BANK POLICY INSTITUTE

November 30, 2023

Via Electronic Mail

Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551
Attention: Ann E. Misback, Secretary
Docket No. OP-1816
Docket No. OP-1817

Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429
Attention: James P. Sheesley, Assistant Executive Secretary
RIN 3064-ZA37
RIN 3064-ZA38

Re: Request for Public Comment on Guidance for Resolution Plan Submissions of Domestic and Foreign Triennial Filers

Ladies and Gentlemen:

The Bank Policy Institute[1] appreciates the opportunity to comment on the Board of Governors of the Federal Reserve System and Federal Deposit Insurance Corporation's (together, the **Agencies**) proposed Guidance for Resolution Plan Submissions of Domestic Triennial Full Filers[2] and Guidance for Resolution Plan Submissions of Foreign Triennial Full Filers[3] (together, **165(d) Proposed Guidance**).

[1] BPI is a nonpartisan public policy, research, and advocacy group, representing the nation's leading banks and their customers. BPI's members include universal banks, regional banks, and major foreign banks doing business in the United States.

[2] Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, *Guidance for Resolution Plan Submissions of Domestic Triennial Full Filers*, 88 Fed. Reg. 64626 (Sept. 19, 2023) (hereinafter **Domestic Filer Proposed Guidance**).

[3] Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, *Guidance for Resolution Plan Submissions of Foreign Triennial Full Filers*, 88 Fed. Reg. 64641 (Sept. 19, 2023) (hereinafter **Foreign Filer Proposed Guidance**).

As a preliminary matter, we provide the following overarching observations:

First, the 165(d) Proposed Guidance should continue to be tailored based on the risk an institution presents, addressing the differences between the largest GSIBs and the Category II and Category III firms that will be subject to the proposed guidance, rather than applying many of the most onerous GSIB expectations without differentiation. In this manner, the 165(d) Proposed Guidance—like the **Long-Term Debt Proposal**[4]—ignores the statutory instruction to tailor the application of prudential standards and, in certain cases, make a determination regarding the application of these standards. Section 165 of the Dodd-Frank Act includes three core, yet simple requirements.[5] The Federal Reserve shall establish enhanced prudential standards for bank holding companies with $250 billion or more in total consolidated assets; shall differentiate the application of enhanced prudential standards (either on an individual basis or by category) based on a bank holding company's capital structure, riskiness, complexity, financial activities, size, or other risk-related factors; and shall make a determination in order to apply enhanced prudential standards to any bank holding company or bank holding companies with total consolidated assets between $100 billion and $250 billion.

The Federal Reserve should therefore tailor the application of the 165(d) Proposed Guidance based on the enumerated statutory factors for both Category II and Category III firms and, with respect to bank holding companies with total consolidated assets between $100 billion and $250 billion, as would be the case for certain Category III firms, differentiate the application of the guidance on the basis of these factors. As the 165(d) Proposed Guidance currently stands, it would apply most of the requirements applicable to a GSIB to any Category II or Category III filer that would use a single point of entry (**SPOE**) resolution strategy.

Second, BPI supports the inclusion of expectations for both SPOE and multiple point of entry (**MPOE**) resolution strategies. It is important that the 165(d) Proposed Guidance explicitly reaffirms that both strategies remain viable options and that institutions may tailor strategies based on their structure and activities.

Third, the agencies should consider the interaction between the 165(d) Proposed Guidance and the pending Long-Term Debt Proposal, which should work together to improve the resolvability of affected banks and avoid duplicative and/or contradictory requirements. Importantly, the long-term debt requirements should reflect an institution's resolution strategy and not push an institution to a particular strategy.

Fourth, as described in more detail in our comments on the FDIC's pending **IDI Rule Proposal**,[6] the Agencies should take a coordinated approach to the two sets of resolution planning requirements. Terms and concepts should be consistent between the two rules, and

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[4] Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, *Long-Term Debt Requirements for Large Bank Holding Companies, Certain Intermediate Holding Companies of Foreign Banking Organizations, and Large Insured Depository Institutions*, 88 Fed. Reg. 64524 (Sept. 19, 2023).

[5] 12 U.S.C. §5365.

[6] Federal Deposit Insurance Corporation, *Resolution Plans Required for Insured Depository Institutions With $100 Billion or More in Total Assets; Informational Filings Required for Insured Depository Institutions With at Least $50 Billion But Less Than $100 Billion in Total Assets*, 88 Fed. Reg. 64579 (Sept. 19, 2023).

insured depository institutions should be permitted to cross-reference their resolution plans under the **165(d) Rule**[7] to the greatest extent possible in their IDI Rule plan to avoid unnecessary duplication. By the same token, concepts that have proven to be unnecessary for IDI Rule plans—specifically the least-cost analysis—should similarly be eliminated from the 165(d) Proposed Guidance.

This letter begins with a discussion as to why it is important to maintain both SPOE and MPOE as viable resolution strategies. It then discusses why it would be appropriate to provide firms subject to the 165(d) Proposed Guidance with at least a full year to incorporate its expectations into their resolution plan once it is finalized. Finally, the letter provides several suggestions on how the 165(d) Proposed Guidance can be better tailored to reduce the burden on filers while still achieving its regulatory objectives.

I. BPI Supports the Recognition of Both SPOE and MPOE Resolution Strategies

BPI supports the inclusion of both SPOE and MPOE resolution strategies in the proposal. The inclusion of expectations for both types of resolution strategies shows that the Agencies understand that SPOE and MPOE are both viable resolution strategies with distinct benefits and tradeoffs. Including both strategies in the guidance will continue to allow filers to adopt resolution strategies depending on their business model, size, interconnectedness and other considerations.

SPOE strategies were initially developed by very large and complex financial institutions with operations in multiple jurisdictions spanning many legal entities. Conversely, MPOE resolution strategies may be better suited for domestic filers with business models centered around the lead IDI and few or no foreign material entities, as well as foreign filers with IDI-focused U.S. operations. Pushing filers with simple legal structures and less-complex businesses toward SPOE—which entails several complex capital and liquidity requirements that banks would need to model on an individual basis—would bring substantial costs without commensurate resolvability benefits as compared with MPOE.

As they have done in the 165(d) Proposed Guidance, it is important for the Agencies to continue their reasoned approach with respect to a filer's choice of resolution strategy. The Agencies should continue to allow triennial filers—regardless of resolution strategy—to refine and enhance their resolution strategies and necessary supporting capabilities as part of the regular resolution planning supervisory process. This would echo the experience of the largest filers, which were able to develop and refine their strategies and operational capabilities over the course of multiple submission cycles based on continuous engagement with the Agencies. This is because resolution planning is an iterative process, with each submission building on the prior submission based on continued engagement with the Agencies.

This proposal would be the first set of comprehensive guidance for many of the triennial full filers. As such, providing filers with less than a year, assuming the Agencies do not grant the extension requested below, and only one submission to respond to all of the applicable

[7] Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, *Resolution Plans Required*, 84 Fed. Reg. 59194 (Nov. 1, 2019).

expectations contained in the 165(d) Proposed Guidance would be insufficient and should not form the basis for a deficiency. Instead, the Agencies should provide feedback in a manner that will better allow filers to continue iteratively building the capabilities they need to operationalize their preferred resolution strategy.

A. The 165(d) Proposed Guidance and other regulatory reform proposals issued by the Agencies, when viewed in their totality, could be regarded as pushing some institutions toward an SPOE strategy.[8]

While the 165(d) Proposed Guidance states that the Agencies do not have a preference for SPOE resolution strategies over MPOE resolution strategies, the strength of that statement is less clear when the guidance is viewed together with the Long-Term Debt Proposal. In particular, the Long-Term Debt Proposal would require banks and holding companies to issue sufficient long-term debt to fully recapitalize the bank at a well-capitalized level (i.e., CET1 capital equal to 6% of risk-weighted assets (**RWAs**), which includes a one percent allowance for balance sheet depletion). Full recapitalization, also known as a "capital refill" approach, is consistent with maintaining the bank as a going concern and not required for an MPOE strategy that involves a wind-down or sale of the bank, or a bridge bank. Specifically, a failing bank will likely still have Tier 1 capital of at least 2% of its total average assets when entering receivership, and neither it nor a bridge bank should be required to be recapitalized or otherwise maintain capital in excess of the adequately capitalized level (i.e., CET1 capital equal to 4.5% of RWAs). Requiring full recapitalization at a well-capitalized level is excessive for an MPOE strategy.[9]

Accordingly, this GSIB-like calibration of the proposed long-term debt requirement to facilitate recapitalization at a well-capitalized level, together with the fact that the Agencies are for the first time proposing to apply SPOE guidance to Category II and III banking organizations, could be interpreted to suggest the Agencies do not view the resolution of a Category II or III firm's IDI under an MPOE approach as viable. Furthermore, such a calibration, in particular with respect to internal long-term debt requirements, could become a binding constraint for MPOE filers such that they have no choice other than to adopt SPOE in light of the associated costs of compliance.

To the extent the Agencies intend that additional filers adopt SPOE as a resolution strategy, there should be a public and transparent discussion, including a notice and comment period, about whether an SPOE strategy is necessary and desirable for Category II and III firms. At a minimum, the 165(d) Proposed Guidance should explicitly reaffirm that the Agencies do not have a preference for SPOE strategies and that MPOE is and will remain a viable resolution strategy. If the Agencies do have a preference for SPOE as a resolution strategy for one or more Category II or III firms, that preference should be articulated publicly in a clear and transparent manner to all affected firms, rather than as negative feedback to a particular firm or cohort of firms in the form of deficiencies on a particular resolution plan. BPI agrees with the concerns raised on this point by FDIC Vice Chairman Travis Hill in his comments on the 165(d) Proposed

[8] Domestic Filer Proposed Guidance at Question 7.

[9] Domestic Filer Proposed Guidance at Question 3; Foreign Filer Proposed Guidance at Question 4.

Guidance.[10]

Furthermore, if the Agencies recommend that a particular firm or all firms of a certain size or category switch to an SPOE strategy, or if a firm affirmatively chooses to alter its strategy, any affected firm should be provided sufficient time to adopt the SPOE strategy. A firm would need at least one year before its next submission deadline to accommodate the significant amount of work needed just to assess the feasibility and implications of transitioning to an SPOE strategy. A full transition to an SPOE strategy would include development of basic capabilities and a comprehensive written plan, which is an iterative process likely to take place over the course of multiple years as funding, operations, governance and other capabilities are built up and considered by the management and boards of the firm. Requiring filers to transition to SPOE on a faster timeline may detrimentally affect resolvability, as that may lead to new SPOE filers relying on resolution planning capabilities that require more time to be fully developed. In addition, firms would require sufficient time to address the changed capital and liquidity requirements and capabilities associated with SPOE strategies. The Agencies should take this into consideration when issuing feedback to a filer that is switching from an MPOE strategy to an SPOE strategy. In particular, the Agencies should generally refrain from issuing any shortcoming or deficiency with respect to a former MPOE filer's first resolution plan relying on an SPOE strategy, in consideration of the fact that domestic GSIBs developed and refined SPOE strategies over the course of multiple filings.

II. Firms Should Have at Least One Year to Incorporate the 165(d) Proposed Guidance into their Resolution Plan Submissions[11]

The 165(d) Proposed Guidance states that the Agencies are proactively considering "a short extension of the next resolution plan submission date" in recognition of the fact that the proposed guidance includes several new expectations for affected filers.[12] BPI supports an extension for affected filers and, further, believes the Agencies should provide at least one full year to respond to the expectations in the 165(d) Proposed Guidance, once finalized, and to reflect those changes in their resolution plans. Further, we request that the Agencies provide notice of any extension of the submission date for affected filers as soon as possible and in advance of any finalized 165(d) guidance.[13] Due to internal governance processes, which are described further below, institutions will need to begin work to have plans approved several

[10] "After more than a decade into resolution planning, it is worth considering whether the FDIC, as the entity ultimately responsible for determining how a bank will be resolved, along with the Federal Reserve, should decide in a clear and transparent manner whether and when institutions need to adopt an SPOE strategy. Conversely, what the agencies should not do is spend more than a decade approving an MPOE strategy for each of these firms, put out guidance that expressly states the agencies do not have a preferred strategy, and then without warning find the plans not credible because of doubts about the MPOE strategy." FDIC, Statement by Vice Chairman Travis Hill on the Proposed Guidance for Title I Resolution Plans (Aug. 29, 2023), *available at* https://www.fdic.gov/news/speeches/2023/spaug2923i.html.

[11] Domestic Filer Proposed Guidance at Question 1; Foreign Filer Proposed Guidance at Question 2.

[12] Domestic Filer Proposed Guidance at 64628; Foreign Filer Proposed Guidance at 64644.

[13] For more details regarding this request, please see Bank Policy Institute, American Bankers Association, Institute of International Bankers and Securities Industry and Financial Markets Association, *Letter to the Board of Governors of the Federal Reserve System and Federal Deposit Insurance Corporation regarding Interim Extension of the July 2024 Submission Date for Triennial Filers* (Nov. 30, 2023).

months before the plan submission date. The current submission date of July 1, 2024 means that institutions will likely need to begin these processes before the 165(d) Proposed Guidance is finalized. To avoid the inefficiency of filers needing to prepare submissions before the guidance is finalized, the Agencies should provide notice, even if initially provided through informal means, of any extension of the submission date as soon as possible and prior to finalization of the guidance.

The 165(d) Proposed Guidance represents a major extension of expectations applicable to the largest filers to Category II and III institutions, as well as an increase in expectations for certain FBOs. Moreover, the 165(d) Proposed Guidance represents the first time the Agencies have provided a comprehensive set of expectations to most of those firms. Despite their larger size and greater amount of resources to devote to resolution planning, the GSIBs were allowed to respond to similar expectations as part of an iterative process spanning multiple submission cycles that built upon other guidance previously provided to those firms. Accordingly, Category II and III firms that are the subject of the 165(d) Proposed Guidance should have at least one full year to implement the guidance once finalized. A reasonable time period will support a more complete implementation of resolution planning and related capability enhancements.

Giving firms one full year would already represent a substantial acceleration from the pace at which these expectations were required to be operationalized by the GSIBs. Any faster implementation would run the risk of turning the resolution planning enhancements into a check-the-box exercise where firms scramble to meet the various expectations by the deadline but may need additional time to appropriately enhance their underlying capabilities while incorporating resolvability considerations into the day-to-day activities of the firm.

In particular, if MPOE filers are expected to meet the alternatives to the least-cost test, despite our comments below recommending against this expectation, firms will need time to develop financial modeling capabilities to meet those expectations, as well as establish quality assurance processes and model and resolution plan-related governance, such as challenge and model validation. Moreover, the proposed alternatives to the least-cost test are a novel interpretation of the FDIC's statutory requirement, which the Agencies have not previously discussed in public or with covered companies. This new and untested interpretation will require filers to undertake new analyses and likely seek additional guidance from the Agencies with respect to its scope and meaning (making it even more difficult to meet such an expectation in the upcoming 165(d) plan submission). While we recommend against including these new expectations, if the Agencies do include them in the guidance then the Agencies should provide sufficient time for filers to conduct this analysis.

In addition, governance processes related to resolution plan submissions cannot be front-loaded, particularly when capabilities are undergoing development, and are an important reason why conforming resolution plans to the updated guidance will require at least one year. Filers generally go through multiple stages of governance approvals before submitting a resolution plan, including the board of directors-level approval required by the 165(d) Rule, which alone could take over a month. Furthermore, in many cases the resolution plan is reviewed by the second and third lines of defense before undergoing governance approvals, meaning it would need to be substantially complete even before that if internal processes call for such review. Forced compression of review and approval timelines could result in different sections of the

plan being produced in a silo, without adequate coordination and review, frustrating the entire purpose of the exercise.

These same timing considerations apply to the FDIC's IDI Rule Proposal, which contemplates that covered IDIs would be required to file no less than 270 days after the effective date of the final rule. For some of the same reasons above, BPI urges the FDIC to provide at least a full year to comply with that rule when it is finalized.

Furthermore, under the current 165(d) Rule[14] new filers are allowed one year to submit their first resolution plans.[15] In the adopting release for the 165(d) Rule, the Agencies similarly noted that, "absent extenuating circumstances, this approach [to providing feedback] will provide a firm with at least one year to consider any and all firm-specific feedback before it is next required to submit a resolution plan."[16] The breadth and depth of the expectations in the 165(d) Proposed Guidance generally surpass the firm-specific feedback under the existing 165(d) Rule, making it even more necessary that firms have at least one year to comply.

III. The 165(d) Proposed Guidance Can Be Better Tailored While Still Achieving Its Regulatory Objectives

A. Filers that use an MPOE resolution strategy should not be required to demonstrate satisfaction of the least-cost test alternatives enumerated in the 165(d) Proposed Guidance.[17]

BPI does not believe that the Agencies should expect MPOE filers to satisfy the alternatives to the Federal Deposit Insurance Act (**FDIA**) least-cost test enumerated in the IDI Resolution section of the guidance.[18]

The FDIC's own IDI Rule Proposal does away with related requirements in the existing IDI Rule, based on the FDIC's experience that submitting this information "provided limited utility to the FDIC relative to the burden of producing the relevant information and analysis."[19] In lieu of providing a least-cost analysis, the IDI Rule Proposal requires IDIs to demonstrate their valuation capabilities that could be used by the FDIC in the event of an actual failure. If the IDI Rule Proposal removes the requirement to satisfy the least-cost test under the FDIA, then the 165(d) Proposed Guidance should also remove this expectation.

Because a real-world resolution event will, by definition, diverge from the hypothetical analyses contained in a resolution plan, the Agencies should take a similar approach in the

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[14] 12 C.F.R. Parts 243 and 381.

[15] 12 C.F.R. §243.4(b)(5); §381.4(b)(5).

[16] 84 Fed. Reg. at 59204.

[17] Domestic Filer Proposed Guidance at Question 10; Foreign Filer Proposed Guidance at Question 10.

[18] Domestic Filer Proposed Guidance at 64639; Foreign Filer Proposed Guidance at 64657.

[19] 88 Fed. Reg. at 64595. *See also* Federal Deposit Insurance Corporation, *Statement on Resolution Plans for Insured Depository Institutions* (June 25, 2021) (exempting filers from the IDI Rule requirement to show how their strategy satisfies the least-cost test), https://www.fdic.gov/resources/resolutions/resolution-authority/idi-statement-06-25-2021.pdf.

165(d) Proposed Guidance. Any hypothetical least-cost test analyses, or a proxy for them, included in a resolution plan would be of no or minimal value to the FDIC in an actual resolution event and would require MPOE filers to expend resources on building a detailed least-cost test model and supporting capabilities for something the FDIC would ultimately calculate itself. Requiring MPOE filers to demonstrate their valuation capabilities, as proposed in the IDI Rule Proposal, would be more useful across the full spectrum of potential resolution events. On a more practical level, it is impossible to actually calculate whether the least-cost test or the enumerated alternatives are satisfied in the abstract in the absence of actual bids from a buyer.

Accordingly, rather than expecting an MPOE filer to conduct hypothetical analyses with limited real-world benefit while also then burdening the Agencies by having them review the analyses, the guidance should focus on ensuring that filers have the necessary capabilities in place should the FDIC actually need to conduct a least-cost analysis. Alternatively, if the IDI Rule Proposal, once finalized, reinstates a least-cost test requirement in some form, then the final guidance should align to such requirement in the IDI Proposed Rule so that firms with an MPOE strategy that are required to submit both 165(d) Rule and IDI Rule resolution plans do not have to conduct two different analyses that are meant to answer the same question. Furthermore, if the least-cost test requirements remain in the 165(d) Proposed Guidance, the Agencies should at least explain to firms the FDIC's policies, principles and practices underlying the least-cost test in a comprehensive and fully transparent manner.

B. BPI agrees that the 165(d) Proposed Guidance does not need to include governance mechanisms expectations for domestic MPOE filers and believes that it should include only limited expectations for certain foreign SPOE filers.[20]

BPI does not believe that governance mechanisms expectations are necessary for domestic MPOE filers and agrees with the Agencies' approach of omitting such expectations for domestic MPOE filers and including only limited expectations for foreign SPOE filers.[21] An MPOE resolution strategy relies on regulators to place the operating subsidiaries into resolution or similar proceedings and, unlike SPOE, does not require the close coordination and timing of the parent's bankruptcy such that the operating subsidiaries remain solvent and operational during resolution. Accordingly, requiring domestic MPOE filers to establish governance mechanisms would not meaningfully enhance their resolvability and would require these filers to allocate resolution planning resources that could be better used elsewhere.

The governance mechanisms expectations of the proposed guidance should also not apply to a foreign SPOE filer with a resolution strategy that does not rely on foreign parent support or any prepositioned resources to be transferred during the runway or resolution period (other than from a solvent IHC subsidiary to its own subsidiary).[22] The playbooks and legal analyses described in that section are generally intended to address bankruptcy challenges that would not arise (or would not be relevant) in the case of full BAU prepositioning at entities that remain solvent in the SPOE strategy, as there should be no transfers of support from entities that would

[20] Domestic Filer Proposed Guidance at Question 6.

[21] Domestic Filer Proposed Guidance at 64635; Foreign Filer Proposed Guidance at 64652.

[22] Foreign Filer Proposed Guidance at 64651-64652.

enter their own resolution proceedings.

C. The 165(d) Proposed Guidance's blanket expectation that MPOE firms remediate vendor arrangements to support the continuity of shared and outsourced services is overbroad.

The 165(d) Proposed Guidance includes new expectations for MPOE filers to update vendor contracts to incorporate appropriate terms and conditions to prevent automatic termination and facilitate continued provision of such services to material entities through resolution.[23] Such a blanket expectation is inappropriate for MPOE filers that primarily receive external services through the bank, as termination of such vendor contracts under *ipso facto* clauses would already be stayed under the FDIA.[24]

Accordingly, the Agencies should clarify that such expectations should apply only to the extent necessary to operationalize an MPOE strategy, such as when material entities obtain services under key vendor contracts that would not be covered by the FDIA stay. Failure to tailor this expectation will otherwise require filers to undertake an expansive scoping and contract remediation effort with no commensurate enhancements to resolvability while likely battling understandable confusion from the vendors about why contracts with an IDI should be remediated, notwithstanding that they would already survive a resolution under the FDIA.

Furthermore, consideration should be given to how filers actually manage key vendor contracts. Many filers already include resolution-resilient terms in their vendor contracts as they come up for renewal or are otherwise periodically reviewed. Allowing filers to continue this process over their usual time horizons would allow for the systematic remediation of in-scope vendor contracts, without requiring filers to undertake a burdensome full review and update in a short period of time. As described above, such a requirement would often result in no commensurate enhancements to resolvability while diverting resources from other resolution planning initiatives. Imposing an arbitrary timeline on remediation of vendor contracts also does not account for the fact that such remediation is not entirely within a filer's control, for example in situations where a contract was recently renewed, and the filer has no leverage to force an early renegotiation, while also ultimately leaving the filer in a weaker negotiating position with the vendor.

D. The 165(d) Proposed Guidance should be tailored rather than applying GSIB guidance in full to various aspects of Category II and III resolution plans.

Various aspects of the proposed guidance apply the expectations included in the guidance appliable to U.S. GSIBs[25] in full to Category II and Category III firms that would use an SPOE strategy, rather than tailoring the expectations to address the fundamental differences between the domestic GSIBs and the firms subject to the guidance. The foreign filers with smaller U.S. operations and large regional banking organizations that make up the Category II and Category

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[23] Domestic Filer Proposed Guidance at 64638; Foreign Filer Proposed Guidance at 64656.

[24] 12 U.S.C. §1821(e)(13)(A).

[25] *See* Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, *Guidance for the 2019*, 84 Fed. Reg. 1438 (Feb. 4, 2019).

III firms subject to the guidance generally have much simpler legal entity structures, including as a result of legal entity rationalization efforts undertaken by foreign filers subject to enhanced prudential standards as part of complying with the U.S. intermediate holding company requirement. The SPOE aspects of the 165(d) Proposed Guidance should expressly take that into account, including with respect to expectations for governance mechanisms, capital, and liquidity.

The Agencies should tailor proposed guidance to address the differences between GSIBs and the Category II and III firms that will be subject to the proposed guidance. In general, firms should only be expected to address the aspects of the proposed SPOE guidance that are relevant to that firm's SPOE resolution strategy rather than be expected to adopt GSIB capabilities in full.

For example, firms with limited payment, clearing and settlement activities, such as those with no critical operations linked to such activities, should not be expected to develop the same full range of capabilities as a firm with more extensive activities. Expecting such firms to enter into a contingency arrangement in BAU and develop extensive payment, clearing and settlement resolution capabilities is overly burdensome and costly, without yielding commensurate resolvability improvements. Key financial market utility and agent bank playbooks should similarly be tailored in level of detail to the complexity of a firm's relationship with that specific intermediary.

As another example, prescriptive separability analysis expectations are inappropriate with respect to businesses and legal entities that would be wound down in resolution. In many cases, it may not be feasible to sell or otherwise transfer such businesses, and requiring complicated analyses does nothing to enhance resolvability. Furthermore, many of the elements of the separability analysis are imported from guidance applicable to GSIBs and may not be appropriate for filers that are not active in the investment banking space or lack large M&A teams.

E. The 165(d) Proposed Guidance should not include RLAP expectations for SPOE filers.

BPI believes that Resolution Liquidity Adequacy and Positioning (**RLAP**) should be removed from the 165(d) Proposed Guidance,[26] consistent with the 2020 resolution planning guidance issued to the largest FBOs (**2020 FBO Guidance**).[27] Importing the RLAP expectation currently applicable only to domestic GSIBs is inappropriate, given the comparatively simple legal entity structures and reduced risk profiles of the firms subject to the proposed guidance. While the implementation of RLAP capabilities would contribute to a firm's resilience in stress, such capabilities are not necessary to successfully effectuate an SPOE resolution strategy once the firm fails, assuming appropriate calibration of the relevant capital and liquidity triggers, and

[26] Domestic Filer Proposed Guidance at 64634; Foreign Filer Proposed Guidance at 64651.

[27] Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, *Guidance for Resolution Plan Submissions of Certain Foreign-Based Covered Companies*, 85 Fed. Reg. 83557 (Dec. 22, 2020).

so are less important for less complex firms that pose less financial stability risks.[28]

Furthermore, RLAP expectations are potentially redundant with other regulatory requirements, such as the Liquidity Coverage Ratio and internal liquidity stress testing.

F. The 165(d) Proposed Guidance should not include RCAP expectations for SPOE filers.

BPI believes that Resolution Capital Adequacy and Positioning (**RCAP**) should be removed from the 165(d) Proposed Guidance,[29] consistent with the 2020 FBO Guidance. Proposing expectations regarding positioning of capital is a premature and moving target, particularly for Category II and III firms that will need to also address the requirements of the **Basel III Endgame Proposal**[30] and Long-Term Debt Proposal. BPI believes that existing capital requirements, particularly to the extent further increased with the Basel III Endgame Proposal and Long-Term Debt Proposal, are more than sufficient to provide a backstop of resources that is appropriate to the size and complexity of the firms subject to the proposed guidance without having RCAP.

Adding yet another, separate, potential constraint on capital adds even more complexity to the resolution planning processes for the firms that will be subject to the final guidance. These firms are smaller and less complex than the domestic GSIBs, from whom this expectation is imported. Similarly, as discussed for RLAP above, the implementation of RCAP capabilities is not necessary to successfully effectuate an SPOE resolution strategy once the firm fails, assuming appropriate calibration of the relevant capital and liquidity triggers, and are therefore less important for the Category II and III firms subject to the 165(d) Proposed Guidance.

G. There is no need to issue derivatives and trading guidance to either SPOE or MPOE firms.[31]

The proposal requests comment on whether to provide guidance on derivatives and trading activities for specified firms that utilize an SPOE resolution strategy.[32] It is not necessary or advisable to issue derivatives and trading guidance to firms that would be subject to the 165(d) Proposed Guidance, regardless of whether the filer has an MPOE or SPOE resolution strategy or is a domestic banking organization or FBO. The derivatives and trading activities of firms that would be subject to the 165(d) Proposed Guidance are much smaller and less systemically important or interconnected than those of the GSIB filers currently subject to specific derivatives

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[28] *See* Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, *Guidance for the 2019*, 84 Fed. Reg. 1438 at FAQ Q2 (Feb. 4, 2019) (discussing that RLAP corresponds to liquidity outflows during the pre-failure runway period while RLEN is intended to cover the post-bankruptcy time period).

[29] Domestic Filer Proposed Guidance at 64633; Foreign Filer Proposed Guidance at 64650.

[30] *See* Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, *Regulatory Capital Rule: Large Banking Organizations and Banking Organizations With Significant Trading Activity*, 88 Fed. Reg. 64028 (Sept. 18, 2023).

[31] Domestic Filer Proposed Guidance at Questions 11 and 12; Foreign Filer Proposed Guidance at Questions 11 and 12.

[32] Domestic Filer Proposed Guidance at 64631; Foreign Filer Proposed Guidance at 64647.

and trading guidance, given that four of those GSIB filers currently account for 87.0% of the total U.S. banking notional amounts for derivatives and trading activities.[33] Extending derivatives and trading guidance to all triennial filers would be a departure from the treatment for GSIBs, which are not uniformly subject to the derivatives and trading guidance in recognition of the differences in their business models. Accordingly, triennial filers similarly should not be subject to derivatives and trading guidance given the smaller scale of their trading activities and their simpler structures.

Furthermore, to the extent that a given filer's derivatives and trading activities are material to its successful resolution, the filer would already be required by the 165(d) Rule itself to describe the specific actions needed to facilitate a rapid and orderly resolution of the firm, including in connection with the failure or discontinuation of a material entity, core business line or critical operation.

To the extent a filer's derivatives and trading activities grow over time, either organically or as a result of acquisitions, that filer would already know the types of enhanced expectations the Agencies would apply to a larger firm's derivatives and trading activities from existing legacy guidance for the GSIBs.

Accordingly, in light of the fact that the derivatives and trading activities of the Category II and III filers are much smaller and simpler than those of the GSIBs and because they are already required to analyze their derivatives and trading activities to the extent relevant to their resolution, BPI does not believe that it is necessary or advisable for the Agencies to issue specific, one-size-fits-all derivatives and trading guidance to this group of filers.

H. Tailoring of Foreign Filer Proposed Guidance expectations

1. If the Agencies decide to provide guidance on derivatives and trading activities in the Foreign Filer Proposed Guidance, they should not include extraterritorial aspects that the Agencies previously considered and rejected in the 2020 FBO Guidance.[34]

As described above, derivatives and trading guidance is not necessary for either Category II or III domestic banking organizations or FBOs.[35] However, if and to the extent that derivatives and trading guidance is issued for FBOs, the guidance should not include extraterritorial aspects that were included in the proposed 2020 FBO Guidance, but ultimately dropped from the final 2020 FBO Guidance.

As discussed in the adopting release to the 2020 FBO Guidance, elements from the 2020 proposal related to derivatives and trading activities originated in the United States and booked directly to non-U.S. affiliates were rejected. Commenters, including BPI members, argued that the derivatives guidance should not include U.S. derivatives and trading activities or prime

[33] Office of the Comptroller of the Currency, *Quarterly Report on Bank Trading and Derivatives Activities Second Quarter 2023* at 1, (Sept. 2023).

[34] Foreign Filer Proposed Guidance at Question 13.

[35] Foreign Filer Proposed Guidance at 64656.

brokerage customer account balances booked directly to non-U.S. affiliates because such activities are beyond the scope of the rule and the information is better gathered through collaboration with home country regulators. Instead, FBO commenters argued that the guidance should only address derivatives and trading activities and prime brokerage customer account balances that are booked to U.S. material entities and related to core business lines and critical operations.

As described by the International Swaps and Derivatives Association in a recent report, "Today, the EU, UK and US each has rules requiring derivatives trades to be reported. Consequently, regulators can use LEIs and related data fields to track exposures of all counterparties to a trade. [. . .] The regulatory perimeter is jurisdictional and could be addressed through MoUs."[36] Accordingly, regulators already have the tools they need to gather information on derivatives activities, including those conducted in foreign jurisdictions. The experience of March 2023 shows the effectiveness of information sharing between regulators in a crisis scenario, as observed by the Basel Committee with respect to Credit Suisse and Silicon Valley Bank:

> Host authorities of significant entities within the relevant banking groups covered by this report (for example members of the CS Core College [i.e., its key regulators], or supervisors of SVB's overseas subsidiary) have, in general, reported positive feedback from their experience of the information sharing and collaboration that took place before, in the run up to, and during the bank events. Despite the pressures faced by home authorities during the acute "weekend" period of each bank's distress, there generally continued to be timely and effective communication, which helped facilitate a relatively smooth rescue (CS) and resolution (SVB) of the distressed banks.[37]

Similar to the proposed 2020 FBO Guidance, there are various flaws in including guidance on derivatives and trading activities originated in the United States and booked directly to non-U.S. affiliates. An FBO's U.S. resolution plan is intended to resolve an FBO's U.S. operations and so should only include information relevant to resolvability of U.S. material entities. The proposed guidance should not request information on derivatives and trading activities with non-U.S. affiliates. Resolution of non-U.S. entities and activities are subject to jurisdiction-specific resolution requirements and regimes through the applicable home country regulatory authorities and therefore, to the extent that any guidance on derivatives and trading activities may be adopted, should not be included in the Foreign Filer Proposed Guidance.

Furthermore, FBOs should only be expected to have U.S. operational capabilities to support the prime brokerage transfer of activity that is booked in the United States aligned to a firm's U.S. resolution strategy. FBOs should not be expected to have U.S. capabilities to operationally transfer prime brokerage activity that is originated in the United States but booked oversees. Prime brokerage activity booked with a non-U.S. affiliate, regardless of where it is

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[36] International Swaps and Derivatives Association, *Hidden in Plain Sight? Derivatives Exposures, Regulatory Transparency and Trade Repositories* at 10, (Oct. 2023), *available at* https://www.isda.org/a/pu7gE/Hidden-in-Plain-Sight-Derivatives-Exposures-Regulatory-Transparency-and-Trade-Repositories.pdf.

[37] Basel Committee on Banking Supervision, *Report on the 2023 banking turmoil* at 22, (Oct. 2023), *available at* https://www.bis.org/bcbs/publ/d555.pdf.

originated, and related capabilities should only be part of an FBO's home country resolution strategy.

2. Foreign filers should only be required to describe the impact of executing the global resolution plan and differing assumptions, strategies and capabilities where such plan is produced by the filer, rather than their home country regulator.

BPI agrees that U.S. resolution planning for FBOs is enhanced by considering the objectives of the group-wide resolution plan and that efforts to enhance the resolvability of U.S. operations and entities should be as complementary as practicable to the group-wide resolution strategy while complying with U.S.-specific requirements. However, the proposed guidance should not require that an FBO detail whether and how the U.S. resolution plan relies on different "assumptions, strategies, and capabilities" than the group-wide resolution strategy. For many FBOs that would be subject to the proposed guidance, the global resolution strategy and plan is written, not by the FBO, but by the home country authority. This presents several challenges to providing information about the assumptions, strategies, capabilities and scenarios relied upon by the home country plan. First, if the framework under home country rules requires that the home country regulator, rather than the FBO, develop and maintain the resolution plan, then the FBO does not have sufficient visibility into the granular assumptions, strategies and capabilities that went into formulating the global resolution strategy. Second, in some countries the resolution plan is not shared with the FBO and is maintained as a proprietary playbook for the regulator itself to put into action when necessary. The FBO may only be informed in general terms whether the regulator selected an SPOE or MPOE strategy and of the high-level implications of the implementation of such strategy. Therefore, FBOs should not be required to provide any information about interaction with the group-wide resolution strategy beyond general information produced internally (that is not otherwise subject to confidential supervisory information restrictions) for their own resolution planning purposes.

Additionally, if a home country regulator has developed various scenarios, and actual decisions and timing by the home country authority in a resolution affect which scenarios and assumptions actually play out, then it is difficult for an FBO's group-wide and U.S. resolution planning efforts to "be as complementary as practicable," as expected in the proposed guidance.

To the extent that the Agencies believe they need detailed information about the assumptions and reasoning supporting global resolution plans, the Agencies should coordinate with home country authorities to receive that information. Existing opportunities for coordination include the periodic Crisis Management Group meetings held in the FBO's home country between home and host country regulators, which focus partly on resolution matters.[38]

[38] The Federal Reserve and the FDIC have participated for a number of years in international supervisory colleges, as well as international crisis management groups, with regard to the FBOs that operate in the United States. These fora should serve to facilitate further understanding of FBOs' U.S. resolution planning in comparison to their home country frameworks. *See, e.g.,* Board of Governors of the Federal Reserve System, *Supervising and Regulating Financial Institutions and Activities*, *available at* https://www.federalreserve.gov/aboutthefed/files/pf_5.pdf, at 94-95 (supervisory colleges are "formed to promote effective, ongoing consolidated supervision of the overall

FBOs are generally not in a position to provide the background and black-box assumptions and scenario analysis expected to be provided under the proposed guidance. In fact, in the guidance currently applicable to the largest FBOs, the Agencies recognized their own ability to "supplement their understanding of the impact on U.S. operations of executing a firm's group resolution plan through international collaboration with home country regulators" and that, therefore, expectations with respect to the group resolution plan were "unnecessary" to supplement the information that is already required to be provided with respect to the group resolution plan under the 165(d) Rule.[39] If the Agencies' views on the ability to collaborate with home country authorities have changed, they should state so explicitly and explain why.

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We appreciate the opportunity to comment on the 165(d) Proposed Guidance. If you have any questions, please contact the undersigned by email at tabitha.edgens@BPI.com.

Sincerely,

Tabitha Edgens
Senior Vice President and
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operations of an international banking group") and 99-100 ("The purpose of crisis management groups is to enhance preparedness for, and facilitate the management and resolution of, a financial crisis affecting a large global banking group."); U.S. Department of the Treasury, *Self-Assessment of Compliance with the Key Attributes of Effective Resolution Regimes for Financial Institutions* (2015), *available at* https://home.treasury.gov/system/files/206/2015-FSAP-KA-Self-Assessment-Response-FINAL.pdf; Federal Deposit Insurance Corporation, Systemic Resolution Advisory Committee, *International Engagement* (Apr. 14, 2016), *available at* https://www.fdic.gov/about/advisory-committees/systemic-resolutions/pdfs/2016-04-16-presentation-international-engage.pdf.

[39] Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, *Guidance for Resolution Plan Submissions of Certain Foreign-Based Covered Companies*, 85 Fed. Reg. 83557 at 83567 (Dec. 22, 2020).