

CONNELL & ANDERSEN LLP
545 FIFTH AVENUE
NEW YORK, NEW YORK 10017

WILLIAM F. CONNELL
ROY C. ANDERSEN

TELEPHONE: (212) 687-6900
FACSIMILE: (212) 687-6999
randersen@connellandersen.com

OF COUNSEL
GEORGE A. SCHNEIDER
LUCA CANTELLI

Outline of Living Wills Requirements for Foreign Banking Organizations

How will the Overall Process Work?

There is no clear statement in the regulations on what will constitute a satisfactory Plan, other than a Plan must be “credible” and able to facilitate an orderly resolution of the foreign bank. However, the regulators have said they expect to have ongoing dialogue with banks and the process will be iterative. The regulators do not expect to be critical of the initial resolution plans. They do expect these Plans to be complete, and they will serve as a basis for better plans moving forward. The regulators have discretion to require additional information as necessary.

Good faith efforts will be rewarded in dealings with the regulators and foreign banks should expect a large degree of assistance from the regulators. Foreign banks that delay in contacting the Fed and that wait until late in the process will not be treated as gingerly.

Who must File?

Systemically important financial institutions (“SIFIs”) and certain large insured depository institutions (“IDIs”). SIFIs required to submit resolution plans are bank holding companies and foreign banking organizations with \$50 billion or more in total consolidated assets. IDIs with \$50 billion or more in total assets will need to file resolution plans. The rule is expected to apply to over 100 institutions, most of which are outside the U.S. and many of which have less than \$50 billion in U.S. assets.

What Foreign Banks Can Submit Tailored Plans?

The regulators recognized that certain foreign banks, although covered as SIFIs, have operations in the US that are less significant and do not pose a serious threat to the US banking system. The Fed has stated “the resolution plan of a foreign-based company that has limited assets or operations in the United States would be significantly limited in its scope and complexity.” These foreign banks can submit “tailored plans” that are less detailed than the plans required for other SIFIs. The rules here are somewhat ambiguous and will need some fleshing out by the regulators.

Tailored plans may be submitted by FBOs: with less than \$100 billion in U.S. nonbank assets; and whose U.S. insured banks, branches and agencies have assets comprising at least 85% of the FBO’s total U.S. consolidated assets.

Most foreign banks that are covered by the Living Will requirements should be able to qualify for the tailored plan option.

Notice Required Before Foreign Banks Can Submit Tailored Plans?

Foreign banks that believe they qualify for the tailored plan approach must provide the Agencies with 270 days' prior notice of their intention to file a tailored Resolution Plan.

What must be submitted?

Analyses of how such institutions could be resolved in insolvency in a way that does not pose systemic risks to the U.S. financial system, in the case of SIFIs, and that protects depositors, creditors and the FDIC insurance fund, in the case of IDIs.

When must plans be submitted?

There is a staggered reporting regime:

A deadline of July 1, 2012 for the largest SIFIs and foreign banks over \$250 billion in nonbank assets and any IDI subsidiaries that are required to submit plans.

A deadline of July 1, 2013, for foreign banks with total nonbank assets of \$100 billion or more and less than \$250 billion.

December 31, 2013, for every other foreign banking organization that is required to submit a plan

Contents of a Resolution Plan

Executive Summary. An outline of the key elements of the plan, material changes to the Resolution Plan, and actions taken to improve the plan's effectiveness or remedy any material weakness of the plan.

Strategic Analysis. An analysis of the plan for a "rapid and orderly resolution." This is under the Bankruptcy Code and done in a reasonable time and in a manner that does not affect the stability of the US financial markets. The analysis should set forth key assumptions, specific actions to be taken to facilitate a rapid and orderly resolution of material entities, critical operations and core business lines, and an analysis of how key resources could be leveraged for an orderly resolution, with a focus on the possibility that the resolution may occur during a time of financial distress in the United States.

A foreign bank may exclude its branches in the US from this analysis if they have less than \$50 billion in assets and do not perform a critical operation. The analysis also is to include a strategy to protect any insured depository institution from risks that may arise from nonbank subsidiaries, including any non-US subsidiaries.

Description of Corporate Governance Structure for Resolution Planning. The description should identify the senior management official responsible for the Plan, as well as how resolution planning is incorporated into the corporate governance structure.

Information Regarding Overall Organization Structure. This should include (i) a list of material entities, mapped to core business lines; (ii) an unconsolidated balance sheet and a consolidating schedule for all material entities; (iii) information on material assets, liabilities, derivatives, hedges, capital and funding sources, and major counterparties; (iv) analysis of the effects of a potential bankruptcy of a major counterparty; (v) identification of trading, payment, clearing and settlement systems; and (vi) an explanation of risks related to non-US operations, including the impact of differing national laws, regulations, and policies on resolution planning.

Information Regarding Management Information Systems. This should identify the management information systems that support its core business lines and critical operations, address the continued availability of such systems in and outside of the United States.

Interconnections and Interdependencies. A description of these between the foreign bank and its material entities and affiliates, and among its critical operations and core business lines, with a focus on how key services and support will be available to its critical operations and core business lines.

Supervisory and Regulatory Information. Identification of supervisory authorities and regulators, including non-US regulators.

Contents of a Tailored Resolution Plan

For foreign banks, it is only necessary to cover its US nonbank material operations in its strategic analysis, corporate governance structure, organizational structure, management information systems, and supervisory and regulatory information.

With regard to interconnections and interdependencies, a foreign bank must describe these between itself and its insured depository institutions, branches and agencies, and nonbank material entities and operations.

In addition, a foreign bank must give an explanation of how it integrates its resolution planning for US operations into its overall contingency planning process.

How are U.S. Bank Subsidiaries of Foreign Banks Treated?

A U.S. subsidiary bank with more than \$50 billion in assets would be required to submit a separate bank Plan, even if its parent foreign bank qualified for a tailored plan.

Regulatory Review of Plans

Within 60 days of submission, the regulators will determine whether a foreign bank's Plan satisfies certain minimum information requirements. Once accepted, the regulators will determine whether a Plan is "credible" and would facilitate an orderly resolution under the Bankruptcy Code.

What if a Plan is Unacceptable?

If a Plan is found to be deficient, the regulators will notify the foreign bank. The bank would then have 90 days, with the possibility of an extension, from receipt of the notice to resubmit a plan that addresses the deficiencies.

If the Plan is not approved, the regulators may impose enhanced capital, leverage and liquidity requirements, or limit the growth, activities or operations of a foreign bank or its subsidiaries. In cases where the problems persist for two years, the regulators may require the foreign bank to divest assets or operations.

Confidentiality

The regulators have stated that most of the Plans will be treated as confidential and be exempt from public disclosure, so long as the institution makes the proper request for confidential treatment. All Plans will have a public section that discusses liquidation strategies and the types of purchasers who may be interested in business lines.

When does a Bank have to Update its Plan?

Foreign banks must notify the regulators within 45 days of any changes that would have a “material effect” on their Plan.

Approvals

Plans must be approved by the board of directors or for foreign banks, by a party with delegated authority from the board.

This is an outline of how the rules of the Resolution Plans might apply to a foreign bank doing business in the U.S. Each bank must make a separate evaluation of how the rules apply to its individual situation and facts. This is not intended to apply to every situation and it is not intended as legal advice.

