable resolution planning requirements should be consolidated and made public, and all past guidance that is not consolidated and public should be deemed superseded.

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4 FDIC and Federal Reserve, Guidance for 2017 §165(d) Annual Resolution Plan Submissions By Domestic Covered Companies that Submitted Resolution Plans in July 2015.

5 Resolution Planning Guidance for Eight Large, Complex U.S. Banking Organizations, 83 Fed. Reg. 32856, 32857 (July 16, 2018).

- All past guidance that is not consolidated in the Final Guidance should be deemed superseded.

- Guidance that has become irrelevant or redundant or has been directly superseded should be excluded from the consolidated Final Guidance.

- All resolution planning requirements, assumptions and guidance should be made public.

➢ The Agencies should engage more proactively with non-U.S. regulators to improve the efficiency of resolution planning requirements and enhance information-sharing across jurisdictions.

  - The Agencies should engage more proactively with non-U.S. regulators so that internationally-agreed standards are implemented consistently and not at levels above what those standards would require, including by:

    - Further engaging with non-U.S. regulators to inform them about how the certainty offered by secured support agreements reduces any justification they might otherwise have for requiring an excessive amount of internal total loss-absorbing capacity (**TLAC**) or corresponding pre-positioned assets; and

    - Recalibrating the internal TLAC requirements set by the Federal Reserve for the U.S. intermediate holding companies (**IHC**) of FBOs at the low end of the Financial Stability Board's (the **FSB**) range of 75% to 90% of external TLAC.

  - The Agencies should develop information-sharing protocols with non-U.S. regulators that would expand and clarify the type of information that firms may share with cooperating regulatory authorities.

A. The Agencies and the filers have made tremendous progress in eliminating obstacles to an orderly resolution.

The Dodd-Frank Wall Street Reform and Consumer Protection Act's (the **Dodd-Frank Act**) resolution planning process requires firms to demonstrate that they have adequately assessed and mitigated the challenges that their structure and business activities pose to an orderly resolution. The Agencies promulgated a rule pursuant to §165(d) of the Dodd-Frank Act (the **Resolution Planning Rule**)[6] which contemplated an iterative process aimed at strengthening the resolution planning capabilities of each firm. As a result of that process, the filers have made significant progress towards eliminating the obstacles to their orderly resolution under Chapter 11 of the U.S. Bankruptcy Code, as evidenced by the lack of deficiencies in the filers' 2017 165(d) Plan submissions.[7]

The cornerstone of this progress has been the development and refinement of the SPOE resolution strategy, and the efforts undertaken by both the Agencies and the filers to make it effective. An SPOE resolution strategy is designed to resolve a banking organization by imposing losses on the shareholders and creditors of the top-tier holding company without imposing losses on taxpayers or relying on extraordinary government support. By

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6 Resolution Plans Required, 76 Fed. Reg. 67323 (Nov. 1, 2011).

7 *See* Letters dated December 19, 2017, from the Federal Reserve and FDIC to Bank of America Corporation, The Bank of New York Mellon Corporation, Citigroup Inc., The Goldman Sachs Group, Inc., JPMorgan Chase & Co., Morgan Stanley, State Street Corporation and Wells Fargo & Company.

having the holding company fail and its **material subsidiaries**[8] recapitalized and provided liquidity support, as needed, pursuant to a secured support agreement or other contractually binding mechanism, an SPOE resolution strategy allows the top-tier parent of a G-SIB to fail while maintaining the critical operations of its material subsidiaries, which would decrease the potential contagion effect of the failure of a top-tier parent on the U.S. economy.

The viability of an SPOE resolution strategy is recognized by the FDIC in its public notice on using SPOE as the resolution strategy for resolving G-SIBs under Title II of the Dodd-Frank Act.[9] In its public notice, the FDIC said that the SPOE strategy would "provide stability to financial markets by allowing vital linkages among the critical operating subsidiaries of the firm to remain intact and preserving the continuity of services between the firm and financial markets that are necessary for the uninterrupted operation of the payments and clearing systems, among other functions."[10]

In addition, the Agencies have implemented significant regulations that further enhance the effectiveness of an SPOE resolution, including but not limited to the Federal Reserve's rule on TLAC[11] and the Agencies' respective rules on requiring contractual stays on the exercise of default rights in qualified financial contracts.[12]

Each filer has also made significant efforts to enhance the credibility of its respective SPOE resolution strategy. All of the filers have adopted or are in the process of moving to an SPOE resolution strategy as their preferred strategy under their 165(d) Plans,[13] and have implemented business-as-usual financial and operational capabilities and structural changes to support the implementation of that strategy, including but not limited to:

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8 In this letter, the term "material subsidiary" means any material entity that is entitled to receive support pursuant to a support agreement. See Annex 5.

9 Resolution of Systemically Important Financial Institutions: The Single Point of Entry Strategy, 78 Fed. Reg. 76614 (Dec. 18, 2013).

10 *Id.* at 76615.

11 Total Loss-Absorbing Capacity, Long-Term Debt, and Clean Holding Company Requirements for Systemically Important U.S. Bank Holding Companies and Intermediate Holding Companies of Systemically Important Foreign Banking Organizations, 82 Fed. Reg. 8266 (Jan. 24, 2017).

12 Restrictions on Qualified Financial Contracts of Certain FDIC-Supervised Institutions, 82 Fed. Reg. 50228 (Oct. 30, 2017) (FDIC's rule); Restrictions on Qualified Financial Contracts of Systemically Important U.S. Banking Organizations and the U.S. Operations of Systemically Important Foreign Banking Organizations, 82 Fed. Reg. 42882 (Sept. 12, 2017) (Federal Reserve's rule).

13 *See, e.g.*, "We have a single point of entry resolution strategy . . ." (Bank of America Corporation, July 2017 165(d) Plan Public Section); "We have chosen a Single Point of Entry resolution strategy . . ." (The Bank of New York Mellon Corporation, July 2017 165(d) Plan Public Section); "Citi's preferred resolution strategy remains a single point of entry strategy . . ." (Citigroup Inc., July 2017 165(d) Plan Public Section); "Our preferred resolution strategy is consistent with a single point of entry strategy . . ." (The Goldman Sachs Group, Inc., July 2017 165(d) Plan Public Section); ". . . we have determined that the best strategy for resolving our firm under the U.S. Bankruptcy Code, what we call our Preferred Strategy, is a Single Point of Entry resolution strategy." (JPMorgan Chase & Co., July 2017 165(d) Plan Public Section); "In July 2015, the Firm submitted its 2015 Plan, which shifted to a Single Point of Entry strategy . . ." (Morgan Stanley, July 2017 165(d) Plan Public Section); "The plan details our preferred resolution strategy — the Single Point of Entry strategy . . ." (State Street Corporation, July 2017 165(d) Plan Public Section); "The strategy described in our most recent resolution plan submission is a multiple point of entry strategy; however, we have made a decision to move to a single point of entry strategy for our next resolution plan submission." (Wells Fargo & Company, Quarterly Report (Form 10-Q), Sept. 30, 2017).

- Establishing clean holding companies with loss-absorbing capital and long-term debt that is structurally and contractually subordinated to the claims of creditors against their material entities;

- Rationalizing their legal entity structures to align those structures to support an SPOE resolution strategy;

- Implementing internal triggers, playbooks and other governance mechanisms to facilitate the timely execution of important resolution actions by the board of directors and senior management;

- Participating in the development of and adhering to the ISDA 2015 Universal Resolution Stay Protocol, which provides for temporary stays on certain default and early termination rights for ISDAs and other standard derivatives contracts;

- Developing strategies and playbooks designed to maintain access to payment, clearing and settlement (**PCS**) services, including by describing operational and liquidity arrangements, such as those designed to meet increased margin and collateral requirements that may be imposed in times of material financial distress, to facilitate continued access to key financial market utilities (**FMU**) and agent banks; and

- Entering into secured support agreements. The secured support agreement imposes a legally binding obligation on the top-tier holding company parent and IHCs or other funding vehicles in a resolution scenario to use their contributable resources to provide capital and liquidity support to the G-SIB's material subsidiaries. The obligations are generally secured by the contributable resources that would be used to support the material subsidiaries, and obligate the parent holding company(ies) to downstream capital and liquidity support before the firm reaches its point of non-viability.

As a result of these and other efforts, the Agencies have determined that none of the filers' 2017 165(d) Plans have deficiencies that would make them not credible.[14]

B. The aggregate burden associated with resolution planning requirements is now far in excess of what is necessary to preserve U.S. financial stability, and elements of the Proposed Guidance are not necessary to achieve resolution planning objectives.

Resolution planning was a novel concept when the Agencies issued the Resolution Planning Rule in 2011, and implementing any new supervisory regime poses challenges. The implementation and evolution of resolution planning requirements over the last seven years, however, have led to inefficiencies that have resulted in unnecessary and significant expenditure of resources not only for the filers in producing plans but also for the Agencies in reviewing them.

The resolution planning guidance currently consists of a series of public and confidential feedback that has been issued over the years as the result of the Agencies' review of the filers' plans.[15] This accretive guidance reflects

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[14] *See supra* n.7.

[15] *See* FDIC and Federal Reserve, Guidance for 2013 § 165(d) Annual Resolution Plan Submissions by Domestic Covered Companies that Submitted Initial Resolution Plans in 2012; detailed guidance and firm-specific feedback in August 2014 and February 2015 for the development of firms' 2015 resolution plan submissions; and FDIC and Federal Reserve, Guidance for 2017 § 165(d) Annual Resolution Plan Submissions by Domestic Covered Companies that Submitted Resolution Plans in July 2015, including the frequently asked questions that were published in response to the 2017 Guidance.

the iterative nature of resolution planning during its formative stages in the early years. It is now time for the Agencies to craft a stable set of requirements for an effective resolution plan and omit those that, through the iterative process are now understood to be of little help in achieving resolution planning objectives. Doing so will allow both the filers and the Agencies to concentrate their focus on those elements that are most relevant to an effective resolution plan.

As a result of the iterative process, filers submit living wills that attempt to address a wide variety of contingencies and contain significant amounts of data that are not useful, resulting in excessively lengthy resolution plans. Former Federal Reserve Chair Janet L. Yellen testified, "these are extremely complex documents for these firms to produce . . . We're looking at plans that run into tens of thousands of pages."[16] There is often little correlation between the length and time it takes to produce the data in a resolution plan section and its importance in assessing whether the filer has eliminated obstacles to its orderly resolution.

The length and complexity of resolution plans, as well as the yearly submission requirement[17] has meant that the Agencies' staff has faced an uphill battle in providing in-depth guidance and feedback in a timely manner.[18] This past struggle with the yearly cycle is evident in the timing of feedback as compared with the next upcoming annual filing. The Agencies provided guidance in April 15, 2013 to the filers that submitted resolution plans on July 1, 2012, only weeks before the July 1, 2013 deadline for the filers to submit their 2013 resolution plans. Although the Agencies extended that year's submission deadline to October 1, 2013, the filers had to significantly overhaul their resolution plans on an abbreviated timetable to meet the new requirements. In 2014, the Agencies provided feedback to the filers on resolution plans they had submitted in 2013 on August 5, after the filers had already submitted new plans on July 1, 2014.[19] When the Agencies jointly determined five filers to have non-credible 2015 resolution plans, guidance was not issued until April 2016, after the filers had made significant progress towards what they expected to be their July 2016 submissions, which then needed to be heavily revised, again on an abbreviated timetable despite the extension of the deadline to October 1, 2016.

More recent discussions of a formal two-year cycle, along with the well-in-advance implementation of a two-year cycle for the next upcoming filing reflect, we believe, the Agencies' understanding from these past events that the complexity of the filings and the one-year cycle pose unnecessary challenges to both Agency staff and filers.

Guidance emerging out of the challenging yearly cycles has, in some instances, had a significant impact on the filer's business-as-usual operations. In some cases, filers have had to implement on short notice standards more restrictive than those that were developed through a formal rulemaking process, which took into account extensive economic analysis in their calibration, were subject to notice and comment and are being phased in over multiple years. For example, the capital and liquidity areas of the 2017 Guidance, carried forward into the Proposed

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16 Federal Reserve's Second Monetary Policy Report for 2014: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs, 113th Cong. (July 15, 2014) (statement of Janet L. Yellen, Chair, Fed. Reserve).

17 The Agencies extended the formal deadline for the July 1, 2018 submissions until July 1, 2019. Federal Reserve and FDIC, Joint Press Release, *Agencies extend next resolution plan filing deadline for certain domestic and foreign banks* (Sept. 28, 2017).

18 *See* Government Accountability Office, Resolution Plans: Regulators Have Refined Their Review Processes but Could Improve Transparency and Timeliness, 33–34 (Apr. 12, 2016) ("FDIC and Federal Reserve officials told us that they recognize the constraints the companies have experienced because of the timing of the regulator's feedback . . . Absent a longer filing cycle, the rule may not effectively allow for the achievement of its intent.").

19 FDIC and Federal Reserve, Agencies Provide Feedback on Second Round Resolution Plans of "First-Wave" Filers (Aug. 5, 2014).

Guidance, require the filers to develop sophisticated and complex modeling for resolution capital and liquidity execution needs for each material entity and to hold and pre-position sufficient resources to meet these needs. As discussed in Annex 5, resolution liquidity requirements, rather than other core liquidity rulemakings, may serve as the binding liquidity constraint for some filers.

There has been increasing recognition of the burdens associated with resolution planning requirements. Federal Reserve Vice Chairman for Supervision Randal K. Quarles has suggested that the Agencies "could reduce the frequency and burden of such requirements, perhaps by requiring more-targeted resolution plans."[20] Federal Reserve Chairman Jerome Powell has stated that the Agencies believe that "it is worthwhile to consider extending the cycle for living will submissions from annual to once every two years, and focusing every other of these filings on key topics of interest and material changes from the prior full plan submission."[21] Former FDIC Chairman Martin J. Gruenberg remarked that moving from a one-year to a two-year cycle for submission and review of plans in 2017 for the upcoming 2019 submission "would give the agencies time to review the plans, provide meaningful feedback, and still enable firms to make structural and operational changes necessary to address their issues. This additional time also enabled more extensive dialogue between firms and agency staff, which proved valuable to both."[22] The U.S. Department of the Treasury has recognized that "[t]he slow accretion of guidance for living wills without the benefit of public notice and comment has imposed an undue burden on participating institutions" and made recommendations to enhance the efficiency of the resolution planning process, including formalizing the transition to a two-year cycle.[23]

This letter suggests approaches that the Agencies can take to reduce the excessive burdens that have been created by the resolution planning process and to enhance focus on the elements of the process most important to achieving the goal of eliminating obstacles to an orderly resolution. These recommendations are consistent with the Agencies' stated goals of streamlining and providing additional clarity to the filers' submissions, and apply to resolution requirements as a whole. They are also consistent with the framework for evaluating financial regulation articulated by Federal Reserve Vice Chairman for Supervision Randal K. Quarles: "if we have a choice between two methods of equal effectiveness in achieving a goal, we should strive to choose the one that is less burdensome for both the system and regulators."[24] In other words, the recommendations that follow, if adopted, would not come at the cost of heightened risks to U.S. financial stability; the recommendations are offered to better focus the Agencies and the filers on the issues most important to effective resolution planning.

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20 Randal K. Quarles, Vice Chairman for Supervision, Federal Reserve, *Getting It Right: Factors for Tailoring Supervision and Regulation of Large Financial Institutions* (July 18, 2018).

21 Jerome H. Powell, Governor, *Remarks by Jerome H. Powell, Member, Board of Governors of the Federal Reserve System at the Salzburg Global Seminar* (June 26, 2017).

22 Remarks by Martin J. Gruenberg, Chairman, Federal Deposit Insurance Corporation, "Resolving a Systemically Important Financial Institution: A Progress Report," The Wharton School University of Pennsylvania; Philadelphia, PA (Feb. 16, 2018).

23 U.S. Department of the Treasury, *A Financial System that Creates Economic Opportunities: Banks and Credit Unions* (June 2017).

24 Randal K. Quarles, Vice Chairman for Supervision, Federal Reserve, *Early Observations on Improving the Effectiveness of Post-Crisis Regulation* (Jan. 19, 2018).

II. The Agencies Should Explicitly Acknowledge That an Effective SPOE Resolution Strategy is a Credible Means of Resolving a G-SIB in an Orderly Manner.

In light of the significant progress that has been made and the recognition by the Agencies that none of the filers' resolution plans have any deficiencies that would make them not credible,[25] the Agencies should include in the Final Guidance an explicit acknowledgment that an SPOE resolution strategy is a credible means of resolving a G-SIB in an orderly manner.

In explicitly acknowledging the credibility of an effective SPOE resolution strategy, any aspects of the prior guidance or even portions of the Proposed Guidance more applicable to the implementation of an MPOE resolution strategy should be explicitly removed or the Agencies should clarify that a filer with an SPOE strategy does not have to provide in its plan information responsive to MPOE-based requirements. There are elements under the Proposed Guidance, however, that seem to suggest that the filers should continue to plan for an MPOE resolution strategy as a contingency arrangement. For an extended discussion of this, see Section III.A.1. of Annex 2.

The Associations believe that a resolution plan can demonstrate that a filer's SPOE resolution strategy is effective by showing that it has:

- The financial resources to support its resolution strategy, which incorporates resolution liquidity resources and needs; resolution capital resources and needs; and derivatives unwind strategies;

- Associated governance and underlying legal analyses to show that the filer can deploy resources to the material subsidiaries in the organization as needed, and can defend such actions from creditor challenge; and

- The operational capabilities to implement the strategy should it be required, including the ability to maintain access to key FMUs and agent banks, and other shared and outsourced services; the ability to effectively communicate with key external and internal stakeholders in order to coordinate the implementation of the strategy; and divestiture readiness including optionality with respect to divestiture strategies.

Viewed through that lens, the Proposed Guidance captures all key vulnerabilities of a G-SIB in resolution.

An explicit acknowledgment of the credibility of an effective SPOE resolution strategy should also lead to a reconsideration of the FDIC's IDI Plan requirement.[26] The FDIC's IDI Plan requirement requires filers to contemplate the resolution of their large insured depository institution subsidiaries. Under an SPOE resolution strategy, however, material operating subsidiaries, including material bank subsidiaries, will remain open and operating in a resolution scenario. As a result, the IDI Plan requirement forces filers to submit two separate plans, with one plan contemplating a contingency that is at odds with the steps that have been taken to make the other plan credible. The Associations therefore believe that the IDI Plan requirement should be amended so that it does not apply to filers that have adopted SPOE as their preferred resolution strategy.

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[25] *See supra* n.7.

[26] FDIC, Resolution Plans Required for Insured Depository Institutions with $50 Billion or More in Total Assets, 77 Fed. Reg. 3075 (Jan. 23, 2012).

If the IDI Plan requirement is retained, however, the IDI Plan guidance should be rationalized with the Final Guidance so as to make the IDI Plan complement the main 165(d) Plan. For example, divestiture options satisfying the 165(d) Plan requirements should also satisfy the IDI Plan requirements and comparable definitions in the IDI Plan, such as critical services, should be harmonized with 165(d) Plan definitions.

Removing guidance designed to facilitate MPOE resolution strategies or making such portions applicable to only those filers not adopting an SPOE resolution strategy and amending the IDI Plan requirement so that it does not apply to filers that have adopted SPOE as their preferred resolution strategy are consistent with the Agencies' aims to streamline the resolution plan submissions. In addition, refining the operational capabilities necessary for an orderly SPOE resolution under the U.S. Bankruptcy Code would also help facilitate an SPOE resolution by the FDIC under Title II of the Dodd-Frank Act.[27]

III. The Resolution Plan Submission Process Should Be Streamlined.

The Final Guidance should formalize a two-year submission and review cycle for the 165(d) Plan. The Associations appreciate the extension of the deadline for the July 1, 2018 submissions until July 1, 2019, and endorse the statements that have been made by regulators suggesting that the transition to a two-year submission and review cycle will be permanent. The Associations believe that it would be beneficial to formalize the two-year submission cycle in the Final Guidance. A formalization of a two-year submission cycle would improve the quality of submissions by permitting filers to more effectively integrate that cycle into their business plans to ensure that resolution planning workstreams are allocated appropriate budgets; proper staff are hired, trained and retained; and institutional knowledge is leveraged more effectively.

As discussed in Section II above, an IDI Plan should not be required for filers that have adopted SPOE as their preferred strategy. To the extent such a requirement is retained, however, the Associations recommend that the IDI Plan requirement also be permanently shifted to a two-year cycle, for the same reasons that the 165(d) Plan deadline should be permanently transitioned to a two-year cycle. In order to promote more efficient allocation of internal resources and maintain the continuity of institutional knowledge, the Associations recommend that the IDI Plan submissions should be due on alternating years to the 165(d) Plan submissions.[28]

With respect to the content within a resolution plan, a filer should be allowed to rely on previously submitted materials and provide updates only for quantitative financial analysis important to the execution of the resolution strategy and for material changes in factual and other information. Resolution plans can be meaningfully streamlined by requiring a filer to focus on updating the quantitative financial analysis, demonstrating that it has the associated governance in place, supported by underlying legal analyses, and maintenance of operational capabilities necessary to timely implement its preferred resolution strategy. Once these capabilities have been established and implemented, if there have been no changes to the underlying facts or analyses that would have a material effect on

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27 *See supra* n.9. In the FDIC's public notice on using SPOE as the resolution strategy for resolving G-SIBs under Title II of the Dodd-Frank Act, the FDIC listed five impediments to any resolution that it considered in developing the SPOE resolution strategy that align with obstacles that the filers have been required to address in their 165(d) Plans. The filers have addressed these obstacles, in part, through the adoption of SPOE resolution strategies. The significant efforts made by the filers to eliminate obstacles to an orderly resolution under Chapter 11 of the U.S. Bankruptcy Code therefore also redound to an orderly resolution under Title II of the Dodd-Frank Act, and the Associations believe that the FDIC should finalize its public notice.

28 The filers note that this request is consistent with the FDIC's recent announcement to delay the next IDI Plan submission until July 2020, at the earliest. *See* Agencies' Press Release, Agencies Extend Deadline for Certain Resolution Plan Submissions (Aug. 30, 2018).

the filer's strategy, a filer should be able to rely on previously submitted materials. A material change should be evaluated in the context of whether it would have a fundamental impact on the operational feasibility of the filer's resolution plan.[29] For an extended discussion of sections that the filers believe, based on their experience, do not change substantially between submissions, see Section IV.A. of Annex 2.

IV. All Resolution Planning Requirements Should Be Consolidated and Made Public, and Any Past Guidance That is Not Consolidated Should Be Deemed Superseded.

The Agencies stated that they "are considering consolidating applicable guidance into a single document, which would provide the public with one source of applicable guidance to which to refer."[30] The Associations strongly endorse this consolidation, and believe that any past guidance that is not consolidated and made public should be deemed superseded, in contrast to the current statement made by the Agencies that past guidance continues to be applicable except to the extent superseded or supplemented by the Proposed Guidance.[31] The approach outlined in the current statement from the Agencies does not set out the guidance and the expectations of the Agencies in a clear and transparent manner. It is already difficult to determine, based on the mixed corpus of public and confidential guidance developed through the iterative feedback since the Resolution Planning Rule which portions of guidance remain applicable. The Associations believe that this difficulty in determining which portions of past guidance remain applicable will increase with each passing year and will cause increasing confusion over time.

As discussed above in Sections I.B and II, the current corpus of resolution plan guidance consists of a series of public and confidential guidance, some of which is no longer relevant because, for example, it contemplates an MPOE resolution strategy. In other cases, older guidance has been made redundant because it has been implicitly superseded by more recent guidance. See Annex 2 for an extended discussion of the portions of existing guidance that should not be consolidated into the Final Guidance.

In some cases, filers have also been subject to standards emerging out of oral guidance given during confidential meetings with the Agencies' staff. Without context for whether other filers are also subject to these same standards, some filers may be taking excessively restrictive positions, leading to competitive disparities and reduced provision of credit and other banking products and services to the economy. In other cases, confidential written guidance, particularly around certain assumptions, continues to exist and remains applicable. This confidential written guidance, to the extent it remains applicable, should become public. The Associations strongly believe that all future applicable requirements, assumptions and standards should be made public, and should be provided within the context of the consolidated Final Guidance.[32]

The Associations believe that the Final Guidance should consolidate all guidance that remains applicable and be released publicly, and serve as the single source of guidance applicable to 165(d) Plans. The Final Guidance should explicitly import applicable requirements from prior guidance, such as the portions of the SR 14-1 Letter that

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29 The concept of materiality in the securities laws is inapposite to this situation.

30 83 Fed. Reg. at 32862.

31 *See* 83 Fed. Reg. at 32862 ("The 2013 Guidance, the 2014 Letter, and the 2015 Communications, as described in the 2016 letters to the firms, continue to be applicable (relevant dates should be updated appropriately), except to the extent superseded or supplemented by the provisions of this document.").

32 The Associations also endorse the ideals articulated by Vice Chairman Quarles when he said that "transparency [is] a necessary precondition to the core democratic ideal of governmental accountability—the governed have a right to know the rules imposed on them by the government." *Supra* n.24.

remain relevant,[33] and should state that all prior guidance and assumptions not explicitly included are deemed superseded, with the exception of the contemplated forthcoming guidance on intra-group liquidity and internal loss absorbing capacity, which should be made public and subject to comment.[34] The filers developed a series of principles that they believe should be used to evaluate whether prior guidance should be excluded and worked individually with external counsel to map and evaluate all prior written guidance, both public and confidential, to validate these principles.[35] These principles are discussed in Section III.A.2 of Annex 2.

V. The Agencies Should Engage More Proactively with Non-U.S. Regulators to Improve the Efficiency of Resolution Planning Requirements and Enhance Information-Sharing Across Jurisdictions.

Global authorities, recognizing that the efficiency and efficacy of resolution planning requirements could be improved through international coordination, have come together through bodies such as the FSB to develop international standards and share information.[36] The Agencies should engage more proactively with non-U.S. regulators to ensure that internationally-agreed standards are implemented consistently and not at levels above what those standards contemplate and take steps towards enhancing information-sharing across jurisdictions.

Regulators in several jurisdictions, including the United States, have acted, or have declared their intention to act, to impose internal TLAC requirements in excess of what would be contemplated by the FSB's guiding principles on internal loss-absorbing capacity, such as by imposing internal TLAC requirements on non-material entities or by mandating a quantum of internal TLAC at the top end of the range or even in excess of what the guiding principles contemplate. As explained in Section II.A. of Annex 5, this can result in ex ante ring-fencing, reducing a firm's flexibility to direct capital and liquidity where and when it is needed most. As explained in Section II.B. of Annex 5, although the Proposed Guidance does not explicitly relate to TLAC requirements, the Federal Reserve should minimize non-U.S. regulators' incentives to engage in ex ante ring-fencing by recalibrating the level of internal TLAC currently required to be held by the U.S. IHCs of FBOs from 89% of the external TLAC that would be required for similarly situated resolution entities to the lower end of the 75–90% range contemplated by the FSB's guiding principles.[37]

The Agencies can also minimize the incentive of non-U.S. regulators to impose requirements at the top end of the range or in excess of what the guiding principles would require by enhancing information sharing across

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33 *See* Annex 2 for additional discussion regarding the SR 14-1 and SR 14-8 Letters.

34 83 Fed. Reg. at 32857. This contemplated forthcoming guidance, when finalized, should be added to and form part of the consolidated Final Guidance so that all 165(d) Plan guidance is located in a single, publicly available document.

35 Each of the filers worked individually with its outside counsel to preserve confidential information.

36 *See, e.g.*, FSB, Guiding Principles on the Internal Total Loss-absorbing Capacity of G-SIBs ('Internal TLAC') (July 6, 2017); FSB, Key Attributes of Effective Resolution Regimes for Financial Institutions (Oct. 15, 2014); FDIC & Bank of England, Resolving Globally Active, Systemically Important, Financial Institutions: A joint paper by the Federal Deposit Insurance Corporation and the Bank of England (Dec. 10, 2012).

37 *See* FSB, Guiding Principles on the Internal Total Loss-absorbing Capacity of G-SIBs ('Internal TLAC') at 7–8 (July 6, 2017). For example, the Bank of England has stated that it will consider other host jurisdictions' calibration of internal minimum requirement for own funds and eligible liabilities (**MREL**) requirements when deciding whether to calibrate a material entity's internal MREL requirement above 75%. Bank of England, Statement of Policy, The Bank of England's approach to setting a minimum requirement for own funds and eligible liabilities (MREL) 9–10 (June 2018) ("In deciding whether to set internal MREL for a material sub-group or subsidiary above 75% scaling, the Bank will take into account . . . The scaling of internal loss-absorbing resources applied by overseas authorities to material subsidiaries located in their jurisdiction.").

jurisdictions. For example, as explained in more detail in Section II.B. of Annex 5, the Agencies should engage more proactively with non-U.S. regulators to share information and expertise with respect to the terms and conditions of secured support agreements, their triggers and mechanisms for contributing capital and/or providing liquidity support to material subsidiaries to keep them open and operating, legal analyses conducted by the filers with respect to creditor challenges and the enforceability of secured support agreements in different jurisdictions. The ultimate objective of these information-sharing efforts should be to encourage the Agencies and non-U.S. regulators to achieve a common understanding and level of comfort with secured support agreements as a key tool for meeting the capital and liquidity needs of material subsidiaries of a firm in a resolution scenario, reducing the need for pre-positioning excessive amounts of capital or liquidity at those subsidiaries.

In addition, the Agencies should develop information-sharing protocols with non-U.S. regulators that would expand and clarify the type of information that firms may share with cooperating regulatory authorities, making it less burdensome for filers to comply with requests for information from non-U.S. regulators and enhancing trust in the efficacy of SPOE resolution strategies.

VI. Description of Annexes

The following Annexes and Appendices to this cover letter form the core of our comment letter and are incorporated into this cover letter by reference.

Annex 1 (Summary of Recommendations) contains a summary of each of our specific recommendations in this cover letter and in Annex 2 (Streamlining), Annex 3 (Payment, Clearing and Settlement), Annex 4 (Derivatives and Trading), Annex 5 (Capital and Liquidity) and Annex 6 (Foreign Banking Organizations).

Annex 2 (Streamlining) contains a detailed analysis of our comments and recommendations regarding how the resolution planning guidance and submission process can be streamlined and consolidated.

Annex 3 (Payment, Clearing and Settlement) contains a detailed analysis of our comments and recommendations on the Proposed Guidance's updates to the PCS activities section of the 2017 Guidance.

Annex 4 (Derivatives and Trading) contains a detailed analysis of our comments and recommendations on the Proposed Guidance's updates to the derivatives and trading activities areas of the 2017 Guidance.

Annex 5 (Capital and Liquidity) contains a detailed analysis of our comments and recommendations on the capital and liquidity areas of the Proposed Guidance and suggestions for any forthcoming guidance in these areas.

Annex 6 (Foreign Banking Organizations) highlights points from this letter that the foreign filers particularly endorse, and provides additional comments on areas of the Proposed Guidance with respect to how they might be applied in future guidance to foreign banking organizations.

Appendix A (Glossary) contains a compilation of all defined terms in this comment letter.

Appendix B (Associations) contains a description of the Associations.

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The Associations appreciate the opportunity to comment on the proposal. If you have any questions, please contact John Court by phone at +1(202)589-2409 or by email at *john.court@bpi.com* or Carter McDowell by phone at +1(202)962-7327 or by email at *cmcdowell@sifma.org*.

Respectfully submitted,

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Annex 1 to
Living Wills Guidance Comment Letter
Summary of Recommendations

TOPICS AND RECOMMENDATIONS
Streamlining (Cover Letter and Annex 2)
Effectiveness of SPOE   ➢ The Agencies should explicitly acknowledge that an effective version of an SPOE resolution strategy is a credible means of resolving a G-SIB in an orderly manner.
➢ The IDI Plan should be eliminated for filers that have adopted SPOE as their preferred resolution strategy for their §165(d) Plan.
Streamlining of Process   ➢ The Agencies should formalize the two-year submission and review cycle.
➢ If the separate IDI Plan requirement is retained, the IDI Plan should also move to a two-year submission and review cycle, with the IDI Plan due in alternating years to the 165(d) Plan.
➢ A filer should be allowed to rely on previously submitted materials and provide updates only for quantitative financial analysis important to the execution of the resolution strategy and for material changes in factual and other information.
Consolidation of Guidance (Questions 1, 8)   ➢ All applicable resolution planning requirements, assumptions and guidance should be consolidated and made public, and guidance that has become irrelevant or redundant, because, for example, it is designed to facilitate an MPOE resolution strategy, or has been superseded, should be excluded from the Final Guidance.
➢ All past guidance that is not consolidated in the Final Guidance and made public should be deemed superseded.
Engagement with Non-U.S. Regulators   ➢ The Agencies should engage more proactively with non-U.S. regulators to improve the efficiency of resolution planning, and enhance information-sharing across jurisdictions.

TOPICS AND RECOMMENDATIONS

Annex 3: Payment, Clearing and Settlement

General Principles for Modification of the PCS Section of the Proposed Guidance

- The PCS analysis should be limited to matters relevant to the successful execution of a filer's particular resolution strategy.
- The Final Guidance should provide filers with the flexibility of providing analysis that may differ based on the type and scope of PCS services provided.
- The Final Guidance should avoid material deviations from the FSB FMI Guidance.
- The Final Guidance should allow filers to update certain discussions in the PCS playbooks only for material changes and not have to resubmit the entire analysis as part of the resolution plan submission if no material changes have occurred.

Clarify and Modify the Scope of the Final Guidance (Question 2)

- The Final Guidance should clarify the definition of provider of PCS services in a manner that is broadly consistent with the FSB FMI Guidance.
- A filer that is a PCS service provider should not have to determine which of the PCS services it provides are critical and for which clients.
- Alternatively, the Final Guidance should clarify that a filer that is a PCS service provider may identify key clients in a manner consistent with the FSB FMI Guidance or in a manner consistent with the services that it provides.
- If the concepts of "key clients" and "critical PCS services" remain unchanged, then the Final Guidance should not require filers to provide contingency analysis for their clients.
- The Final Guidance should not require filers to map key clients to key FMUs and agent banks.

Clarify Expectations Regarding the Content of PCS Playbooks (Questions 3, 5)

- The funding and liquidity analysis required for PCS playbooks should be consistent with the liquidity requirements in other parts of the Final Guidance.
- The Final Guidance should recognize that any playbooks produced for agent bank relationships may be different from those produced for FMUs.
- The Final Guidance should not indirectly require a filer to address the potential loss of access to an FMU or agent bank.
- The Final Guidance should not require separate playbooks to be provided for a filer's role as provider of PCS services.
- The PCS activities section of the guidance, if it is applied to the foreign filers, should limit the scope of the PCS section to material entities, even where it requires discussion of indirect relationships.

TOPICS AND RECOMMENDATIONS

Limit the Scope of Contingency Arrangements for Key Clients (Questions 4, 6)

- ➢ The Final Guidance should not require the discussion of contingency arrangements for key clients if it is irrelevant to the filer's strategy.

- ➢ The Final Guidance should clarify the Agencies' expectations regarding engagement with key clients on possible contingency arrangements.

Annex 4: Derivatives and Trading (Question 7)

Active and Passive Wind-Down Analysis

- ➢ The Associations support the proposed elimination of the requirement to provide separate active and passive wind-down scenario analyses and rating agency playbook requirements.

Tailored Capabilities and Analysis

- ➢ The Final Guidance should allow a dealer firm the flexibility to tailor its capabilities and analyses to those relevant to, and necessary to support, the dealer firm's preferred resolution strategy, giving due recognition to the development by dealer firms of an SPOE resolution strategy.
  - A dealer firm should be allowed to tailor capabilities and analyses to the firm's preferred resolution strategy.
  - The Final Guidance should not require the replication of information that dealer firms are already required to make available to regulators pursuant to other regulatory requirements or that is captured elsewhere in the resolution plan.

Incorporation of Reasonable Alternative Assumptions

- ➢ The Final Guidance should permit a dealer firm to incorporate reasonable alternative assumptions that are consistent with its resolution strategy into its preferred resolution strategy and to base its RCEN and RLEN modeling on such alternative assumptions, so long as such assumptions are justified.
  - A dealer firm should be allowed to also present alternative reasonable assumptions relating to how counterparties would act during a wind-down if justified.
  - A dealer firm should be allowed to present alternative assumptions regarding inter-affiliate transactions.
  - A dealer firm should be allowed to present alternative timelines for the stabilization and resolution periods.

Focus Requirements for Development of Derivatives Capabilities on Material Entities

- ➢ The Agencies should limit the requirement for the development of derivatives capabilities and related analyses to a dealer firm's material entities.
  - The Agencies should confirm that the term "material derivatives entities" means a firm's material entities that engage in derivatives activities.
  - In other places, where the scope of a requirement is not specified, the Agencies should confirm that the requirement only applies to material entities.

TOPICS AND RECOMMENDATIONS

- The Agencies should limit the "firm-wide" derivatives capabilities requirements to a dealer firm's material entities, rather than across both material entities and non-material entities.

Operational Costs Model

➢ A dealer firm should not be required to separately model the operational costs necessary to execute its resolution strategy that are specifically associated with its derivatives activities, as these are already included in the material entity cost analyses.

"Linked" Non-Derivatives Trading Position

➢ The Final Guidance should provide clarity that linked non-derivatives trading positions should be defined by dealer firms based on their overall business and resolution strategies.

Annex 5: Capital and Liquidity

Support Agreements and Internal TLAC

➢ Forthcoming guidance should permit filers to take into account secured support agreements or similar mechanisms to recapitalize and provide liquidity to relevant material entities in meeting resolution planning capital and liquidity requirements.

➢ The Agencies should proactively coordinate with non-U.S. regulators to reduce ex ante ring-fencing, including by sharing information and expertise with respect to the terms and conditions of secured support agreements and by the Federal Reserve recalibrating the level of internal TLAC currently required to be held by the U.S. IHCs of U.S. G-SIBs from 89% of the external TLAC that would be required for similarly situated entities to the lower end of the FSB's 75–90% range.

More Realistic Assumptions and Requests for Clarification

➢ Forthcoming guidance should permit filers to make more tailored, realistic assumptions about flows of liquidity in their resolution planning capital and liquidity estimates and methodologies.

➢ Forthcoming guidance should clarify certain aspects of resolution planning capital and liquidity standards.

- The Agencies should clarify that it is appropriate for filers to have safeguards against "false positives" that would avoid a premature bankruptcy filing, including modifying assumptions during an actual stress scenario to reflect actual facts and circumstances.
- The Agencies should clarify that a filer may assume that after a material subsidiary has been recapitalized and has received the required level of liquidity support pursuant to a support agreement, the subsidiary will have access to all sources of capital and liquidity, secured or unsecured, to which a filer with sufficient capital and liquidity would normally have access.
- The Agencies should clarify that a material entity that is expected to remain a going concern under a firm's resolution strategy, or that is subject to a regulatory regime that does not have a "well-capitalized" requirement or that has regulatory capital ratios different from those to which a U.S. bank is subject, has regained "market confidence" or would qualify as having an "investment grade rating" when it meets its applicable capital or liquidity requirements or otherwise meets the definition of "investment grade" under the U.S. capital rules, and that a material entity that would wind down in an orderly manner would not require an equivalent level of capital or liquidity in order to achieve stabilization.

TOPICS AND RECOMMENDATIONS
Annex 6: Foreign Banking Organizations
➢ Future resolution planning guidance with respect to derivatives and trading activities should be appropriately tailored to the size, complexity and risk profile of the foreign filers' U.S. operations.
➢ Any guidance that may apply directly to the foreign filers' future resolution plan submissions should better take into account the more limited scope of their operations subject to U.S. resolution planning requirements and, like the Proposed Guidance, be subject to a notice-and-comment process.

Annex 2 to
Living Wills Guidance Comment Letter
<u>Responses Regarding the Consolidation and Streamlining of Resolution Planning Guidance</u>

This <u>Annex 2</u> supplements the cover letter to which it is attached and together with that cover letter (the **Cover Letter**) and all annexes thereto constitutes the comments of the Associations. Terms not otherwise defined in this <u>Annex 2</u> have the meanings specified in the Cover Letter. Attached for your convenience as <u>Appendix A</u> is a glossary showing all the defined terms in one place.

I. Introduction

This Annex is designed to provide greater detail on the recommendations provided in Sections II to IV of the Cover Letter to consolidate all resolution planning guidance into one publicly available document and to streamline the resolution plan process in light of the significant progress that has been made by the Agencies and the filers in eliminating obstacles to an orderly resolution. This Annex is divided into three subparts. Section II responds to Question 1 posed by the Agencies in the Proposed Guidance, which asks whether the Proposed Guidance represents the key vulnerabilities for a filer in resolution. Section III responds to Question 8 posed by the Agencies in the Proposed Guidance, which asks if all applicable guidance should be consolidated, and if so, which aspects warrant inclusion, additional clarification or modification. Section IV provides a list of the types of information where filers should be allowed to rely on previously submitted materials, and to provide updates only for quantitative financial analysis important to the execution of the resolution strategy and for material changes in factual and other information.

II. Key Vulnerabilities Captured

A. The filers believe that the Proposed Guidance captures all of the key vulnerabilities in the filers' resolution strategies.

The Agencies specifically noted that the Proposed Guidance "is not meant to limit firms' consideration of additional vulnerabilities or obstacles that might arise based on a firm's particular structure, operations, or resolution strategy," but specifically requested comment on whether the Proposed Guidance represents the key vulnerabilities for a filer in resolution.[1] As discussed in the Cover Letter, the Associations believe that a credible resolution strategy is predominantly based on a filer's ability to demonstrate that it has the financial resources to support its resolution strategy, associated governance and underlying legal analyses to support its ability to provide the financial resources where needed, and the operational capabilities to timely implement its strategy. The Proposed Guidance is

1 *See* 83 Fed. Reg. at 32857–58.

organized around similar principles. Therefore, the Associations believe that the key vulnerabilities, especially those associated with an SPOE resolution strategy, have been captured by the Proposed Guidance.[2]

The Associations believe that now that SPOE is a well-established strategy among the G-SIBs and the key elements of a credible resolution strategy are better understood by the Agencies and the filers, resolution planning guidance should focus on core resolution planning elements and avoid the imposition of new requirements or changes to existing requirements unless there has been a meaningful development, such as a legislative or judicial change that has a material effect on the filer's strategy. To meet new resolution planning requirements, a filer may have to make significant changes to its business-as-usual operations or develop sophisticated and complex models. Imposing new requirements or frequently changing existing requirements can therefore be unnecessarily burdensome and counterproductive. For example, certain filers had to devote resources to satisfying the requirement under the 2017 Guidance to conduct a passive wind-down analysis of their derivatives and trading activities[3] and the requirement to engage with ratings agencies in order to create rating agency playbooks,[4] both of which are eliminated under the Proposed Guidance.[5] While the Associations strongly support these changes and endorse the rationale for making these changes, the introduction and subsequent withdrawal of these requirements meant that the filers devoted resources to satisfying requirements that ultimately yielded little benefit to eliminating obstacles to an orderly resolution. Therefore, any future resolution planning guidance should refrain from imposing burdensome incremental requirements, and should be provided within the context of the consolidated Final Guidance, which is discussed in detail below in Section III.

Since the Associations believe that the Proposed Guidance has addressed the key vulnerabilities associated with an SPOE resolution strategy, all resolution planning guidance that remains applicable should now be consolidated and made public, the resolution planning process should be streamlined and certain information in a submission should be required to be updated only for material changes.

III. Consolidation of Resolution Planning Guidance

A. All 165(d) Plan guidance should be consolidated and made public, and any prior guidance that is not consolidated should be deemed superseded.

The Agencies stated that they "are considering consolidating all applicable guidance into a single document, which would provide the public with one source of applicable guidance to which to refer" and have invited comment on which pieces should be consolidated and which aspects warrant clarification or modification.[6] For the reasons articulated in the Cover Letter and in Section II above, the Associations agree that the Agencies should take a more holistic approach to resolution planning guidance, and consolidate all guidance that remains applicable into one publicly available document, using the Final Guidance as the base, in order to streamline the resolution planning process, rationalize and better focus the entire body of existing guidance, and increase transparency.

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2 As discussed in more detail below in Section III.A.1, the filers also believe that guidance designed to facilitate an MPOE resolution strategy should be explicitly removed or made applicable to only those filers not adopting an SPOE resolution strategy.

3 2017 Guidance, Section VII.c (Passive Wind-Down Analysis).

4 2017 Guidance, Section VII.b (Stabilization).

5 *See* 83 Fed. Reg. at 32861.

6 *See* 83 Fed. Reg. at 32862.

1. Guidance designed to facilitate an MPOE resolution strategy should be explicitly removed or made applicable to only those filers not adopting an SPOE resolution strategy.

Certain elements of the guidance issued before 2016 and aspects of the new Proposed Guidance require filers to address vulnerabilities relevant to an MPOE resolution strategy. Specifically, portions of the older guidance, which was released in the early years of resolution planning and prior to the shift to SPOE resolution strategies, continue to apply[7] and require filers to provide analysis and information that is relevant only to the facilitation of an MPOE resolution strategy. There are elements under the Proposed Guidance that would also seem to suggest that the filers should continue to plan for an MPOE resolution strategy as a contingency arrangement. Since all of the filers have moved or are in the process of moving to an SPOE resolution strategy, those MPOE-related portions of the prior and Proposed Guidance are no longer relevant but still require filers to devote resources to the production of information that is no longer necessary to the successful implementation of their resolution plans.

As a consequence, including information that meets this MPOE-related guidance in an SPOE resolution plan runs counter to the objective of streamlining the resolution plan submissions without furthering the goal of addressing potential obstacles to the successful execution of a filer's preferred resolution strategy. Such guidance relevant to an MPOE resolution strategy should therefore be explicitly removed or designated as inapplicable to a resolution plan with an SPOE resolution strategy. Examples of guidance designed to facilitate an MPOE resolution strategy are provided below.

- ***Identified Obstacles***. The Agencies had previously identified a set of vulnerabilities or obstacles to the filers' strategies for a rapid and orderly resolution.[8] These obstacles—in particular, multiple competing insolvencies, global cooperation and operations and interconnections—are relevant to an MPOE resolution strategy, given that the SPOE resolution strategy was developed, in part, in order to mitigate these obstacles. As described above, the Associations believe that the particular vulnerabilities relevant to SPOE strategies are captured most effectively in the Proposed Guidance. To the extent that any relevant elements of prior guidance are still helpful for filers to address in their resolution plans, they have generally been superseded by the Proposed Guidance, as discussed further below. The Associations thus believe that guidance related to these identified obstacles is no longer directly relevant to their resolution strategies or has been superseded by subsequent guidance and so should be explicitly removed, at least with respect to an SPOE-based resolution plan.

- ***Description of Processes Affected by Failure of a Material Entity***. Certain portions of prior guidance require a filer to provide additional information about how insolvency proceedings or the failure of a material entity might affect a filer's capabilities or processes for successfully implementing its resolution strategy. For example, the 2013 Guidance requires a filer to describe the order in which affected material entities would be expected to be placed into resolution and an explanation of the filer's ability to control that sequencing, and also the effects if the material entities entered into resolution under a different sequence.[9] Such guidance specific to the implementation of an MPOE resolution strategy should be explicitly removed.

- ***Proposed Derivatives and Trading Activities Guidance***. Certain portions of the Proposed Guidance would require filers to analyze and address issues that may not be relevant to their resolution strategy.

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[7] *See* 83 Fed. Reg. at 32862, n.21.

[8] 2013 Guidance, Section II.A, and Attachments A–D (Identified Obstacles and Identified Proposed Mitigants; Global Cooperation; Operations and Interconnectedness; Counterparty Actions; and Funding and Liquidity).

[9] 2013 Guidance, Section II.B (General Description of Bankruptcy).

For example, the Proposed Guidance would require a filer to demonstrate that it has the capabilities for inter-affiliate risk monitoring and controls for the potential exposures that may result from the termination of a specific affiliate counterparty, even if both affiliates would survive under the filer's preferred resolution strategy.[10] This is discussed in greater detail in Annex 4.

- ***Proposed PCS Guidance***. The PCS activities section of the Proposed Guidance would require a filer to analyze its available contingency arrangements to minimize disruption in the provision of PCS services to its clients (which includes affiliates), even if the filer's preferred SPOE resolution strategy contemplates maintaining continuity of access without taking contingency actions with respect to its clients.[11] This section of the Proposed Guidance would therefore require a filer to plan for a contingency that is not relevant to the successful execution of its SPOE resolution strategy. This is discussed in additional detail in Annex 3.

2. Earlier guidance that has been made redundant or superseded by the Proposed Guidance should be explicitly removed.

Certain earlier guidance has now been made redundant or superseded by the Proposed Guidance and, as a consequence, should explicitly be rescinded or otherwise clearly made inapplicable. A non-exhaustive list of examples along with reasons for the exclusion of each is provided below.

- ***Funding and Liquidity Analysis***. Funding and liquidity is one of the identified obstacles that the filers are required to address from the 2013 Guidance,[12] but which has been made redundant by the Proposed Guidance. For example, the requirements associated with the funding and liquidity obstacle are not related to and are much less sophisticated than the work that the filers have done since in response to the 2017 Guidance on resolution liquidity execution need (**RLEN**) and resolution liquidity adequacy and positioning (**RLAP**).

- ***General Descriptions of Bankruptcy***. The 2013 Guidance requires a filer's narrative to contain an indicative description of how the filer would commence a bankruptcy proceeding and the pre-filing actions and decisions, etc.[13] This requirement has been superseded by the expectation in the Proposed Guidance that all filers submit detailed bankruptcy playbooks,[14] and is thus no longer necessary.

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10 *See* 83 Fed. Reg. at 32869.

11 *See* 83 Fed. Reg. at 32866.

12 2013 Guidance, Section II.A, and Attachment D (Identified Obstacles and Identified Proposed Mitigants and Funding and Liquidity).

13 2013 Guidance, Section II.B (General Descriptions of Bankruptcy).

14 2017 Guidance, Section V (Legal Obstacles Associated with Emergency Motions) ("A bankruptcy playbook, which includes a sample emergency motion and draft documents setting forth the post-transfer governance terms substantially in the form they would be presented to the bankruptcy court, is an appropriate vehicle for detailing the issues outlined in this section."). Many filers submitted such playbooks, and explicitly reference and describe the contents of their bankruptcy or board governance playbooks in the public sections of their July 2017 165(d) Plans. These descriptions all indicate that the playbooks explain in detail the steps that would be taken in preparation for and throughout bankruptcy proceedings, with particular emphasis placed on pre-planning to facilitate a quick and orderly commencement of proceedings. Examples include the preparation of legal documents to be filed in a bankruptcy proceeding as well as guidance on how to promptly finalize these documents if and when necessary. *See, e.g.*, "Board Playbooks [include] clearly identified triggers linked to specific actions for the timely execution of a bankruptcy filing

- ***Requirements to Submit Project Plans***. Prior guidance has required the development and submission of project plans showing how a filer plans to address specific guidance requirements. While it is important for a filer to continuously evaluate its resolution preparedness capabilities for any ongoing improvements, many of these project plans have been completed, and, in other cases, the specific requirements underlying those project plans have been superseded by subsequent guidance or other regulations. The Final Guidance should clarify that previously submitted project plans or superseded requirements to submit project plans do not continue to alter the requirements in the Final Guidance. For example, the 2013 Guidance requires a filer to identify and develop a plan to mitigate the occurrence of financial contract triggers arising from parent guarantees, cross-defaults or ratings downgrade or withdrawal.[15] Such a requirement has been superseded by the finalized mandatory stay regulations on qualified financial contracts,[16] and any required discussion in the filers' plans should instead be governed by Footnote 37 in the Proposed Guidance.[17] As another example, the 2013 Guidance requires a filer to describe any projects the filer has undertaken or plans to initiate to maintain and preserve access to the filer's critical shared services and facilities,[18] which has been superseded by the "Management Information Systems" and the "Shared and Outsourced Services" sections of the Proposed Guidance[19] and should not continue to govern future submissions.

- ***2016 Feedback Letters and Other Firm-Specific Communications***. On April 12, 2016, the Agencies released filer-specific feedback letters that noted deficiencies and shortcomings in the U.S. G-SIB filers' resolution plans that had to be addressed by October 2016.[20] To the extent that the filers have adequately addressed deficiencies and shortcomings described in the 2016 Feedback Letters, the Agencies should be explicit when consolidating guidance that the requirements in the 2016 Feedback Letters do not continue to alter the requirements in the Final Guidance. For example, the 2016 Feedback Letters for several filers required them to produce board governance playbooks that include clearly identified triggers for the escalation of information, the successful recapitalization of subsidiaries

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and related pre-filing actions." (Bank of America Corporation, July 2017 165(d) Plan Public Section); "Governance Playbooks [identify] triggers linked to specific actions at each stage of distress post-recovery, including the execution of JPMC's bankruptcy filing and related pre-filing actions." (JPMorgan Chase & Co., July 2017 165(d) Plan Public Section); "The Playbook provides steps for preparing to potentially commence a Chapter 11 bankruptcy case in order to implement our SPOE strategy." (The Bank of New York Mellon Corporation, July 2017 165(d) Plan Public Section); "Citi has integrated a Bankruptcy Playbook into the Trust Structure Playbook, which also includes a pre-drafted emergency transfer motion and other relevant first-day bankruptcy motions and documents." (Citigroup Inc., July 2017 165(d) Plan Public Section); "Our 2017 Resolution Plan now includes an updated Directors' Resolution Playbook that incorporates clearly identified triggers, linked to specific actions, for…the timely execution of a bankruptcy filing and related pre-filing actions." (The Goldman Sachs Group, Inc., July 2017 165(d) Plan Public Section); "[The Bankruptcy Playbook] outlines the process for preparing for MS Parent's bankruptcy filing and addresses key issues that will arise in the days and weeks preceding and immediately following the bankruptcy filing, and enhancements to its bankruptcy motions." (Morgan Stanley, July 2017 165(d) Plan Public Section).

15 2013 Guidance, Attachment C (Counterparty Actions).

16 *See* 12 C.F.R. 252.81–8; 12 C.F.R. 382.1–7; 12 C.F.R. 47.1–8.

17 *See* 83 Fed. Reg. at 32867, n.37.

18 2013 Guidance, Attachment B (Operations and Interconnectedness).

19 83 Fed. Reg. at 32866–7.

20 *See* Letters dated April 12, 2016, from Federal Reserve and FDIC to Bank of America Corporation, The Bank of New York Mellon Corporation, Citigroup Inc., The Goldman Sachs Group, Inc., JPMorgan Chase & Co., Morgan Stanley, State Street Corporation and Wells Fargo & Company.

prior to bankruptcy and the timely execution of a bankruptcy filing and related pre-filing actions.[21] This requirement has been directly superseded by the "Governance Mechanisms" section of the Proposed Guidance.[22] The Final Guidance should therefore govern where it contains requirements similar to or that directly supersedes the requirements in the 2016 Feedback Letters. A similar approach should be taken with respect to the feedback letters issued to certain filers on December 19, 2017,[23] as well as the detailed guidance and firm-specific feedback in August 2014 and February 2015 for the development of the filers' 2015 resolution plans.

The Associations believe that the Final Guidance should consolidate and make public all guidance that remains applicable, so that the Final Guidance serves as the single source of guidance applicable to 165(d) Plans. The Associations recommend that, in determining what prior guidance should remain applicable, the following principles should be used:

- Prior guidance that is entirely duplicative of the Resolution Planning Rule or that provides clarification of that rule that was helpful in the formative years of the resolution planning process, but that the process has evolved beyond, should be excluded.

- Prior guidance that is substantively duplicated in the Proposed Guidance should be excluded.

- Prior guidance that has been explicitly listed as no longer applicable should remain excluded, e.g., FAQ LIQ 7 explicitly states that the runway period liquidity assumptions required by the 2014 Confidential Letters no longer apply.

- Prior guidance that has been displaced by a new holistic framework provided in the Proposed Guidance that covers the same substantive topic should be excluded.

- As mentioned in Section III.A.2, prior guidance that addresses an MPOE resolution strategy should be excluded.

- Any discrete assumptions that the Agencies would like the continued application of should be included in the consolidated Final Guidance.

- The FAQs continue to provide helpful gloss on the Agencies' interpretations and expectations, except for those that have been superseded because of revisions made to the 2017 Guidance in the Proposed Guidance.

Each of the filers has separately worked with its outside counsel to review and map prior written guidance, both public and confidential, to the Proposed Guidance. The results of this exercise were used to validate the view that the principles described above would be a workable way to consolidate all of the prior guidance that should

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21 *See, e.g.*, Letter from the Federal Reserve and FDIC to Jay Hooley, State Street Corporation (April 12, 2016) (stating "[board] playbooks must include clearly identified triggers linked to specific actions for: (A) the escalation of information . . . (B) successful recapitalization of subsidiaries prior to bankruptcy . . . and (C) timely execution of a bankruptcy filing and related pre-filing actions"); Letter from the Federal Reserve and the FDIC to Michael E. O'Neill and Michael L. Corbat, Citigroup Inc. (April 12, 2016) (stating "the 2017 Plan should include board playbooks with clearly identified triggers linked to specific actions for: (A) the escalation of information . . . (B) successful recapitalization of subsidiaries prior to bankruptcy . . . and (C) timely execution of a bankruptcy filing and related pre-filing actions").

22 *See* 83 Fed. Reg. at 32864.

23 *See* Letters from the Federal Reserve and FDIC to Bank of America Corporation, The Goldman Sachs Group, Inc., Morgan Stanley and Wells Fargo & Company (Dec. 19, 2017).

remain applicable in one place, as well as to provide quality assurance to confirm that, given the iterative, duplicative and overlapping nature of the prior guidance, consolidation of all prior guidance would help to avoid confusion about what remains applicable.

Therefore, the Associations believe that all prior guidance and assumptions not explicitly included in the consolidated Final Guidance and made public should be deemed to be superseded. In addition, the contemplated forthcoming guidance on intra-group liquidity and internal loss absorbing capacity should be made public and subject to comment and, when final, should be added to and form part of the consolidated Final Guidance so that all 165(d) Plan guidance is in one document.

B. Relevant elements from the SR 14-1 Letter and the SR 14-8 Letter that the Agencies would like applied to resolution planning should be directly incorporated into the Final Guidance, and the other elements of those letters should no longer form part of resolution planning guidance.

The Proposed Guidance references specific elements from both the SR 14-1[24] and SR 14-8[25] Letters, each of which is promulgated solely by the Federal Reserve. The Associations believe that to the extent the Agencies would like to refer to any specific requirements from those letters, those requirements should be directly described in the Final Guidance without cross-referencing any other document. The SR 14-1 Letter should then be rescinded, and the SR 14-8 Letter should be otherwise kept separate from resolution planning guidance.

In particular, with respect to the SR 14-8 Letter, in cross-referencing the letter, the Proposed Guidance would require a filer to support the actionability of divestiture options by conducting analysis required by the SR 14-8 Letter.[26] The SR 14-8 Letter is, however, guidance that applies solely to recovery planning, not for the purpose of resolution planning. If the Agencies would like filers to conduct certain analysis referenced in the SR 14-8 Letter as part of their divestiture analysis for 165(d) Plan submissions, those specific elements should be incorporated directly into the consolidated resolution planning guidance rather than cross-referenced, and the SR 14-8 Letter itself, as recovery planning guidance, should remain separate from the resolution plan requirements.

With respect to the SR 14-1 Letter, the Proposed Guidance similarly cross-references the capabilities that filers are expected to maintain for recovery or resolution preparedness under the SR 14-1 Letter, including the capabilities to maintain access to PCS services, to model funding and liquidity and to produce specific types of management information on a timely basis.[27] The Associations believe that to the extent there are relevant elements in the SR 14-1 Letter not captured by other resolution planning guidance or other regulations, they should be incorporated directly into the Final Guidance and the SR 14-1 Letter should be rescinded. The result would be that relevant portions of the SR 14-1 Letter and associated capabilities would become part of the resolution plan review and examination process, and the standalone Federal Reserve supervision process for SR 14-1 Letter capabilities would no longer be necessary. Owing to the overlap between the SR 14-1 Letter and the Agencies' resolution planning requirements, the filers are now subject to duplicative examination processes for the same capabilities. Combining the separate SR 14-1 Letter requirements in the Final Guidance would be consistent with the goal of

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24 SR Letter 14-1, "Heightened Supervisory Expectations for Recovery and Resolution Preparedness for Certain Large Bank Holding Companies - Supplemental Guidance on Consolidated Supervision Framework for Large Financial Institutions" (Jan. 24, 2014).

25 SR Letter 14-8, "Consolidated Recovery Planning for Certain Large Domestic Bank Holding Companies" (Sept. 25, 2014).

26 83 Fed. Reg. at 32868.

27 *See* 83 Fed. Reg. at 32863, 32865, 32866.

streamlining the resolution planning process and providing clarity, and would provide additional benefit by promoting the efficient allocation of supervisory resources.

The following requirements of the SR 14-1 Letter have been superseded by the current Proposed Guidance and other regulations relevant to resolution planning that have since been adopted. If the SR 14-1 Letter is to be consolidated into the Final Guidance, the following SR 14-1 requirements should be eliminated:

- ***Collateral Management***. The portion of the SR 14-1 Letter that specifically requires a filer to identify the legal entity and geographic jurisdiction where counterparty collateral is held[28] has been largely superseded by the U.S. Department of the Treasury's recordkeeping rule for qualified financial contracts, which requires a G-SIB to monitor and track detailed information about its QFCs on a business-as-usual basis,[29] and thus should not be separately required. The SR 14-1 Letter also requires a review of ISDA Master Agreements and Credit Support Annexes on a quarterly basis for triggers that may be breached as a result of changes in market conditions.[30] When a filer amends such agreements to be compliant with the banking agencies' mandatory stay regulations on qualified financial contracts,[31] such triggers should no longer have a material impact on the orderly resolution of a G-SIB. Finally, the SR 14-1 Letter also requires a filer to identify legal and operational differences and potential challenges in managing collateral within specific jurisdictions,[32] which is substantively superseded by the "Managing, Identifying and Valuing Collateral" section of the Proposed Guidance.[33]

- ***PCS Activities***. The requirements to assess the potential effects of adverse actions and develop contingency arrangements in the event of such adverse actions[34] have been superseded by the "Payments, Clearing and Settlement Activities" section of the Proposed Guidance.[35]

- ***Shared and Outsourced Services***. The requirement to have robust arrangements in place for the continued provision of shared or outsourced services needed to maintain critical operations[36] has been superseded by the "Shared and Outsourced Services" section of the Proposed Guidance.[37]

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28 *See* Attachment to SR Letter 14-1, "Principles and Practices for Recovery and Resolution Preparedness" (Jan. 24, 2014).

29 *See* Qualified Financial Contracts Recordkeeping Related to Orderly Liquidation Authority, 81 Fed. Reg. 75624, 75624 (Oct. 31, 2016).

30 *See* Attachment to SR Letter 14-1.

31 *See* 12 C.F.R. 252.81-8; 12 C.F.R. 382.1-7; 12 C.F.R. 47.1-8.

32 *See* Attachment to SR Letter 14-1.

33 *See* 83 Fed. Reg. at 32866 (Managing, Identifying, and Valuing Collateral—requiring a filer to "have a comprehensive collateral management policy that outlines how the firm as a whole approaches collateral and serves as a single source for governance.").

34 *See* Attachment to SR Letter 14-1.

35 *See* 83 Fed. Reg. at 32865–66 (Payment, Clearing, and Settlement Activities—requiring a filer to provide playbooks that include "a discussion of the potential range of adverse actions . . ." and a discussion of "any possible alternative arrangements that would allow the firm and its key clients continued access to PCS services in resolution.").

36 *See* Attachment to SR Letter 14-1.

37 *See* 83 Fed. Reg. at 32866–67 (Shared and Outsourced Services—requiring a filer to maintain a "fully actionable implementation plan to ensure the continuity of shared services that support critical operations and robust arrangements to support the continuity of shared and outsourced services.").

- ***Liquidity and Funding***. The RLEN and RLAP requirements under the Proposed Guidance require filers to consider as inputs the liquidity reserves of each of a filer's material entities, the funding needed to maintain critical operations and to assess potential funding frictions between affiliates.[38] RLEN and RLAP models are subject to a filer's model governance requirements, including model validation. Each of the filers has implemented or is in the process of implementing a secured support agreement or other contractually binding mechanism with associated governance, including trigger mechanisms, to maintain funding for material entities and critical operations. Therefore, most, if not all, of the funding and liquidity capabilities required by the SR 14-1 Letter have been superseded by elements of the Proposed Guidance and should not be separately required. Please see Annex 5 generally for a discussion of our comments and recommendations on the capital and liquidity areas of the Proposed Guidance.

- ***Management Information Systems (MIS)***. The SR 14-1 Letter requires a filer to have the capabilities to produce certain types of information by material entity on a timely basis.[39] Some of these MIS requirements have been either directly or partially superseded by various sections of the Proposed Guidance or other regulations relevant to resolution planning. For example:

    - The SR 14-1 Letter requires a filer to be able to "produce legal agreement information, including parties to the agreement and key terms and interdependencies." To the extent such agreements are qualified financial contracts, this requirement has been superseded by the U.S. Department of the Treasury's recordkeeping rule for qualified financial contracts.[40]

    - The requirements to have the capabilities to produce information on service level agreements between affiliates and on key third party contracts have been superseded by the "Shared and Outsourced Services" section of the Proposed Guidance.[41]

    - The requirement to be able to produce information regarding "licenses and memberships to all exchanges and value transfer networks, including FMUs" has been superseded by the "Payment, Clearing and Settlement Activities" section of the Proposed Guidance to the extent it refers to key FMUs.[42]

    - The requirement to have the capabilities to produce "data to facilitate third-party valuation of assets and businesses, including risk metrics" has been superseded by the Proposed Guidance requirements on the "Separability" section.[43]

The Associations believe that any specific elements of the SR 14-1 Letter that the Agencies desire to retain, to the extent they are not captured in other resolution planning guidance or other regulations, should be directly incorporated into the consolidated Final Guidance, and the SR 14-1 Letter itself should be rescinded.

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38 *See* 83 Fed. Reg. at 32864.

39 *See* Attachment to SR Letter 14-1.

40 81 Fed. Reg. 75624.

41 *See* 83 Fed. Reg. at 32866–7 (for example, "[t]he firm should also store SLAs in a central repository or repositories in a searchable format, develop and document contingency strategies and arrangements for replacement of critical shared services . . .").

42 *See* 83 Fed. Reg. at 32865.

43 *See* 83 Fed. Reg. at 32868 (". . . this analysis should facilitate buyer due diligence and include carve-out financial statements, valuation analysis and a legal risk assessment.").

IV. Streamlining of Resolution Planning Process

A. The 165(d) Plan submission process should be streamlined and certain information to be submitted as part of a submission cycle should be updated for only material changes.

Going forward, resolution plans can be meaningfully streamlined by focusing on updating the quantitative financial analysis relevant to the execution of the resolution strategy, the associated governance and underlying legal analysis (to the extent updates are needed) and maintaining operational capabilities necessary to timely implement an orderly resolution strategy. The Associations believe that these are the core elements to maintaining an effective resolution plan on an ongoing basis. Updates to the resolution plans on a going forward basis should concentrate on these elements, thereby better focusing the update process on the information that, through the iterative process of resolution planning in the early years, is now understood to be the most beneficial to achieving resolution planning objectives. This will also streamline the Agencies' review process by avoiding the need to examine previously submitted information that is essentially unchanged.

The Resolution Planning Rule permits the Agencies to exempt a filer from one or more of the informational requirements under the rule, and the Agencies have used this authority to vary the content of resolution plans and for streamlining of resolution planning guidance.[44] The Associations believe that the Agencies should extend this principle so that, for future cycles, if a filer's resolution strategy has not changed and there have been no changes to the underlying facts or analysis that would have a material effect on the filer's strategy, a filer should be able to rely on previously submitted materials, rather than having to regularly update and resubmit unchanged or substantively unchanged information.[45] A material change should be evaluated in the context of whether it would have a fundamental impact on the feasibility of a filer's resolution strategy.[46] For example, a filer should not have to regularly resubmit lengthy descriptions of material entities or core business lines for which the scope of their activities and interconnections have not meaningfully changed from the prior resolution plan submission. As a general principle, updates should not be necessary once the underlying analysis has been completed for the governance and operational capabilities established if the underlying facts have not materially changed. Some examples of sections that the filers believe, based on their experience, typically do not change substantially between submissions are provided below.

- ***Information not relevant to the execution of the resolution strategy***. A filer's resolution plan contains a large amount of factual descriptions, for example, of the filer's legal entity structure, descriptions of the material entities and core business lines and interdependencies between them.[47] Such factual descriptions may not change substantially between submissions and may not be relevant to the execution of the resolution strategy unless a meaningful change has occurred to the filer's structure or business operations.

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44 In January 2018, the Agencies made public feedback letters to 19 foreign-based firms, in which the Agencies exercised their authority under § __.4(k) to reduce the informational content requirements for certain of those firms, subject to certain conditions. Of relevance here is that the firm must not experience a material event as specified in § __.3(b)(2). *See, e.g.*, Letter from the Federal Reserve and the FDIC to Jianyu (Jerry) Li, Bank of China Limited (Jan. 29, 2018); Letter from the Federal Reserve and the FDIC to Thomas Sharp, BPCE (Jan. 29, 2018); Letter from the Federal Reserve and the FDIC to Christopher O'Donnell, Standard Chartered PLC (Jan. 29, 2018).

45 To avoid confusion going forward, the Associations believe that the Final Guidance should make it clear when the Agencies are exercising their authority under the Resolution Planning Rule to vary the information requirements of the filers' resolution plan submissions.

46 The concept of materiality in the securities laws is inapposite to this situation.

47 *See* 76 Fed. Reg. at 67336–37.

- ***Descriptions of the filer's operational capabilities***. Over the years, the filers have made significant efforts to enhance the credibility of their respective resolution strategies, including implementing business-as-usual financial and operational capabilities and executing structural changes to support the implementation of that strategy. These efforts include amending vendor contracts and intra-group service agreements to include resolution-resilient terms, developing employee retention strategies and creating governance playbooks and communications strategies to coordinate efforts among key stakeholders in a resolution scenario. Such operational capabilities, once they have been implemented and described in a filer's resolution plan, are not expected to change from year to year. For example, if a filer has remediated all of its material vendor agreements, each resolution plan should not have to re-describe such remediation efforts. Descriptions of operational preparedness capabilities that have been implemented should not have to be resubmitted on an ongoing basis unless there has been a material change.

- ***Unchanged legal analyses***. A filer's resolution plan contains a variety of supporting legal analyses. For example, although not required, the Proposed Guidance expects the filers to create and maintain bankruptcy playbooks and other analyses regarding legal obstacles associated with emergency motions.[48] The filers have also conducted analyses based on the resolution regimes adopted by other jurisdictions to meet the requirements to demonstrate that there is an incentive for global regulatory cooperation. Such legal analyses, once completed, are not expected to change unless there has been a significant statutory change, a material change in the underlying case law or a material change in the underlying facts, such as a new material entity in a new foreign jurisdiction. Unless there has been such a change, a filer should not have to resubmit this analysis on a regular basis.

- ***Maintenance of certain information may be exceedingly burdensome without corresponding benefit when compared to maintaining the capabilities to readily produce the information***. Finally, the ongoing maintenance of certain information imposes burdens on a filer without a corresponding benefit for resolution planning purposes. The main example of this is the maintenance of an active virtual data room for the filer's objects of sale. This requirement is extremely burdensome and costly and brings little to no marginal benefit when compared to having this be an operational capabilities requirement for a filer to be able to generate and populate a virtual data room within a specified period of time.

The Associations believe that this kind of targeted streamlining effort could lead to a meaningful reduction in the thousands of pages of material that the Agencies must review—which was one of the reasons why the Agencies are considering a biannual submission cycle[49]—enabling the Agencies to better focus examination resources on the

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48 2017 Guidance, Section V (Legal Obstacles Associated with Emergency Motions) ("A bankruptcy playbook, which includes a sample emergency motion and draft documents setting forth the post-transfer governance terms substantially in the form they would be presented to the bankruptcy court, is an appropriate vehicle for detailing the issues outlined in this section."). In the public sections of July 2017 165(d) Plans, many filers highlight their analysis of legal obstacles associated with emergency motions and their use of bankruptcy playbooks, as well as other documents, to mitigate these challenges. *See, e.g.*, "To address legal obstacles that could arise from emergency motions that Citi would file for the transfer of subsidiaries from Citigroup Parent to New Citigroup and consistent with the 2017 Guidance, Citi has integrated a Bankruptcy Playbook into the Trust Structure Playbook, which also includes a pre-drafted emergency transfer motion and other relevant first-day bankruptcy motions and documents." (Citigroup Inc., July 2017 165(d) Plan Public Section); "The Bankruptcy Playbook ties key MS Parent actions to the triggers…and addresses the Legal Obstacles Associated with Emergency Motions vulnerability from the 2017 Guidance . . ." (Morgan Stanley, July 2017 165(d) Plan Public Section).

49 Federal Reserve and FDIC, Joint Press Release: Agencies announce joint determinations for living wills (Dec. 19, 2017).

elements of a resolution plan most important to assessing a filer's resolution strategy and most helpful to achieving resolution planning objectives.

Annex 3 to
Living Wills Guidance Comment Letter
Responses Regarding Payment, Clearing, and Settlement Activities Areas of Proposed Guidance

This Annex 3 supplements the cover letter to which it is attached and together with that cover letter (the **Cover Letter**) and all annexes thereto constitutes the comments of the Associations. Terms not otherwise defined in this Annex 3 have the meanings specified in the Cover Letter. Attached for your convenience as Appendix A is a glossary showing all the defined terms in one place.

I. Introduction

The Associations welcome the opportunity to comment on the PCS activities section of the Proposed Guidance. The Associations agree that the ability to maintain continuity of access to key PCS services is a vital step to being able to maintain a filer's critical operations in a resolution scenario, and therefore is key to the successful implementation of a filer's resolution strategy. The filers also agree that having playbooks covering key aspects of PCS services promotes better understanding of adverse actions that FMUs and agent banks could take in a resolution scenario and the identification of ways that filers can respond in order to promote continuity of access to key PCS services and successful execution of their chosen resolution strategy. The Associations, however, believe that certain modifications and clarifications should be made to the PCS activities section of the Proposed Guidance in order to ensure that it achieves the stated goal of streamlining resolution plan submissions while also providing further clarity.

The suggested clarifications and modifications to the PCS activities section of the Proposed Guidance are provided below in two parts. Section II describes general principles that should be applied when modifying the PCS activities section of the Proposed Guidance, which touches on the themes described in the Cover Letter. Section III then provides more detailed comments, organized around the questions raised by the Agencies in the Supplementary Information to the Proposed Guidance.

II. General Principles

A. The PCS analysis should be limited to matters relevant to the successful execution of a filer's particular resolution strategy.

The primary objective of the PCS requirements in resolution planning guidance should be to improve the resolvability of major direct users of PCS services in the financial system and to mitigate the potential systemic impacts arising from their loss of access to such services. All of the information to be provided by a filer in the PCS section of its resolution plan should be to facilitate that objective.

Each of the filers has adopted or is in the process of adopting SPOE as its preferred resolution strategy. The goal of an SPOE resolution strategy is to maintain the continued operations of a G-SIB's material entities in order to minimize the potential systemic impact that would arise from the failure of that G-SIB. In demonstrating the effectiveness of its resolution strategy, a filer should show that it has the financial and operational capabilities to satisfy any potential adverse actions imposed by key FMUs and agent banks in times of material financial distress, and therefore is able to maintain continuity of access to key PCS services. To the extent that a filer's plan sufficiently supports its ability to maintain continuity of access to key PCS services, then further contingency analysis that would not be relevant to the successful implementation of the resolution strategy, such as with respect to key clients, should not be required. As discussed in Annex 2, mandatory inclusion of information extraneous to the successful implementation of a filer's preferred resolution strategy runs counter to the Agencies' goal of streamlining the resolution plan process.

B. The Final Guidance should provide filers with the flexibility of providing analysis that may differ based on the type and scope of PCS services provided.

The Proposed Guidance, as drafted, does not distinguish between the roles and responsibilities of providers of different types of PCS services. Furthermore, the Proposed Guidance does not explicitly recognize that an entity acting in the role of a PCS service provider may provide payment, securities settlement and custodian services to clients based on agreements with a high degree of variability designed to reflect the clients' needs and the full scope of services the filer provides, which may not be limited to PCS services. These types of arrangements are qualitatively different than arrangements between an FMU and its clients, which generally consist of a limited set of services offered pursuant to a standardized rulebook for all of its members. The Final Guidance should explicitly recognize such differences in order to allow a filer to produce analysis tailored to the context of the services that it provides.

C. The Final Guidance should avoid material deviations from the FSB FMI Guidance.

The FSB published its final "Guidance on Continuity of Access to Financial Market Infrastructures (FMIs) for a Firm in Resolution" in July 2017 (the **FSB FMI Guidance**).[1] The Associations believe that the FSB FMI Guidance represents a significant and important step towards resolving the tension between preserving necessary operational and risk management discretion for providers of PCS services and facilitating users' efforts to maintain continuity of access in resolution. The FSB FMI Guidance does so by establishing clear expectations for engagement among the relevant parties, providing clarity around the scope of the guidance, including by limiting the scope of "FMI service users" to members of G-SIB groups,[2] and recognizing the roles and responsibilities that different firms have in the chain of financial intermediation.

The FSB FMI Guidance also represents an international effort among regulators (including the Federal Reserve) to develop an appropriate framework for evaluating a G-SIB's arrangements to support continuity of access to critical FMI services in resolution. Therefore, in order to promote consistent outcomes and cooperation among the regulators in key jurisdictions for G-SIBs, which is important to the successful execution of a G-SIB's resolution strategy, the Associations believe that there should be greater consistency between the Final Guidance and the FSB FMI Guidance. Where appropriate, the Final Guidance on PCS services should make use of the same definitional constructs used in the FSB FMI Guidance. Material deviations in resolution planning terms and concepts among regulators increase the complexity of global resolution planning for G-SIBs; the Associations believe that having

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1 FSB, Guidance on Continuity of Access to Financial Market Infrastructures (FMIs) for a Firm in Resolution (July 6, 2017).

2 FSB FMI Guidance, p.5 ("An 'FMI service user' or 'firm' is used interchangeably in this guidance to mean a legal entity that is part of a global systemically important bank (G-SIB) and which has direct or indirect access to critical FMI services.").

common conceptual frameworks apply across jurisdictions improves the filers' ability to coordinate internally, and facilitates international understanding of a global resolution plan. This comment letter therefore provides specific examples where the Associations believe that greater consistency between the Final Guidance and the FSB FMI Guidance would be helpful.

D. The Final Guidance should allow filers to update certain discussions in the PCS playbooks only for material changes and not have to resubmit the entire analysis as part of the resolution plan submission if no material changes have occurred.

The Associations are strongly supportive of the objective of the Proposed Guidance to streamline the filers' resolution plan submissions.[3] In furtherance of this objective, once the underlying analysis for the PCS playbooks has been completed, if there have been no changes to an FMU's rulebook or an agent bank's contracts that would materially affect the filer's strategy to maintain continuity of access to key PCS services, the Final Guidance should clarify that a full resubmission of the PCS playbooks is not required. Information, at least with respect to a filer's operational capability, should be updated only for material changes,[4] as it is burdensome for filers to have to resubmit the analysis on a regular basis if no meaningful changes have occurred. This principle means that, for example, if there have been immaterial factual changes (e.g., a change in the total volume of transactions with an FMU), a filer should not have to update and resubmit the playbook. For the avoidance of doubt, the filers understand and agree that the underlying financial analysis will have to be updated for every submission to account for new financial information or to satisfy other applicable requirements (e.g., stress testing). The financial discussion related to PCS activities, however, could be submitted separately from the PCS playbooks, as discussed in Section III.B.1 below.

Similarly, neither an FMU's rulebook nor an agent bank's contractual relationship, once negotiated, will change drastically on an annual or regular basis. As noted in Section II.B above, an FMU's relationship with its members is governed by a common set of rules and procedures. Amendment of these rules and procedures typically requires prior notice, and sometimes the opportunity for comment, before the final rules and procedures become effective. An agent bank will enter into a bilaterally negotiated contract with each of its clients, which does not typically change once the contract has been executed. Provided that there have been no changes that would affect a filer's strategy for satisfying potential adverse actions (or to the range or nature of the potential adverse actions) by an FMU or agent bank and its ability to maintain continuity of access to key PCS services, the underlying analysis generally is not expected to fundamentally change between submissions and therefore should not have to be resubmitted in full. This will also streamline the Agencies' review process by avoiding the need to examine previously submitted information that is essentially unchanged.

III. Comments Responding to Specific Requests for Comment

A. Clarify and modify the scope of the Final Guidance

Question 2: Is the guidance sufficiently clear with respect to the following concepts: scope of PCS services, user vs. provider, direct vs. indirect relationships? What additional clarifications or alternatives concerning the proposed framework or its elements, if any, should the Agencies consider? For instance, would further examples of ways that firms may act as provider of PCS

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3 *See* 83 Fed. Reg. at 32857.

4 For these purposes, a material change should be evaluated in the context of whether it would have a fundamental and major impact on the operational feasibility of the filer's resolution plan. See Section III of the Cover Letter and Section IV.A of Annex 2 for a more detailed discussion.

services be useful? Should the Agencies consider further distinguishing between providers based on the type of PCS service they provide?

1. The Final Guidance should clarify the definition of a provider of PCS services in a manner that is broadly consistent with the FSB FMI Guidance.

The Final Guidance should clarify the definition of a "provider of PCS services" and the differences between a direct and indirect relationship with an FMU. Without such a clarification, the Final Guidance would conflate the roles and responsibilities of various entities that provide PCS services in a manner that could undermine rather than support effective resolution planning.

The Proposed Guidance defines a "provider of PCS services" as an entity that "provides its clients with access to an FMU or agent bank through the firm's membership to or relationship with that service provider . . . or if it provides key clients with critical PCS services . . . through the firm's *own operations*."[5] This definition is unclear and inconsistent with how the industry distinguishes between different types of PCS service providers. What might constitute providing PCS services through a filer's own operations is extremely broad, unless it is grounded in the provision of access to an FMU or agent bank. The Proposed Guidance also separately attempts to make the distinction between direct and indirect provision of PCS services, but, as currently defined, where to draw the line between the two is unclear, and may result in differing interpretations of what it means to be a provider of PCS services.[6]

Instead, the Final Guidance should define a direct relationship as a relationship where the filer has a direct membership with an FMU, and an indirect relationship as a relationship where the filer accesses an FMU through the membership held by an agent bank or other similar intermediary. Not only would this approach be much simpler than the concepts used in the Proposed Guidance, but it would also be broadly aligned with how the industry understands and uses these concepts.

Using this approach, the Final Guidance should define a "provider of PCS services" as an entity that provides clearing, payment, securities settlement and/or custody services to another firm in order to facilitate that firm's access to an FMU. This would eliminate the need for a filer to distinguish whether the provision of services is through the filer's own operations. As discussed further in Section III.B.4 below, it would also give a filer that is a provider of PCS services the flexibility to include any analysis of it as a provider within the scope of its existing FMU or agent bank playbooks, or in other relevant sections of its resolution plan. This proposed definition is also broadly consistent with the approach taken in the FSB FMI Guidance, which uses a similar definition for the term "FMI intermediary," which is very similar in concept to the term "provider of PCS services."[7]

Finally, this proposed approach would also help clarify the treatment of custodian banks, which are not directly addressed by the Proposed Guidance. More specifically, a custodian bank would fall within the proposed definition of a provider of PCS services only to the extent that it functions as an agent bank by providing its clients

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5 83 Fed. Reg. at 32857, n.29 (emphasis added).

6 The Proposed Guidance provides the following as examples of direct relationships: a "firm's direct membership in the FMU, firm provides key clients with critical PCS services through its own operations, firm's contractual relationship with an agent bank." In comparison, an indirect relationship is where a "firm provides its clients with access to the relevant FMU or agent bank through the firm's membership to or relationship with that FMU or agent bank." Under these examples, both the direct and indirect relationships include a dependence on an agent bank or other intermediary. *See* 83 Fed. Reg. at 32859.

7 *See* FSB FMI Guidance, p.5 (An "FMI intermediary" is defined as "an entity that provides clearing, payment, securities settlement and/or custody services to other firms in order to facilitate the firms' direct or indirect access to an FMI.").

with direct or indirect access to an FMU. This proposed approach would also streamline the resolution plan submission by avoiding the inclusion of duplicative analysis in the PCS section of such a filer's resolution plan, or the need to create additional playbooks for a material entity that may provide PCS services, given that discussion of the provision of custody services is generally already provided by a filer in the critical operations or core business line analyses of its resolution plan.

2. A filer that is a PCS service provider should not have to determine which of the PCS services it provides are critical and for which clients.

The Final Guidance should not require a filer that is a provider of PCS services to identify which of the PCS services it provides are critical and for which clients. The Proposed Guidance does not define "critical PCS services" beyond providing as an example that PCS services are critical with respect to a particular client where "the suspension or termination of such services would impact the key client's continued access to PCS services."[8] The concept of critical PCS services is therefore defined by reference to the criticality of those services to a particular client. Instead of using such a standard that is difficult for a filer to administer because it is reliant upon a determination made by an external third party (i.e., clients), critical PCS services should instead be defined by reference to the services needed to support the filer's core business lines and/or critical operations relevant to PCS activities.

The FSB FMI Guidance recognizes that a client-based identification of critical PCS services is not practical and notes that "[w]hether a particular service is a critical FMI service will depend on its role in maintaining the particular firm's critical functions and not on the systemic importance of the FMI service more generally. A provider of critical FMI services is not therefore responsible for making a determination in respect of its members or customers as to which of its services is critical to them."[9] As a result, the FSB FMI Guidance defines "critical FMI services" as services "the discontinuation of which could lead to the collapse of . . . one or more of the firm's critical functions," and clarifies that such services are "identified in the course of the resolution planning for a firm."[10]

The Associations agree with the position of the FSB FMI Guidance. Having the concept of critical PCS services hinge on the criticality of such services to a particular client is an overly broad standard. Any assessment of criticality relative to the client would be both difficult to administer and affected by matters that may be beyond the filers' understanding or control, such as the substitutability of the filer's services and whether the client already uses more than one service provider. Users of PCS services typically select the services of agent banks for business reasons (e.g., because they have preexisting banking accounts at or other relationships with an institution), not because a particular agent bank provides PCS services or otherwise provides indirect access to an FMU which are critical to their operations. Furthermore, if a filer's client already has a preexisting relationship with another entity that could provide some or all of the same PCS services, even if the client does not currently use the services of that entity, then the PCS services that the filer provides may not be critical because of the ease of substitutability. Clients may also not cooperate in a filer's efforts to define its critical PCS services because a client may not want a filer to know the criticality of the filer's services for commercial reasons (e.g., to avoid losing leverage when negotiating the terms of future transactions). Therefore, a filer that is a PCS service provider should not have to identify which of the PCS services it provides are critical from the perspective of its clients and should not have to identify key clients with respect to particular critical PCS services.

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8 83 Fed. Reg. at 32865, n.29.

9 FSB FMI Guidance, p.7.

10 FSB FMI Guidance, p.5.

The Associations agree, however, that it is important for a filer to understand its role as provider of PCS services and to help clients understand the potential impacts from actions it may take, such as limitations on intraday credit or a prefunding requirement for settlement activity. The Associations also agree that the filers are able to identify their clients based on certain business metrics, such as those described in Section III.A.3 below. Indeed, certain of the filers have provided public client notices to explain such potential impacts pursuant to the requirement in the PCS activities section of the 2017 Guidance. However, the Associations believe that any assessment of provided PCS services for criticality should depend on the PCS services needed to maintain the filer's own core business lines or critical operations, rather than be determined on a per-client basis or be hinged on the concept of criticality with respect to a specific client.

3. Alternatively, the Final Guidance should clarify that a filer that is a PCS service provider may either identify key clients in a manner consistent with the FSB FMI Guidance or in a manner consistent with the services that it provides.

If the Final Guidance continues to define "critical PCS services" by reference to the criticality of those services to the filer's clients, then the Associations believe that the concept of "key clients" should either be limited in scope or that the Final Guidance should clarify that a provider of PCS services may identify and describe its key clients by category or in a manner consistent with the types of PCS services it provides.

The difficulty of identifying key clients that are recipients of critical PCS services is further compounded by the breadth of the definition of "client" in the Proposed Guidance; specifically, any "individual or entity, including affiliates of the firm, that relies upon continued access to the firm's PCS services and any related credit or liquidity offered in connection with those services."[11] A filer would thus need to conduct outreach with potentially all of its clients in an effort to determine which may be key clients that are recipients of critical PCS services, and even then the outcome of such outreach would likely be inconsistent and, ultimately, not useful for resolution planning purposes.

Although a client that is subject to resolution planning requirements is used to assessing its organization and analyzing its operations in resolution planning terms, many of its clients may be subject to a less-stringent tier of resolution planning requirements, or none at all. Such clients may therefore be unfamiliar with the process of evaluating services from the perspective of determining which would be critical for their ongoing operations. Moreover, given the broad nature of the example provided for critical PCS services—"would impact the key client's continued access to PCS services"[12]—each client may have varying subjective measures of assessing what constitutes an "impact," or, of the multitude of services received from a filer, which services are critical and which are non-critical.

In addition, the list of key clients deemed to be recipients of critical PCS services would likely change over time, which would require an ongoing and highly burdensome process of engagement with a filer's clients and lead to lists of "key clients" and "critical PCS services" that regularly change even though the underlying services provided by the filer remain the same.

Therefore, the Final Guidance should limit the definition of key clients to only members of G-SIBs or U.S. domestic systemically important banking organizations (**D-SIBs**) (i.e., U.S. banking organization groups with more than $100 billion in total consolidated assets). An unnecessarily broad application of the Final Guidance to smaller clients would be counterproductive to the goal of improving resolvability and mitigating the potential systemic impacts arising from the loss of access by major direct users to critical PCS services. Limiting the scope of key clients to

[11] 83 Fed. Reg. at 32865, n.31.

[12] 83 Fed. Reg. at 32865, n.29.

members of G-SIBs or U.S. D-SIBs would be more consistent with that goal. It would also greatly facilitate a filer's ability to determine which of its PCS services are critical to a particular client, because these institutions already define such services for purposes of their resolution plans. This limitation to the definition of key client would also be consistent with the definition of an "FMI service user" in the FSB FMI Guidance, which is limited to members of G-SIBs.[13]

If the Agencies decide not to limit key clients to members of G-SIBs or U.S. D-SIBs, the Final Guidance should clarify that a provider of PCS services may identify and describe its key clients in a manner consistent with the types of services that it provides. In particular, the Associations would expect that such a definition of key client would use one or more of the following alternatives:

- ***Analyze Categories of Clients***. The Final Guidance could allow a filer to determine key clients at a higher level of generality, for example, by defining categories of key clients, and providing more broad-based analysis than for a specific list of individual clients. This would give a filer the ability to use a framework of analysis that is consistent with how it manages its key clients today, which is generally determined based on business lines or by overall services provided, rather than based on a client's usage of any individual FMU.

- ***Average Transaction Volume or Market Value***. The Final Guidance could allow a filer to identify its top clients based on either transaction volume/value, market value of exposures with that client or market value of assets held under custody, averaged over an appropriate time period (e.g., quarterly or yearly). A filer would then analyze its relationships with top clients based on such categories, with the threshold of "top" defined using an appropriate numerical limit or percentage. A filer should be able to choose the most suitable metric and the frequency of any such measurements based on the types of PCS services provided to reflect its business model. For example, the metrics that would make sense for a futures commission merchant may differ from the metrics that should be used by a custodian.

4. If the concepts of "key clients" and "critical PCS services" remain unchanged, then the Final Guidance should not require filers to provide contingency analysis for their clients.

As described in Sections III.A.2 and III.A.3 above, because of how the Proposed Guidance treats the concepts of "critical PCS services" and "key clients," it may not be feasible for a filer to determine which of its clients are key clients that receive critical PCS services, and therefore for which clients an analysis of contingency actions or alternative arrangements that would facilitate the clients' continued access to PCS services would be required. It would be exceedingly burdensome for a filer to undertake and produce this analysis, with no benefit from the perspective of being able to operationalize the filer's preferred resolution strategy. To the extent a key client that receives critical PCS services is subject to its own resolution planning requirements, it should already be responsible for documenting in its resolution plan the identification of, and arrangements for maintaining continuity of access to, critical PCS service providers.

If the concepts of "critical PCS services" and "key clients" remain unchanged, then the Final Guidance should not require a filer to analyze the range of contingency actions that it may take or any alternative arrangements available to facilitate its key clients' continued access to critical PCS services if its resolution strategy is designed to permit the filer to maintain access to FMUs and agent banks. As discussed in Section II.A, if a filer's preferred resolution strategy contemplates the filer's ability to maintain continued access to key FMUs and agent banks, additional analysis regarding what happens if its key clients lose access is not relevant to and does not provide

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13 *Supra*, n.2.

information that would facilitate the successful implementation of the filer's resolution strategy. Although the Proposed Guidance states that a filer does not have to incorporate into its preferred resolution strategy or RLEN/RCEN estimates the loss of FMU or agent bank access,[14] requiring an analysis of contingency arrangements for its key clients nonetheless may require the filer to address such a scenario. Both as a guiding principle and with respect to this particular proposed requirement, the Final Guidance should focus on information necessary to the successful execution of a filer's preferred resolution strategy.

5. The Final Guidance should not require filers to map key clients to key FMUs and agent banks.

The Final Guidance should not require a filer to map key clients to key FMUs and agent banks. As G-SIBs, the filers generally provide a suite of services to their clients, which often encompass multiple business lines and jurisdictions. The filers that are themselves agent banks or custodians could have clients on a global scale that rely on them for access to a large number of FMUs and agent banks. Currently, filers generally determine their key clients based on business lines or overall services provided, and not based on usage of any particular FMU or agent bank. In addition, the mapping of key clients to FMUs and agent banks using quantitative metrics may be neither feasible nor relevant given the netting arrangements that filers may conduct on behalf of their clients prior to clearing and settling transactions at an FMU. Therefore, the mapping of each key client to an FMU or agent bank would likely require the development of new information and monitoring systems that do not currently exist. The potential resolvability enhancements associated with this proposed requirement are unclear and without any meaningful offsetting benefit. To the extent that the requirement to identify key clients is retained, the Final Guidance should provide each filer the flexibility to determine how best to characterize and capture its relationships without having to map key clients to particular FMUs or agent banks.

B. Clarify expectations regarding the content of PCS playbooks

Question 5: Specifically for users of PCS activities, should the guidance indicate that firms are expected to expressly include particular PCS-related liquidity sources and uses such as client pre-funding, or specific abilities to control intraday liquidity inflows and outflows (e.g., throttling or prioritizing of payments)? If so, what particular sources and uses should firms be expected to include?

1. The funding and liquidity analysis required for PCS playbooks should be consistent with the liquidity requirements in other parts of the Final Guidance.

The Proposed Guidance would require filers to provide very specific, granular information about PCS-related liquidity sources and uses throughout the resolution period, presented by currency type, and discussion of intraday credit and other custodial arrangements.[15] In addition, the Proposed Guidance would require PCS playbooks to describe a filer's ability to control intraday liquidity inflows and outflows and to identify and prioritize time-specific payments.[16] This would appear to require, in effect, a filer to conduct stress testing on liquidity inflows and outflows on a per-FMU or per-agent bank basis. While the Associations agree that the ability to demonstrate sufficient liquidity is vital to maintaining continuity of access to key PCS services in resolution, the Associations believe that these requirements should be consistent with the overall liquidity requirements imposed by the Final Guidance. Therefore, the Final Guidance should clarify that any PCS-related liquidity requirements should be factors

[14] 83 Fed. Reg. at 32865.

[15] 83 Fed. Reg. at 32865–32866.

[16] 83 Fed. Reg. at 32866.

that are incorporated into a filer's overall resolution liquidity models (i.e., RLEN and RLAP), and are not incremental to or otherwise more stringent than liquidity requirements imposed by the rest of the guidance.

Furthermore, while it is important for a PCS playbook to include appropriate liquidity and funding analysis, the Final Guidance should clarify that a filer retains the flexibility to discuss the details of such funding and liquidity in other parts of its resolution plan (i.e., that a filer is not required to include duplicative detail in the PCS playbooks if the relevant funding and liquidity analysis is included elsewhere in the resolution plan). The Final Guidance should allow filers the flexibility to determine where such information is most appropriately addressed.

Question 3: Are the Agencies' expectations with respect to playbook content for firms that are users or providers (or both) of PCS services sufficiently clear? What additional clarifications, alternatives, or additional information, if any, should the Agencies consider?

2. The Final Guidance should recognize that any playbooks produced for agent bank relationships may be different from those produced for FMUs.

The Final Guidance should take into account the different relationship that an agent bank has with its clients as compared to the relationship between an FMU and its members, and, as a consequence, should not require the same level of detail and analysis in playbooks for agent bank relationships as compared to playbooks for FMU relationships.

The nature of a filer's relationship with an agent bank is more bespoke than its relationship with an FMU. An FMU's relationship with its members is governed by a common set of rules and procedures, which typically apply in the same manner to all of its members. An FMU playbook may therefore require detailed analysis regarding how the common rulebook applies in the context of a specific member relationship. There is also a lack of substitutability among most FMUs such that the loss of access to one would be difficult, if not practically impossible, to replace. In comparison, a filer's relationship with an agent bank is generally governed by different documentation, client needs and even governing law. Since agent bank relationships are based on and are subject to bilateral negotiations, the governing agreements will generally already be tailored to the risks of the types of services provided. For example, a futures commission merchant may face more direct risk exposure from the financial distress of a client, and its contracts will therefore explicitly contemplate more adverse actions than the contracts for the services provided by an agent bank offering payment services. Therefore, while the Associations agree that it is important to provide playbooks for key agent banks, the Final Guidance should recognize that the analysis in playbooks for key agent banks will generally be different from the analysis for FMUs, in terms of content, organization and level of detail.

The FSB FMI Guidance similarly recognizes that its implementation could differ between FMIs and FMI intermediaries, because, among other reasons, FMI intermediaries are subject to different regulatory regimes from FMIs, typically have customized bilateral contracts and may have a wider commercial relationship with their clients.[17]

Finally, the Proposed Guidance requests that filers continue to engage with key agent banks, and that playbooks should reflect any feedback received during such ongoing outreach. Because agent banks may themselves be G-SIBs or members of large banking organizations, agent banks may have concerns with the sharing of confidential information with competitor institutions. The Final Guidance should take into account concerns about the appropriate level of information sharing and recognize that the analysis for agent banks may, in many instances, be less detailed than the analysis produced for key FMUs.

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[17] *See* FSB FMI Guidance, p.7.

3. The Final Guidance should not indirectly require a filer to address the potential loss of access to an FMU or agent bank.

The Associations strongly agree with the Proposed Guidance that, regardless of a filer's preferred resolution strategy, a filer's PCS analysis should be focused on maintaining continuity of access to key PCS services, and not on scenarios in which a filer loses access to a key FMU or agent bank. The Proposed Guidance would, however, indirectly require a filer to address such a scenario by mandating the analysis of the financial and operational impact to its material entities and its key clients resulting from the loss of access to an FMU or agent bank.[18] The loss of access by a filer to an FMU that has no substitutes, such as the Depository Trust Company, would have catastrophic consequences on the filer and on the financial system as a whole. Including a discussion of the consequences of such loss of access on each of a filer's material entities and key clients would not, in the filers' view, provide any incremental benefit to a filer's resolution plan.

In addition, a filer is not in the best position to understand the potential financial and operational impact to its key clients due to loss of access, even if the concepts of "provider of PCS services," "key clients" and "critical PCS services" are clarified and reasonably constrained as described above. A client may also not want to disclose the potential impact of loss of access to the PCS services provided by a filer for commercial reasons. More importantly, a filer is unlikely to have sufficient knowledge or insight into its clients' overall operations so as to know, or be able to project, the impact of the loss of a particular PCS service on a particular client. Providing such an analysis would be especially burdensome if the scope of key clients is broadly defined to include institutions not subject to resolution planning requirements, including both wholesale and non-wholesale clients.

The Associations believe that this proposed requirement runs counter to the objective of streamlining the resolution planning process. Satisfying this proposed requirement would lead to a substantial misallocation of resources to produce analysis that in many instances would be speculative and, in any event, would not provide any helpful information with respect to the successful implementation of a resolution strategy and would be irrelevant to demonstrating that the filers could maintain access to key PCS services in resolution.

If this requirement is retained, the Final Guidance should provide specific metrics and examples of financial and operational impacts to key clients that filers should consider when seeking to meet this requirement. At a minimum, the Final Guidance should confirm that a filer may focus only on metrics to which it has direct access (e.g., intraday credit that it provides to key clients, settlement volume/value or market value of the activity that a filer processes for its key clients) and not on metrics that may be proprietary to its clients (e.g., aggregate key client activity across all agent banks, aggregate key client assets under custody across all custodians, aggregate margin posted by key clients across all broker-dealers, the extent to which a key client maintains arrangements with other banks that offer similar PCS services, etc.).

4. The Final Guidance should not require separate playbooks to be provided for a filer's role as provider of PCS services.

The Proposed Guidance would require a filer to create a playbook for each material entity that provides PCS services "through the firm's own operations," including "contingency arrangements to permit the firm's key clients to maintain continued access to PCS services."[19] As discussed in additional detail in Section III.A.1, it may be difficult, in practice, to distinguish between providing PCS services through a filer's own operations as opposed to via another FMU or agent bank. Therefore, the analysis for a provider of PCS services should be limited to how the filer, based on the definition of provider of PCS services recommended above, facilitates its clients' direct or indirect access to

18 83 Fed. Reg. at 32865.

19 83 Fed. Reg. at 32866, n.34.

FMUs. As a consequence, the analysis of a filer's role as provider of PCS services should be folded into individual FMU and agent bank playbooks, rather than having to be provided on a standalone basis.

Alternatively, the Final Guidance should allow PCS playbooks to provide information about a filer's provision of PCS services at a higher level of generality, and clarify that the discussion of any contingency arrangements for clients (if the requirement is retained—see Section III.C.1 below) should not be provided on a per-client basis for the reasons provided below:

- As described in Section III.A.4 above, it may not be feasible for a filer to determine which of its clients receive critical PCS services, and therefore for which clients an analysis of contingency actions or alternative arrangements would be required. It would be exceedingly burdensome for a filer to undertake and produce this analysis, with no benefit from the perspective of being able to operationalize the filer's preferred resolution strategy. Instead, a filer that is a PCS service provider should be able to describe its general capabilities to transfer client activity and any related assets, or the types of contingency actions the filer may generally take under its standard contract terms, to the extent this information is not already captured in other sections of its resolution plan (see bullet below and Section III.C.1).

- A provider of PCS services already covers much of the proposed analysis in its discussion on maintaining continuity of critical operations. Overlapping information is unnecessary and will not provide additional benefits.

- If, as described in Section III.A.3, the definition of key client is limited to a member of a G-SIB or U.S. D-SIB group, that client would be subject to its own resolution planning requirements and would already provide information to the Agencies about its contingency arrangements for maintaining access to its key FMUs or agent banks. It is inefficient to require playbooks for both sides of a PCS relationship to provide the same information, particularly since the user is better positioned to make the necessary determinations with respect to criticality, substitutability and impact.

5. The PCS activities section of the guidance, if it is applied to the foreign filers, should limit the scope of the section to material entities, even where it requires discussion of indirect relationships.

If the content of the Proposed Guidance is eventually extended to apply to the **foreign filers**,[20] the foreign filers believe that for material entities that are indirectly accessing key FMUs through affiliate relationships, such analysis should be focused solely on the contractual arrangement with that affiliate, rather than on that affiliate's direct relationship with the FMU.

The foreign filers' U.S. resolution plans are generally limited to their operations within the United States, except where information about their non-U.S. affiliates or operations is relevant to the execution of their U.S. resolution strategies.[21] If a U.S. material entity is indirectly accessing services provided by a key FMU through an affiliate located outside of the United States, the U.S. material entity is unlikely to be able to control or otherwise direct that non-U.S. affiliate with respect to the non-U.S. affiliate's overall relationship with the FMU, similar to how the U.S. material entity could not direct how an agent bank it uses interacts with a local FMU. Contingency arrangements that the U.S. material entity may make in order to maintain access to key PCS services may not be the

[20] The foreign filers referred to in this section are: Barclays PLC, Credit Suisse Group AG, Deutsche Bank AG and UBS Group AG.

[21] *See, e.g.*, 12 C.F.R. §§ 243.4(a)(2)(i) and 243.4(g).

same arrangements as those its non-U.S. affiliate may take. For example, if the U.S. material entity provides margin, the affiliate may aggregate and net margin collected across all of its clients and not all of the margin posted by the U.S. material entity may be posted to the FMU. As would be the case for any other agent bank relationship, requiring a foreign filer's U.S. material entities to provide information about what subsequently happens at a non-U.S. affiliate in the context of the overall relationship with an FMU would therefore be overreaching. Therefore, if similar guidance is issued for the foreign filers, it should limit the required analysis in PCS playbooks for a U.S. material entity in its capacity as user of PCS services to the provision of information regarding the scope of PCS services being provided indirectly and other aspects of the contractual arrangement between it and its non-U.S. affiliate.

C. Limit the scope of contingency arrangements for key clients

Question 4: Should the guidance indicate that providers of PCS activities are expected to expressly consider particular contingency arrangements (e.g., methods to transfer client activity to other firms with whom the clients have relationships, alternative agent bank relationships)? Should the guidance also indicate that firms should expressly consider particular actions they may take concerning the provision of intraday credit to affiliate and third-party clients, such as requiring pre-funding? If so, what particular actions should these firms address?

1. The Final Guidance should not require the discussion of contingency arrangements for clients if it is irrelevant to the filer's strategy.

As discussed in Section II.A, if a filer has already determined how to maintain continuity of access to key FMUs and agent banks without passing on adverse actions to clients (i.e., pre-funding requirements or alternative contingency arrangements), then information about the potential range of contingency arrangements available or the range of contingency actions that the filer may take with respect to its clients would not be needed for the successful implementation of the filer's resolution strategy.

If this requirement is retained, the discussion of the potential range of contingency arrangements or any alternative arrangements available to a filer should be limited to actions a filer may take based on existing contractual arrangements with its clients, and not require analysis of all the potential options its clients may have to facilitate continued access to critical PCS services. A filer should not have to provide in its resolution plan information regarding contingency actions that its clients could theoretically take in order to maintain continued access, especially when the filer does not necessarily have access to information about the clients' overall business needs and preexisting relationships.

The filers agree that it may be important to demonstrate that a filer has the operational capacity to be able to transfer clients to another PCS service provider should they wish to terminate their relationship with a filer in a stress or resolution scenario. Filers generally consider such contingency arrangements on the basis of client or service characteristics and not on an FMU-by-FMU basis. As such, any such discussion, if required, is more appropriately suited for other sections of a resolution plan (e.g., discussion of critical operations or derivatives and trading activities) and not in PCS playbooks. Furthermore, such contingency arrangements should be discussed in general terms with respect to all of a filer's clients and not on a client-by-client basis.

Question 6: Specifically for providers of PCS services are the Agencies' expectations concerning a firm's communication to its key clients (including affiliates as applicable) of the potential impacts of implementation of identified contingency arrangements sufficiently clear? What additional clarifications, if any, should the Agencies consider? Should the Agencies expect firms to communicate this information at specific times or in specific formats?

2. The Final Guidance should clarify the Agencies' expectations regarding engagement with key clients on possible contingency arrangements.

The Proposed Guidance would encourage filers to engage with their key FMUs, agent banks and key clients, and to reflect any feedback received in their PCS playbooks.[22] The Associations agree with this requirement in the context of engagement with key FMUs and agent banks, because such dialogue increases understanding of the types of adverse actions that key FMUs and agent banks may impose, and how they may react in a resolution scenario. It is, however, unclear how engagement with possibly thousands of clients would benefit a filer's analysis of how to maintain continuity of access to key PCS services, particularly if a filer's strategy to maintain access is not reliant on passing along adverse actions to or requiring pre-funding from its clients.

Therefore, the Final Guidance should clarify that such engagement, if any, with respect to key clients should be limited to communications regarding the potential elimination of intraday credit or other actions contractually permitted under the terms governing the relationship so that key clients understand how their existing obligations may be affected in a resolution scenario.[23] Such engagement should not include discussions of potential contingency arrangements or any other alternative arrangements to facilitate continued access of key clients to the filer's PCS services in the unlikely event that a filer lost access to its key FMUs and agent banks, as such arrangements are not part of the filer's preferred resolution strategy.

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22 83 Fed. Reg. at 32865.

23 As discussed above in Section III.A.2, certain filers have already provided client notices pursuant to the requirement in the 2017 Guidance.

Annex 4 to
Living Wills Guidance Comment Letter
Responses Regarding Derivatives and Trading Activities Areas of Proposed Guidance

This Annex 4 supplements the cover letter to which it is attached and together with that cover letter (the **Cover Letter**) and all annexes thereto constitutes the comments of the Associations. Terms not otherwise defined in this Annex 4 have the meanings specified in the Cover Letter. Attached for your convenience as Appendix A is a glossary showing all the defined terms in one place.

I. Introduction

The Associations welcome the opportunity to comment on the derivatives and trading activities section of the Proposed Guidance. The Associations appreciate that the Agencies have provided their specific expectations as to the capabilities and analyses a dealer firm is expected to develop and demonstrate with respect to derivatives and trading activities. At the same time, the Associations believe that certain modifications and clarifications should be made with respect to the derivatives and trading activities portion of the Proposed Guidance in order to ensure that it achieves its stated goal of streamlining the resolution plan submissions while also providing further clarity.

This Annex is intended to respond to Question 7 in the Proposed Guidance[1] and is organized by section along the following key themes, which touch on the themes described in the Cover Letter:

- ***Section II:*** The Associations support the proposed elimination of the requirement to provide separate active and passive wind-down scenario analyses and rating agency playbook requirements.
- ***Section III:*** The Final Guidance should allow a dealer firm the flexibility to tailor its capabilities and analyses to those relevant to, and necessary to support, the dealer firm's preferred resolution strategy, giving due recognition to the development by dealer firms of an SPOE resolution strategy.
- ***Section IV:*** The Final Guidance should permit a dealer firm to incorporate reasonable alternative assumptions that are consistent with its resolution strategy into its preferred resolution strategy and to base its resolution capital execution need (**RCEN**) and resolution liquidity execution need (**RLEN**) modeling on such alternative assumptions, so long as such assumptions are justified.
- ***Section V:*** The Agencies should limit the requirement for the development of derivatives capabilities and related analyses to a dealer firm's material entities.

1 83 Fed. Reg. at 32862 ("Question 7: Do the proposed changes relative to the [2017 Guidance] provide sufficient clarity or are additional clarifications required?").

This Annex concludes with a short section that includes two additional recommendations regarding the requirements to (i) model the operational costs associated with derivatives activities in resolution and (ii) include in a dealer firm's derivatives portfolio linked non-derivative trading positions, which do not fit cleanly into the four key themes described above.

II. The Associations Support the Proposed Elimination of the Requirement to Provide Separate Active and Passive Wind-Down Scenario Analyses and Rating Agency Playbook Requirements.

The Proposed Guidance would eliminate the requirement in the 2017 Guidance that dealer firms' resolution plans include separate passive and active wind-down scenario analyses.[2] Instead, a dealer firm would be allowed to provide a single analysis of its strategy to stabilize and de-risk its derivatives portfolios, tailored to its resolution plan.[3] The Associations support this proposal. As described in detail under Section III below, a dealer firm should have the flexibility to tailor its resolution strategy to the unique business model and operations of the firm. Doing so would enhance resolvability by allowing dealer firms to focus their resolution planning efforts to the circumstances most relevant to their resolution strategy, therefore improving the quality of the resolution plans submitted and their relevance in a potential resolution scenario.

There are still, however, some remnants of the requirement that a dealer firm conduct a passive wind-down analysis in certain aspects of the Proposed Guidance. For example, in connection with the *Residual Derivatives Portfolio Analysis*, Footnote 58 of the Proposed Guidance would require a dealer firm that relies on a line of business sale strategy for a derivatives portfolio to include that portfolio in its potential residual derivatives portfolio.[4] This would effectively require a dealer firm to present a passive wind-down analysis for any derivatives expected to be exited through a line of business sale because it would require the dealer firm to assume that derivatives portfolio remains at the end of the resolution period, regardless of its actual wind-down strategy through a line of business sale. This requirement should be eliminated to permit dealer firms to focus their resources on their preferred resolution strategy.

The Proposed Guidance would also eliminate the mandatory rating agency playbook requirement.[5] The Associations support this aspect of the Proposed Guidance, as not all dealer firms' derivatives strategies are dependent upon an investment-grade rating and such playbooks would not be relevant for such dealer firms. If a dealer firm's derivatives strategy provides for an active wind-down, for example, it may not be necessary for the dealer firm to regain investment-grade ratings during the stabilization period. Consistent with Section III below, the Associations strongly support changes to the Agencies' previous resolution planning guidance that allow dealer firms to submit plans that are more closely and reasonably tailored to each dealer firm's specific resolution strategy.

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2 83 Fed. Reg. at 32861.

3 The Proposed Guidance clarifies that a dealer firm could adopt a going-concern strategy, whereby a dealer firm's derivatives entities would re-establish investment-grade status, an active wind-down strategy or an alternative, third strategy (including a mixed strategy whereby certain derivatives entities execute one strategy and other derivatives entities execute another strategy)—as long as the dealer firm's resolution plan adequately supports the execution of the chosen strategy. 83 Fed. Reg. at 32870, n.55.

4 83 Fed. Reg. at 32871, n.58.

5 83 Fed. Reg. at 32861.

III. The Final Guidance Should Allow a Dealer Firm the Flexibility to Tailor its Capabilities and Analyses to Those Relevant to, and Necessary to Support, the Dealer Firm's Preferred Resolution Strategy, Giving Due Recognition to the Development by Dealer Firms of an SPOE Resolution Strategy.

A. A dealer firm should be allowed to tailor capabilities and analyses to the firm's preferred resolution strategy.

The Agencies should explicitly provide each dealer firm with flexibility to focus on the specific issues and impediments that are relevant and material to its resolution strategy and business model. This would be consistent with the Agencies' stated intention of streamlining dealer firms' resolution plan submissions[6] and would result in a more effective use of both the Agencies' review and dealer firms' resolution planning resources. Furthermore and consistent with the Cover Letter, the Associations also believe that any analyses and capabilities that are more applicable to the implementation of an MPOE resolution strategy should be explicitly removed or the Agencies should clarify that a filer with an SPOE strategy does not have to provide in its plan information responsive to MPOE-based requirements.

In some places the Proposed Guidance recognizes the need to permit dealer firms to focus on issues relevant and material to their preferred strategy. For example, Footnote 50 of the Proposed Guidance recognizes that, with respect to any product/asset class, a dealer firm may have reasons for not capturing data on (or not using) one or more of the enumerated segmentation dimensions.[7] The Associations agree with this approach and believe it should be applied more generally throughout the derivatives and trading requirements of the Final Guidance.

However, the Proposed Guidance would require each dealer firm to devote time and resources to analyze and address issues that may not be relevant to its resolution strategy or business model. For example:

- ***Inter-Affiliate Risk Monitoring and Controls:*** The Proposed Guidance would require each dealer firm to demonstrate that it has the capabilities to provide timely transparency into the management of risk transfers between affiliates, including a method for measuring, monitoring and reporting the market risk exposures for a given entity resulting from the termination of a specific affiliate counterparty or a set of affiliate counterparties.[8] This is required even if the relevant affiliates would survive under the dealer firm's resolution strategy, which is generally the case for material entities under an SPOE strategy. In such a case, the dealer firm would have no need or intention to terminate such inter-affiliate transactions, except at the point when such inter-affiliate transactions are consensually unwound. Therefore in an SPOE strategy (as opposed to under an MPOE strategy, where all or most material entities would be expected to fail) the capability should not be required with respect to inter-affiliate transactions between material entities that survive under the preferred resolution strategy. While the Associations agree that a material entity should have the capability to identify and replace risk exposures to any affiliate counterparty that has failed, in the context of an SPOE strategy the capability should only be required with respect to transactions between a material entity and an entity that is not assumed to survive under the preferred resolution strategy. Furthermore and as described in Section V below, even where relevant, the focus of this capability should be on managing the risk of a material entity rather than of a non-material entity, since (i) non-material entity exposures are, by definition, not material to a dealer firm's resolution strategy and (ii) a material entity's exposure to a non-material entity would be covered by the capability.

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6 83 Fed. Reg. at 32857.

7 83 Fed. Reg. at 32869, n.50.

8 *See* 83 Fed. Reg. at 32869.

- ***Compression Strategies:*** The Proposed Guidance would require each dealer firm to provide detailed information regarding compression strategies, regardless of whether such strategies are relevant to its resolution strategy.[9] Providing detailed information on compression strategies where such strategies would not be used in resolution serves no regulatory purpose and drains resolution planning resources away from the development of relevant capabilities and analyses.

To address this issue, the Final Guidance should explicitly permit a dealer firm not to provide any particular capability or analysis described in the Final Guidance if the dealer firm can explain why it is not relevant to the dealer firm's preferred strategy. Revising the Proposed Guidance in such a fashion would not weaken the core resiliency and resolvability benefits of producing resolution plans, as the Agencies would still have the ability to determine whether a dealer firm's submission appropriately addresses relevant derivatives issues as part of the Agencies' credibility determination process.

B. The Final Guidance should not require the replication of information that dealer firms are already required to make available to regulators pursuant to other regulatory requirements or that is captured elsewhere in the resolution plan.

Dealer firms should not be required to replicate in granular detail in their resolution plans information that they are already required to make available to regulators pursuant to other regulatory requirements or that is captured elsewhere in the resolution plan. A key example of this occurs in the *Derivatives Booking Framework* portion of the Proposed Guidance.[10] While the Associations understand the interest of the Agencies in BAU booking models and automation of derivatives and trading processes and controls in BAU, detailed information about booking models (including with respect to derivatives and trading controls and the components of firm-wide market, credit and liquidity risk management frameworks that are material to the management of a dealer firm's derivatives practices) is available to the Agencies as part of the normal safety and soundness examination process, which is a better vehicle for the Agencies to obtain such information. In addition, dealer firms' resolution plans already include descriptions of their derivatives booking models and the associated resolvability implications, as well as associated information regarding firm-wide market, credit and liquidity risk management frameworks (which may not be specific to derivatives activities). Requiring dealer firms to repackage this information in order to present it in accordance with the requirements of the *Derivatives Booking Framework* portion of the Proposed Guidance would be burdensome and would not serve to further enhance resolvability.

While the Associations agree that it is appropriate to include in the dealer firms' resolution plans a description of the material elements of their derivatives risk management framework and booking model and how they impact resolvability, together with a cross-reference to where more detailed documentation outside of the resolution plan is maintained, requiring dealer firms to include in their resolution plans highly granular descriptions of BAU processes and trade flows is unnecessary to achieve this goal, and results in duplication of effort and diversion of resources that could be focused elsewhere.

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[9] *Id*.

[10] 83 Fed. Reg. at 32868.

IV. The Final Guidance Should Permit a Dealer Firm to Incorporate Reasonable Alternative Assumptions That are Consistent With its Resolution Strategy Into its Preferred Resolution Strategy and to Base its RCEN and RLEN Modeling on Such Alternative Assumptions, so Long as Such Assumptions are Justified.

A. A dealer firm should be allowed to also present alternative reasonable assumptions relating to how counterparties would act during a wind-down if justified.

The Proposed Guidance would impose certain assumptions with respect to counterparty behavior in connection with derivatives unwinds that may not be realistic depending on a dealer firm's particular resolution strategy.[11] All of the dealer firms have either adopted or are in the process of adopting an SPOE strategy as their preferred resolution strategy. Each has well-developed mechanisms to support this strategy through the provision of capital and liquidity to their material subsidiaries, governance mechanisms and other capabilities. Factors that may influence the behavior of counterparties (both internal and external) in an SPOE strategy may be different than the calculus faced by those counterparties under an MPOE strategy.

The Final Guidance should allow dealer firms to present alternative reasonable assumptions relating to how counterparties would act during a wind-down if these assumed actions would be mutually beneficial for the parties involved, including with respect to affiliates that are counterparties. Specifically, the Final Guidance should allow a dealer firm to base its preferred resolution strategy's RCEN/RLEN estimates on such alternative reasonable assumptions, while still requiring a dealer firm to present a fallback analysis (including through the use of appropriate financial modeling, where applicable) using the corresponding standardized assumption in the Final Guidance, to the extent it is retained. For example, in modeling for counterparty actions in relation to *Early Exits (Break Clauses)*,[12] the Final Guidance should allow a dealer firm to model the actions that it reasonably expects counterparties to take based on the counterparty's best interest, regardless of whether a given transaction or set of transactions is "in the money" to the counterparty or whether the counterparty has a contractual break right.[13] Two situations in which this could occur are as follows:

- First, counterparties with no actionable termination rights may be incentivized to agree to a negotiated unwind of their transactions in order to minimize credit exposure to a G-SIB group whose top-tier parent has failed.

- Second, counterparties that do have actionable termination rights that are not in the money might seek to exercise those contractual rights notwithstanding the fact that doing so would require them to pay the dealer firm in order to (i) avoid facing uncertainty about the status of a transaction during an insolvency proceeding of the top-tier parent or (ii) re-establish an existing hedge with a more credit-worthy counterparty.

The considerations that may drive such decisions under an SPOE strategy where the counterparty faces a material entity that remains outside of insolvency proceedings and still has the wherewithal to satisfy any termination

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11 *See* 83 Fed. Reg. at 32870–71.

12 *Id*.

13 Under this proposal, the dealer firm would also be required to present a fallback analysis which assumes that counterparties (external or affiliates) will exercise any contractual termination right, consistent with any rights stayed by the ISDA 2015 Universal Resolution Stay protocol or other applicable protocols or amendments, (i) that is available to the counterparty at or following the start of the resolution period; and (ii) if exercising such right would economically benefit the counterparty, assuming such assumption is retained in the Final Guidance. *Id.*

payment obligation may be very different than under an MPOE strategy where the counterparty faces an entity that has already failed and is subject to judicial or regulatory resolution proceedings.

By using well-supported expected counterparty behavioral assumptions that are more realistic than the ones prescribed by the Proposed Guidance, a dealer firm would be able to present a preferred resolution strategy and RCEN/RLEN estimates that are better tailored to its specific derivatives portfolio and business model. Allowing the use of well-supported alternative assumptions and their incorporation into the preferred resolution strategy's RCEN/RLEN modeling would not weaken the core resiliency and resolvability benefits of producing resolution plans, since the Agencies would still have the ability to (i) determine the reasonability of such alternative assumptions and their incorporation into a dealer firm's RCEN/RLEN modeling as part of the Agencies' credibility determination process and (ii) evaluate a dealer firm's fallback analysis under any standardized assumptions included in the Final Guidance.

B. A dealer firm should be allowed to present alternative assumptions regarding inter-affiliate transactions.

A dealer firm should also be allowed to present alternative assumptions regarding inter-affiliate transactions and incorporate them into its RCEN/RLEN models so long as they are appropriately justified. For example, a dealer firm should be allowed to assume that inter-affiliate transactions between material entities may be unwound at lower costs than transactions with external counterparties. Similarly, a dealer firm should be allowed to assume that a material entity may continue to enter into or unwind OTC derivatives transactions with another material entity, even if those transactions are not strictly "risk-reducing" to both parties, so long as there is a reasonable business justification for the transaction for each of the involved entities, the required capital and liquidity to support the transaction is accounted for in the dealer firm's RCEN/RLEN modeling, and the operational resources to conduct the transactions are supported by the dealer firm's resolution plan. While the Associations understand the benefits and importance of using conservative assumptions for resolution planning, requiring dealer firms to incorporate into their RCEN/RLEN modelling assumptions with respect to inter-affiliate behavior that are inconsistent with the dealer firm's business model and real-world incentives decreases the usefulness of the resulting analysis. As before, the Agencies would still retain the ability to evaluate a dealer firm's fallback analysis under any standardized inter-affiliate assumptions included in the Final Guidance.

C. A dealer firm should be allowed to present alternative timelines for the stabilization and resolution periods.

Consistent with the above, a dealer firm should have the flexibility to tailor the timeline for its stabilization and de-risking strategy for purposes of its RCEN/RLEN modelling based on reasonable assumptions that are supported by its capital and liquidity models. The Proposed Guidance would impose an assumed resolution period of 12 to 24 months for all dealer firms.[14] A dealer firm should have the flexibility to base its RCEN/RLEN model on an alternative resolution period, such as 36 months, if it can be demonstrated to be feasible under its resolution plan and is supported by capital and liquidity forecasts. Requiring a dealer firm to incorporate into its RCEN/RLEN modelling an assumed resolution period that is inconsistent with the characteristics of its derivatives portfolio and business model results in the production of a preferred resolution strategy that is designed to meet an arbitrary constraint, rather than a strategy that is designed to minimize systemic risk and the possibility of a disorderly unwind of the derivatives portfolio. By allowing dealer firms to also include an analysis based on a justifiable alternative resolution timeline (in addition to the standard timeline) and to base their RCEN/RLEN modelling on such alternative timeline, the Agencies would gain the benefit of a resolution plan that is better tailored to a dealer firm's idiosyncratic

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[14] 83 Fed. Reg. at 32871.

characteristics and real-life business model, while still being able to evaluate a firm's fallback analysis under the standardized 12 to 24-month resolution period.

V. The Agencies Should Limit the Requirement for the Development of Derivatives Capabilities and Related Analyses to a Dealer Firm's Material Entities.

In a number of places, the Proposed Guidance is unclear as to whether required capabilities or analyses are required of only of those derivatives entities designated as material entities under a firm's resolution plan, or also extend to entities that are not designated as material entities.

As discussed more generally above, derivatives capabilities should only be required as relevant to each dealer firm's resolution strategy. Non-material entities are, by definition, not material to a dealer firm's resolution strategy. A dealer firm's resolution plan is required to describe "actions that will be taken . . . to prevent or mitigate any adverse effects . . . on the financial stability of the United States" that would result from the failure or discontinuation of only the dealer firm's material entities, not any of its other entities.[15] The key elements of a dealer firm's resolution plan, from governance to capital and liquidity, are focused on the needs of, and strategy for resolving, the dealer firm's material entities. Derivatives and trading activities should not be treated differently.

A dealer firm's non-material entities are not material to the resolution of that dealer firm's derivatives and trading activities because material entity designation processes already generally consider the size and scope of a legal entity's derivatives activities in determining whether to designate the legal entity as a material entity. An entity that has not been designated by the dealer firm as a material entity taking into account such criteria would not conduct a sufficient level of derivatives activity to be material to a dealer firm's resolution.

Any impact from the close-out of a non-material entity's derivatives portfolio on a material entity will already be fully captured in a dealer firm's resolution plan through (i) consideration of any inter-affiliate transactions with a material entity in the discussion and analysis of that material entity's derivatives activities and (ii) discussion of a dealer firm's compliance efforts with respect to the QFC Stay Rules, which will mitigate the risk that the failure of a non-material entity would trigger cross-defaults in the qualified financial contracts of a material entity.[16] Accordingly, the development of capabilities to address the derivatives activities of non-material entities would not meaningfully enhance the resiliency or resolvability of a dealer firm's systemically important activities.

A. The Agencies should confirm that the term "material derivatives entities" means a dealer firm's material entities that engage in derivatives activities.

The Proposed Guidance introduces a new term, "material derivatives entity," which is used in connection with the requirements regarding *Inter-Affiliate Risk Monitoring and Controls* and *Non-Surviving Entity Analysis*.[17] The Associations believe that this term is intended to be limited to material entities that are "derivatives entities," as defined under the Proposed Guidance, and request that this point be clarified in the Final Guidance. This interpretation is supported by the statement in the Supplementary Information, made in connection with inter-affiliate risk monitoring and control, which describes expectations regarding an inter-affiliate market risk framework "that enables the firm to monitor and limit the exposures a *derivatives entity that is a material entity* could experience in an

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15 Resolution Planning Rule, §__.4(c)(1)(v).

16 Relatedly, the Agencies should clarify that the reference to the Protocol in Footnote 57 includes both the ISDA 2015 Universal Resolution Stay Protocol and the ISDA 2018 U.S. Resolution Stay Protocol.

17 *See* 83 Fed. Reg. at 32869, 32871.

extreme resolution scenario."[18] This is also consistent with the 2017 Guidance and its explicit reference to material entities in the Appendix Derivatives Data Tables. In addition to this textual analysis, the Associations believe that such an interpretation is consistent with the goals of resolution planning.

B. In other places, where the scope of a requirement is not specified, the Agencies should confirm that the requirement only applies to material entities.

The Agencies should clarify that the *Potential Residual Derivatives Portfolio Analysis*[19] is limited to the residual derivatives portfolios of a dealer firm's material entities. A dealer firm's preferred resolution strategy is centered on the resolution of its material entities, and as such only the residual derivatives portfolio of its material entities is relevant to its resolution plan.

The Agencies should also clarify that the requirement to incorporate derivatives capital and liquidity needs into the firm's RCEN and RLEN estimates[20] is limited to material entities. Limiting the scope of RCEN and RLEN to a dealer firm's material entities is consistent both with the purpose of ensuring sufficient capital and liquidity to execute the dealer firm's preferred resolution plan and with other sections of the Proposed Guidance, where RCEN and RLEN estimates are explicitly limited to a dealer firm's material entities.[21]

C. The Agencies should limit the "firm-wide" derivatives capabilities requirements to a dealer firm's material entities, rather than across both material entities and non-material entities.

The Proposed Guidance would require certain derivatives capabilities to be implemented with regard to a dealer firm's "firm-wide" derivatives portfolio, including the derivatives portfolios of a dealer firm's non-material entities. Such a requirement would impose modeling and governance burdens that significantly outweigh any associated resiliency and resolvability benefits. For example, under *Portfolio Segmenting and Forecasting*, a dealer firm would be required to have capabilities for segmenting, categorizing and ranking ease of exit for its derivatives portfolio, and forecasting exit costs, for its firm-wide derivative portfolio.[22] The development of these capabilities with respect to the derivatives positions of a dealer firm's non-material entities is not relevant to the successful implementation of the dealer firm's resolution strategy, which is focused on its material entities, and would impose significant burdens that would outweigh any resolution benefits.

At a minimum, the Final Guidance should provide an exit ramp from the requirement to satisfy these requirements for non-material entities if the vast majority of derivatives activities would be covered by an analysis of the material entities. For example, if at least 95% of a dealer firm's derivatives transactions measured by firm-wide derivatives notional and by firm-wide gross market value of derivatives (the standard articulated in the Proposed Guidance in connection with the expectations for the description of booking models)[23] are booked to its material entities, the dealer firm would not be required to satisfy the derivatives strategy and derivatives capabilities requirements with respect to the derivatives portfolios of the dealer firm's other entities. This alternative approach

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18 *See* 83 Fed. Reg. at 32861 (emphasis added).

19 83 Fed. Reg. at 32871.

20 *Id*.

21 *See* 83 Fed. Reg. at 32863–64 (proposing RCEN and RLEN requirements relating to the capital and liquidity needs of only material entities).

22 83 Fed. Reg. at 32869.

23 83 Fed. Reg. at 32868, n.43.

would eliminate the risk that a dealer firm's derivatives analyses would not capture any material derivatives exposures.

VI. Additional Comments on Derivatives and Trading Activities Section of the Proposed Guidance.

A. A dealer firm should not be required to separately model the operational costs necessary to execute its resolution strategy that are specifically associated with its derivatives activities, as these are already included in the material entity cost analyses.

The Proposed Guidance would require a dealer firm to incorporate into its preferred resolution strategy's RCEN and RLEN estimates of operational costs that are associated with its derivatives activities.[24] A dealer firm should not be required to model the operational costs necessary to execute its resolution strategy that are specifically associated with its derivatives activities. Dealer firms currently model operational costs at the material entity level, as required by the Proposed Guidance,[25] and the burden associated with developing models separating out and specifying these costs at the level of specific activities (i.e., derivatives activities) would be complex and not be justified in light of the goal behind firms' models: to reasonably and conservatively estimate total resolution execution needs for material entities. Such an approach would be consistent with the Proposed Guidance's requirements with respect to liquidity modeling, which is conducted on a per–material entity (rather than per-activity) basis.

B. The Final Guidance should provide clarity that linked non-derivatives trading positions should be defined by firms based on their overall business and resolution strategies.

Footnote 41 under the discussion of Booking Practices indicates that a dealer firm's derivatives portfolio should include its derivatives positions "and linked non-derivatives trading positions."[26] The Final Guidance should provide clarity that "linked" non-derivatives trading positions should be defined by dealer firms based on their overall business and resolution strategies. In addition, the Final Guidance should clarify that the inclusion of "linked" trading positions is required only for purposes of the description of booking practices, and does not apply to other elements of the Proposed Guidance, including the dealer firm's wind-down analysis. The strategy a dealer firm employs to wind-down or otherwise resolve its non-derivatives trading positions will form a part of the firm's overall resolution strategy, but dealer firms should have the flexibility to unwind their trading positions in the manner that makes the most sense in terms of their strategy and not be required to analyze or align their strategy based on the construct of specific "linkage."

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[24] 83 Fed. Reg. at 32871.

[25] 83 Fed. Reg. at 32863–64.

[26] 83 Fed. Reg. at 32868, n.41.

Annex 5 to
Living Wills Guidance Comment Letter
Responses Regarding Capital and Liquidity Areas of Proposed Guidance

This Annex 5 supplements the cover letter to which it is attached and together with that cover letter (the **Cover Letter**) and all annexes thereto constitutes the comments of the Associations. Terms not otherwise defined in this Annex 5 have the meanings specified in the Cover Letter. Attached for your convenience as Appendix A is a glossary showing all the defined terms in one place.

I. Introduction

Although the capital and liquidity areas of the Proposed Guidance remain materially unchanged from the 2017 Guidance, the Associations understand that the Agencies intend to provide additional information or feedback regarding intra-group liquidity and internal loss-absorbing capacity in the future.[1] Accordingly, the Associations specifically preserve the opportunity to revisit and add to our comments when the Agencies provide any additional information or feedback on this or any other aspect of resolution planning capital or liquidity standards.

Section II of this Annex explains why filers should be permitted to take support agreements into account in meeting their resolution planning capital and liquidity requirements, and recommends that the Agencies proactively engage with non-U.S. regulators regarding the benefits of such agreements. Section III explains why resolution planning capital and liquidity standards should permit filers to make more tailored, realistic assumptions about the flow of liquidity between affiliates rather than "one size fits all" ring-fencing and similar assumptions, and describes the Associations' specific requests for certain changes or clarifications to the Proposed Guidance.

II. Support Agreements

A. Forthcoming guidance should permit filers to take into account secured support agreements or similar mechanisms to recapitalize and provide liquidity to relevant material entities in meeting resolution planning capital and liquidity requirements.

For resolution planning purposes, banking organizations generally divide their consolidated capital and liquidity resources between **contributable resources** that are held at the top-tier parent or another affiliate, such as an IHC or funding vehicle (**support providers**), and **pre-positioned resources** that are held at **material subsidiaries**.[2] Like the 2017 Guidance, the Proposed Guidance would require filers to balance the flexibility

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[1] *See, e.g.*, 83 Fed. Reg. 32827, 32858 n.8.

[2] In this Annex, the term "material subsidiary" means any material entity that is entitled to receive support pursuant to a support agreement.

provided by holding contributable resources at support providers with the certainty provided by pre-positioning resources at material subsidiaries.[3] Striking the right balance of contributable resources and pre-positioned resources requires taking into account the projected and potential capital and liquidity needs of each material subsidiary and weighing conflicting priorities.

Holding more **contributable resources** helps ensure that recapitalization resources will be available to meet unanticipated losses and that liquidity will be available to meet unanticipated outflows, no matter where such losses or outflows occur. This flexibility maximizes a firm's ability to direct capital and liquidity where and when it is needed most. Excessive pre-positioning can amount to ex ante ring-fencing, increasing the risk that support providers will not have sufficient contributable resources to recapitalize or cover liquidity outflows from the material subsidiaries, in the event that the pre-positioning of internal TLAC or liquidity does not ultimately align with the distribution of losses or outflows in an actual resolution scenario.

Holding more **pre-positioned resources** mitigates the uncertainty, at the material subsidiary level, that intercompany frictions could prevent a material subsidiary from receiving additional capital or liquidity that it might need in a time of stress. This benefit is particularly comforting to host regulators, who otherwise might not have a basis on which to trust a home country regulator to allow the flow of resources to support a subsidiary in the host jurisdiction. However, pre-positioning resources may reduce a firm's flexibility to direct capital and liquidity where and when it is needed most, creating separate pools of capital and liquidity that are necessarily duplicative (because they assume that each material subsidiary will require additional capital or liquidity). As a consequence of that reduced flexibility and the creation of separate pools of capital and liquidity, a firm that holds a relatively greater proportion of its capital and liquidity as pre-positioned resources would generally need to maintain greater aggregate levels of capital and liquidity resources (both pre-positioned and contributable resources) than a firm that relies on contributable resources.

In order to address the trade-offs between holding more contributable resources and holding more pre-positioned resources, several U.S. banking organizations, including all of the filers, have entered into secured support agreements. Support agreements impose legally binding and enforceable obligations on the top-tier parent and other support providers in a resolution scenario to use their contributable resources to provide capital and liquidity support to their material subsidiaries. Such an agreement generally obligates the support providers to provide capital and liquidity support to these material subsidiaries; in periods of financial distress, the obligation is generally based on various capital and/or liquidity metrics, including resolution capital execution need (**RCEN**) and resolution liquidity execution need (**RLEN**) metrics, which are designed to be triggered before the firm reaches its point of non-viability.

Support agreements provide firms with the flexibility of holding contributable resources at the support providers, while addressing the localized uncertainty that pre-positioning is designed to mitigate, by contractually obligating the contribution of resources at a time when the group's resources are sufficient to cover the needs of the material subsidiaries. Support agreements generally contain the following features that enhance the certainty that contributable resources will be available to the material subsidiaries and that any transfers of resources would be enforceable against potential challenges by external creditors:

- The obligations of the support providers under a support agreement are generally secured. A security agreement grants the material subsidiaries security interests in substantially all of the contributable resources available to provide support under the secured support agreement. The filers have taken steps to perfect these security interests under the applicable Uniform Commercial Code in the United States and under relevant non-U.S. law. The security interests granted to the material subsidiaries will

[3] *See* 83 Fed. Reg. at 32863.

generally have priority over all other creditors of the support providers with respect to the pledged collateral (i.e., the contributable resources with respect to the amount of capital or liquidity support needed by material subsidiaries).

- Support providers other than the top-tier parent, such as IHCs and funding companies, generally have no material liabilities to unaffiliated third parties and thus would not have their own external creditors that could challenge the contribution of resources to material subsidiaries.

- The RCEN and RLEN or other applicable triggers are designed to occur before the top-tier parent would become balance sheet insolvent or unable to pay its debts when due, the most common traditional definitions of the point of non-viability.

As a result of the development of support agreements, the Agencies should revisit the pre-positioning requirements articulated in the 2017 Guidance and reassess the assumptions related to the movement of capital and liquidity between material subsidiaries and an IHC or other funding company. At a minimum, the Agencies should explicitly permit a filer, in calculating its resolution capital adequacy and positioning (**RCAP**) and resolution liquidity and positioning (**RLAP**) and in determining the appropriate balance between contributable and pre-positioned resources, to take into account the existence of a secured support agreement and any other enforceable mechanism,[4] such as the right to draw on committed parent liquidity facilities, for the provision of capital and liquidity to its material subsidiaries in resolution.

Forthcoming guidance on resolution planning capital and liquidity standards should explicitly permit filers to meet any such standards with secured support agreements or other similar enforceable mechanisms to the extent such agreements or mechanisms are applicable. For example, forthcoming guidance should permit any filer to:

- Use the existence of secured support agreements or other similar enforceable mechanisms to reduce its pre-positioned resources at material subsidiaries, for purposes of meeting RCAP and RLAP standards, in favor of contributable resources held at an IHC or other funding company.

- Use the existence of secured support agreements or other similar enforceable mechanisms for purposes of meeting RCEN and RLEN standards. As described in greater detail in Section III.A below, forthcoming guidance should explicitly permit a filer to assume that it could move funds from an IHC or funding company to a material subsidiary, and from a material subsidiary (e.g., to the extent it has a liquidity surplus) to an IHC, funding company or another material subsidiary if all the relevant entities are parties to a secured support agreement or other similar enforceable mechanism because host country regulators should be less likely to ring-fence surplus liquidity based on the assurance provided by secured support agreements that such an entity would have a right to capital and liquidity support in the event it were necessary.

In addition, although the Associations recognize that the Proposed Guidance does not explicitly relate to TLAC requirements, the Associations believe that, to the extent that internal TLAC requirements are proposed for U.S. banking organizations,[5] and subject to the terms of any such potential requirements, the same rationale underlying the recognition of contributable resources subject to secured support agreements or other similar

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4 Please see Footnote 2 in Annex 6 for an example of such an alternative enforceable mechanism that could be applied to non-U.S. filers.

5 In the Supplementary Information to the final TLAC rule, the Federal Reserve indicated that if it determined that it would be appropriate to propose domestic internal TLAC requirements, it would invite public comments at that time. 82. Fed. Reg. at 8304.

enforceable mechanisms should apply to any such requirements. The Associations believe that the RCAP requirement for filers to determine the appropriate balance between pre-positioned and contributable resources renders any such proposal duplicative and unnecessary. But, if such domestic internal TLAC requirements are implemented, filers with secured support agreements or similar enforceable mechanisms in place to meet applicable resolution planning capital and liquidity standards should also be permitted to meet any applicable internal TLAC requirements for their relevant subsidiaries with an equivalent amount of contributable resources subject to such agreements or mechanisms.[6]

B. The Agencies should proactively coordinate with non-U.S. regulators to reduce ex ante ring-fencing.

As explained above in Section II.A, excessive pre-positioning requirements can amount to ex ante ring-fencing, which increases the risk that, in the event of material financial distress, support providers will not have sufficient contributable resources to recapitalize or cover liquidity outflows from the material subsidiaries that actually incurred the most severe losses or outflows triggering the need for capital or liquidity support. Non-U.S. host regulators that are concerned about whether the entities in their jurisdictions will be supported in resolution and that are concerned other host regulators will require an excessive amount of pre-positioned resources at their material entities will have a strong incentive to similarly require pre-positioning at excessive levels. For example, a non-U.S. host regulator may be motivated to set its internal TLAC requirement at the high end of the 75% to 90% range established by the FSB in its guiding principles on internal loss-absorbing capacity.[7]

Secured support agreements, however, provide a mechanism for all material subsidiaries, including non-U.S. material subsidiaries, to receive capital and/or liquidity support in a resolution scenario based on calculations of their specific capital or liquidity needs. To the extent non-U.S. regulators become more familiar with this mechanism and the associated legal analyses with respect to potential creditor challenges and enforceability by the material subsidiaries, the regulators should be less motivated to engage in ex ante ring-fencing of capital and liquidity, such as by setting their internal TLAC requirements at the high end of the 75% to 90% range. If non-U.S. regulators are persuaded that secured support agreements reduce their need to ring-fence or to set internal TLAC requirements at excessive levels, they will permit firms to free up contributable resources that could be allocated to meet losses when and, most importantly, where they arise in a resolution scenario. Accordingly, the Agencies should engage more proactively with non-U.S. regulators to share information and expertise with respect to the terms and conditions of secured support agreements, their triggers and mechanisms for contributing capital and/or providing liquidity support to material subsidiaries to keep them open and operating, and the legal analyses conducted by the filers with respect to creditor challenges and the enforceability of secured support agreements in different jurisdictions.[8]

The ultimate objective of these information-sharing efforts should be to encourage the Agencies and non-U.S. regulators to achieve a common understanding and level of comfort with secured support agreements as a key tool for meeting the capital and liquidity needs of the material subsidiaries of a U.S. G-SIB in a resolution scenario.

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6 The Federal Reserve, in its role on the FSB, should also encourage the FSB to confirm that contributable resources committed to material subsidiaries under secured support agreements can count towards internal TLAC requirements under its Guiding Principle 9, which contemplates that home and host authorities may jointly agree to substitute on-balance sheet internal TLAC with internal TLAC in the form of collateralized guarantees, subject to certain conditions. *See* Financial Stability Board, Guiding Principles on the Internal Total Loss-absorbing Capacity of G-SIBs ('Internal TLAC') (July 6, 2017).

7 FSB, Guiding Principles on the Internal Total Loss-absorbing Capacity of G-SIBs ('Internal TLAC') (July 6, 2017).

8 The Agencies should also engage with non-U.S. regulators to ensure appropriate consideration of the FSB's guiding principles with respect to the definition of a material sub-group to ensure that pre-positioning requirements, including internal TLAC requirements, are not imposed on non-material subsidiaries.

This would not only give the Agencies more certainty with respect to the reactions of non-U.S. regulators in the event the top-tier parent of a U.S. G-SIB enters into a bankruptcy or Title II proceeding (i.e., encouraging cooperation and coordination between the Agencies and non-U.S. regulators in giving effect to U.S. G-SIBs' resolution plans as they affect non-U.S. material subsidiaries); it should also make it more likely that non-U.S. regulators would permit U.S. G-SIBs to use secured support agreements to meet a portion of applicable internal TLAC requirements for their non-U.S. material subsidiaries, thus reducing the need for pre-positioning excess amounts of capital or liquidity at those subsidiaries.

While the Associations recognize that the Proposed Guidance does not explicitly relate to TLAC requirements, the same rationale underlying the ability of firms to use secured support agreements or similar enforceable mechanisms to meet resolution planning capital and liquidity standards should apply equally to the extent that internal TLAC requirements apply to non-U.S. firms (or in the event that they are proposed to apply to U.S. firms). With respect to non-U.S. firms, the Associations believe that the Federal Reserve should recalibrate the level of internal TLAC currently required to be held by the non-resolution U.S. IHCs of foreign G-SIBs from 89% to the low end of the FSB's 75–90% range. The Federal Reserve's current super-calibration of the internal TLAC requirement is unnecessary and increases the likelihood that non-U.S. subsidiaries or subgroups of U.S. G-SIBs will face similarly super-calibrated requirements in their host jurisdictions, raising the risk of excessive and duplicative ex ante ring-fencing.[9] Moreover, where the parent of a U.S. IHC has entered into a secured support agreement or similar enforceable mechanism obligating it to recapitalize and provide sufficient liquidity to the U.S. IHC or its material U.S. subsidiaries, the Federal Reserve would have less of a need for pre-positioned resources.

III. More Realistic Assumptions and Requests for Clarification

A. Forthcoming guidance should permit filers to make more tailored, realistic assumptions about flows of liquidity in their resolution planning capital and liquidity estimates and methodologies.

In past guidance on resolution planning capital and liquidity standards, the Agencies have emphasized the need for firms to take into account the risk profiles of their individual entities, as well as potential obstacles to the movement of funds between affiliates, and the Proposed Guidance specifically directs firms to "reflect the idiosyncratic liquidity profile and risk of the firm" in calculating RLAP and the minimum amount of liquidity needed at each material entity based on each entity's liquidity requirements and other factors in calculating RLEN.[10] The advantage of this approach, unlike the more standardized, "one size fits all" approach to assumptions underlying, for example, the Liquidity Coverage Ratio (**LCR**), is that it permits firms to more accurately calculate their resolution planning liquidity requirements based on their own idiosyncratic risks and circumstances. Unfortunately, the Proposed Guidance vitiates this advantage by forcing firms to use other standardized, "one size fits all" assumptions that are inconsistent with a more tailored and realistic analysis based on a firm's own risk profile and the liquidity position of its individual material entities.

The Proposed Guidance requires filers to assume, for example, the complete and immediate ring-fencing for all material entities irrespective of their specific factual circumstances. Filers are required to assume that a net

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9 For example, the Bank of England has stated that it will consider other host jurisdictions' calibration of internal MREL requirements when deciding whether to calibrate a material subsidiary's internal MREL requirement above 75%. Bank of England, Statement of Policy, The Bank of England's approach to setting a minimum requirement for own funds and eligible liabilities (MREL) 9–10 (June 2018) ("In deciding whether to set internal MREL for a material sub-group or subsidiary above 75% scaling, the Bank will take into account . . . the scaling of internal loss-absorbing resources applied by overseas authorities to material subsidiaries located in their jurisdiction.").

10 *See* 83 Fed. Reg. at 32863–64.

liquidity surplus at one material entity could not be moved to meet a net liquidity deficit at another material entity or to augment parent resources.[11] In calculating the stand-alone net liquidity position of each material entity, the Proposed Guidance requires interaffiliate exposures to be treated in the same way as third-party exposures, giving as an example an overnight unsecured exposure.[12] This assumption fails to distinguish between factual circumstances that would make ring-fencing more or less likely, such as whether the material entities in question are branches of the same legal entity, parent and subsidiary rather than sister affiliates, whether an entity is a provider or receiver of liquidity, whether interaffiliate transactions are secured or unsecured, and whether the material entities in question are parties to a secured support agreement or a similar enforceable mechanism for providing liquidity support.

The Agencies should instead allow filers to reflect in their resolution planning liquidity estimates, whether based on RLAP, RLEN or a replacement resolution planning liquidity standard, realistic assumptions about the generation of liquidity and about flows of liquidity between affiliates, subject to applicable legal and regulatory constraints and also taking into account the extent to which such payments may be required by support agreements, such as:

- The ability to monetize liquid assets that may not meet the LCR definition of high quality liquid assets (**HQLAs**), but which filers have been able to demonstrate for purposes of their internal liquidity stress tests would generate cash even in stressed conditions;

- Liquidity support between a bank and its branches, which, as part of the same legal entity, should not generally face limitations on the ability of the bank to deploy liquidity where needed in its branch network;

- Liquidity transfers between affiliates within the same ownership chain (i.e., between two subsidiaries of the bank), including amounts from a non-bank affiliate to a bank and from a bank to a non-bank affiliate within the bank's Regulation W limits, as any parent entity should be expected to manage its liquidity in a manner that maximizes the availability of liquidity to its operations on a consolidated basis;

- Dividends, even across ownership chains, except to the extent that the payment of dividends would be restricted under applicable laws or regulations, such as when a bank subsidiary would have an insufficient capital buffer in stressed conditions to avoid restrictions on capital distributions;

- Transfers of HQLA placed with an affiliated bank branch that provides clearing services for affiliates in the relevant currency, because there should be no reason to assume that an affiliate would not continue to need such clearing services or that the branch would use its own liquidity instead of funding from the affiliate to provide such services;

- The continued performance of secured funding transactions between material entities, at least to the extent the collateral consists of HQLAs (e.g., repo transactions secured by sovereign debt), because the termination of such transactions would simply result in an exchange of cash or cash-like assets;

- Repayments or prepayments of intercompany debt and deposits between subsidiaries and their parent companies; and

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11 *See id*.

12 *See id*.

- Inter-affiliate ordinary course cash management transactions that allow filers to meet payment obligations in appropriate locations or currencies that arise and are settled on an intra-day basis and that carry no overnight risk.

B. Forthcoming guidance should clarify certain aspects of resolution planning capital and liquidity standards

1. Safeguards against false positives

The Agencies should clarify that the goal of resolution metrics is to enable appropriate governance and management actions in a timely manner leading up to a bankruptcy event in order to mitigate the risk of requiring public funds to support resolution. While filers should incorporate predetermined metrics for triggering contractually-binding capital and liquidity obligations and other resolution actions, the Agencies should clarify that it is also appropriate for filers to have safeguards against "false positives" that would avoid a premature bankruptcy filing (without compromising the enforceability of the secured support agreements or other recapitalization and liquidity support mechanisms).

The Associations note that permitting filers to make more tailored and realistic assumptions based on the specific factual circumstances of their material entities, as discussed in sub-section II.A above, would also serve as a safeguard against premature bankruptcy filings. The Agencies should clarify that filers would be permitted to modify these assumptions during an actual stress scenario to reflect actual facts and circumstances. For example, if a filer's support agreement included an RLEN trigger that was based on an assumption of full ring-fencing at each material subsidiary such that, on a consolidated basis, the filer's RLEN trigger was activated because it could not use a liquidity surplus in one or more material subsidiaries to fill liquidity shortfalls at other material subsidiaries, its top-tier parent company could be put in a position of having to file for bankruptcy under the terms of the support agreement even if, in reality, the relevant host country regulators had decided not to ring-fence the material entities with a liquidity surplus. In this case, the filer should be permitted to update its RLEN assumptions to reflect the actual actions taken by host country regulators — e.g., the absence of ring-fencing — in order to ensure a more accurate and up to date measure of RLEN, which could prevent a premature bankruptcy filing.

2. Access to liquidity after recapitalization

The Agencies should clarify that a filer may assume that after a material subsidiary has been recapitalized and has received the required level of liquidity support pursuant to a support agreement, the subsidiary will have access to all sources of capital and liquidity, secured or unsecured, to which a filer with sufficient capital and liquidity would normally have access.

3. Standard for stabilization of material entities

Forthcoming guidance should clarify that a material entity that is expected to remain a going concern under a filer's resolution strategy, as well as any material entity that is subject to a regulatory capital regime that does not have a "well-capitalized" requirement (e.g., a broker-dealer) or that has regulatory capital ratios different from those to which a U.S. bank is subject (e.g., a non-U.S. bank that is not subject to the U.S. Tier 1 leverage ratio), has regained "market confidence" or would qualify as having an "investment grade rating"[13] when it meets its applicable

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[13] *See* 83 Fed. Reg. at 32863.

capital or liquidity requirements or otherwise meets the definition of "investment grade" under the U.S. capital rules.[14] The Agencies should further clarify that material entities that would be wound down in an orderly manner under a filer's resolution strategy and thus would not need to enter into the same level of new transactions would not require an equivalent level of capital or liquidity in order to achieve stabilization.

14 12 C.F.R. § 217.2 ("Investment grade means that the entity to which the Board-regulated institution is exposed through a loan or security, or the reference entity with respect to a credit derivative, has adequate capacity to meet financial commitments for the projected life of the asset or exposure. Such an entity or reference entity has adequate capacity to meet financial commitments if the risk of its default is low and the full and timely repayment of principal and interest is expected.").

Annex 6 to
Living Wills Guidance Comment Letter
Comments Regarding Potential Application to Foreign Filers

This Annex 6 supplements the cover letter to which it is attached (the **Cover Letter**) and together with that cover letter and all annexes thereto constitutes the comments of the Associations. Terms not otherwise defined in this Annex 6 have the meanings specified in the Cover Letter. Attached for your convenience as Appendix A is a glossary showing all the defined terms in one place.

I. Introduction

The **foreign filers**[1] welcome the opportunity to comment generally on the Proposed Guidance. Although the Proposed Guidance would not directly apply to the foreign filers, the Agencies' Guidance for 2018 § 165(d) Annual Resolution Plan Submissions by Foreign-Based Covered Companies that Submitted Resolution Plans in July 2015 (**2018 FBO Guidance**) is substantially similar to the 2017 Guidance applicable to the U.S. G-SIBs and to the Proposed Guidance, as has been the case with prior guidance as well. The foreign filers believe that any guidance that may apply directly to their future resolution plan submissions should better take into account the more limited scope of their operations subject to U.S. resolution planning requirements and similarly be subject to a notice-and-comment process. Accordingly, the foreign filers specifically wish to preserve the opportunity to revisit and supplement these comments, in addition to any other comments that they may raise when the Agencies provide any future guidance, information or feedback applicable directly to them.

This Annex highlights certain issues related to the Proposed Guidance specific to the foreign filers for the Agencies' consideration. Section II below first reiterates that the foreign filers strongly support the comments made in the other sections of this comment letter. Section III provides some additional comments on portions of guidance from the perspective of the foreign filers.

II. The Foreign Filers Strongly Support the Comments, Requests for Clarifications and Recommendations Made in the Cover Letter and the Other Annexes.

The foreign filers strongly support the comments and recommendations raised in the Cover Letter, in particular with respect to (i) enhancing coordination between the Agencies and non-U.S. regulators to improve the efficiency of resolution planning efforts and information-sharing across jurisdictions and (ii) suggesting that the Agencies should explicitly acknowledge that an effective version of an SPOE resolution strategy is a credible means of resolving a G-SIB in an orderly manner. In light of these points, the foreign filers also believe that the Agencies

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1 The foreign filers referred to in this annex are: Barclays PLC, Credit Suisse Group AG, Deutsche Bank AG and UBS Group AG.

should take into account home country SPOE resolution strategies when formulating resolution requirements and guidance for the U.S. operations of FBOs.

In addition, the foreign filers especially support the comments and recommendations with respect to the following items:

- ***Annex 2: Responses Regarding the Consolidation and Streamlining of Resolution Planning Guidance***

  - ***Section III.A:*** All 165(d) Plan guidance should be consolidated and integrated with the underlying regulation, including that (i) guidance designed to facilitate an MPOE resolution strategy should be explicitly removed or made applicable to only those filers not adopting an SPOE resolution strategy and (ii) earlier guidance that has been made redundant or superseded by the Proposed Guidance should be explicitly removed.

- ***Annex 3: Selected Responses to Proposed Changes to Prior Guidance on Payment, Clearing and Settlement Activities***

  - ***Section III.B.5:*** The PCS activities section of the guidance, if it is applied to the foreign filers, should limit the scope of the section to material entities, even where it requires discussion of indirect relationships.

- ***Annex 5: Responses Regarding Capital and Liquidity Areas of Proposed Guidance***

  - ***Section II.B:*** The Agencies should proactively coordinate with non-U.S. regulators to reduce ex ante ring-fencing. In particular, the Federal Reserve should revisit its calibration of the level of internal TLAC currently required to be held by the U.S. IHCs of FBOs. In addition, the same rationale underlying the ability of U.S. G-SIBs to use secured support agreements or similar enforceable mechanisms to meet resolution planning capital and liquidity standards should apply equally to the extent that internal TLAC requirements apply to non-U.S. firms.[2]

III. Future Resolution Planning Guidance With Respect to Derivatives and Trading Activities Should Be Appropriately Tailored to the Size, Complexity and Risk Profile of the Foreign Filers' U.S. Operations.

Derivatives and trading requirements applicable to a foreign filer should be appropriately tailored to reflect the size, activities and risk profile of the foreign filer's derivatives and trading activities conducted and booked in the United States. The Proposed Guidance divides the U.S. G-SIBs into dealer and non-dealer firms based on certain thresholds of derivatives and trading activity. Any derivatives and trading guidance that is made applicable to the foreign filers should similarly be commensurate with the scope of their U.S.-booked derivatives and trading activities.

Application of derivatives and trading activities requirements to positions booked outside the United States—at least to the extent the transactions do not result in any liabilities, risks or other economic impact on the material entities considered in the U.S. resolution plan—would expand the scope of a foreign filer's U.S. resolution plan beyond the foreign filer's U.S.-resolvable operations. These derivatives positions would be resolved pursuant to

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2 An example of another enforceable mechanism could be a support agreement that, although not providing material subsidiaries with a security interest in contributable resources, nevertheless provides host country regulators with sufficient assurance that the agreement may be enforced by the material subsidiaries in accordance with its terms.

a local jurisdiction's legal requirements and in accordance with locally-produced or global resolution plans of the relevant foreign filer. Imposing additional U.S. resolution planning requirements on these derivatives positions runs the risk of creating multiple inconsistent proposed approaches. In addition, it would require a foreign filer to unnecessarily analyze and describe how such positions would be resolved under the U.S. resolution planning framework, despite the fact that the U.S. framework would not apply to these positions in an actual resolution scenario because they would be resolved under the foreign filer's home-country resolution framework.

Accordingly, any derivatives and trading requirements applicable to a foreign filer should be appropriately tailored to reflect the size, activities and risk profile of the foreign filer's derivatives and trading activities conducted and booked in the United States. Derivatives booked outside of the United States that do not result in any liabilities, risks or other economic impact on the material entities considered in the U.S. resolution plan should be explicitly excluded from the scope of a foreign filer's U.S. resolution plan.

Appendix A to
Living Wills Guidance Comment Letter
Glossary

Term	Definition
§165(d) Plan, also referred to as a resolution plan or a living will	resolution plan of a covered company, as defined in the Resolution Planning Rule, required to be submitted to the Federal Reserve and the FDIC pursuant to § 165(d) of the Dodd-Frank Act
2017 Guidance	Guidance for 2017 § 165(d) Annual Resolution Plan Submissions by Domestic Covered Companies that Submitted Resolution Plans in July 2015
2018 FBO Guidance	Guidance for 2018 § 165(d) Annual Resolution Plan Submissions by Foreign-Based Covered Companies that Submitted Resolution Plans in July 2015
The Agencies	The Federal Reserve and the FDIC
The Associations	The Bank Policy Institute and the Securities Industry and Financial Markets Association
contributable resources	consolidated capital and liquidity resources that are held at the top-tier parent or another affiliate, such as an IHC or funding vehicle
Dodd-Frank Act	The Dodd-Frank Wall Street Reform and Consumer Protection Act
D-SIB	domestic systemically important banking organization
FBO	foreign banking organization
FDIC	Federal Deposit Insurance Corporation
Federal Reserve	Board of Governors of the Federal Reserve System
filers	the eight U.S. banking organizations to which the Proposed Guidance applies: Bank of America Corporation, The Bank of New York Mellon Corporation, Citigroup Inc., The Goldman Sachs Group, Inc., JPMorgan Chase & Co., Morgan Stanley, State Street Corporation and Wells Fargo & Company
FMI	financial market infrastructure
FMU	financial market utilities
foreign filers	Barclays PLC, Credit Suisse Group AG, Deutsche Bank AG and UBS Group AG

Term	Definition
FSB	Financial Stability Board
FSB FMI Guidance	Guidance on Continuity of Access to Financial Market Infrastructures (FMIs) for a Firm in Resolution
G-SIB	global systemically important banking organization
IDI Plan	resolution plan of a covered insured depository institution, as defined in 12 C.F.R. 360.10(b)(4), required to be submitted to the FDIC
IHC	intermediate holding companies
LCR	liquidity coverage ratio
material entity	a subsidiary or foreign office of the covered company that is significant to the activities of a critical operation or core business line
material subsidiary	any material entity that is entitled to receive support pursuant to a support agreement
MIS	management information systems
MPOE	multiple-point-of-entry
MREL	minimum requirement for own funds and eligible liabilities
NSFR	net stable funding ratio
pre-positioned resources	resources that are held at any material entity other than a support provider that is party to a support agreement
PCS	payment, clearing and settlement
Proposed Guidance	Resolution Planning Guidance for Eight Large, Complex U.S. Banking Organizations
RCAP	resolution capital adequacy and positioning
RCEN	resolution capital execution need
Resolution Planning Rule	rule promulgated by the Federal Reserve and FDIC pursuant to §165(d) of the Dodd-Frank Act aimed at strengthening the resolution planning capabilities of each covered company as defined by the rule
RLAP	resolution liquidity adequacy and positioning
RLEN	resolution liquidity execution need
SPOE	single-point-of-entry
SR 14-1 Letter	Heightened Supervisory Expectations for Recovery and Resolution Preparedness for Certain Large Bank Holding Companies – Supplemental Guidance on Consolidated Supervision Framework for Large Financial Institutions
SR 14-8 Letter	Consolidated Recovery Planning for Certain Large Domestic Bank Holding Companies

Term	Definition
support providers	top-tier parent or another affiliate, such as an IHC or funding vehicle, in which contributable resources are held
TLAC	total loss-absorbing capacity

Appendix B to
Living Wills Guidance Comment Letter
<u>Associations</u>

<u>A Description of Each Association</u>

<u>The Bank Policy Institute</u>. The Bank Policy Institute is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's small business loans, and are an engine for financial innovation and economic growth.

<u>The Securities Industry and Financial Markets Association</u>. SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate on legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (**GFMA**). For more information, visit http://www.sifma.org.