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Living Wills: Can a Flexible Approach to Rulemaking Address Key Concerns Surrounding Dodd-Frank's Resolution Plans

Clay R. Costner

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Living Wills: Can a Flexible Approach to Rulemaking Address Key Concerns Surrounding Dodd-Frank’s Resolution Plans?

I. INTRODUCTION

In 2008, IndyMac, a large bank located in California, was nearly insolvent when the Federal Deposit Insurance Corporation (FDIC) decided to take control.¹ John F. Bovenzi, the federal regulator placed in charge of IndyMac, recounts the FDIC making many important decisions regarding creditors’ interests “[o]ver a single weekend.”² The difficulties in making prompt decisions about complex subject matter, such as derivatives contracts, became apparent.³ Bovenzi goes on, “[i]magine trying to undertake such an exercise at any of the nearly 30 much larger and much more complex American financial institutions.”⁴ In the heart of the 2008 financial crisis, the difficulties in unwinding the large interconnected structures of some of the major financial institutions like American International Group, Inc. and Lehman Brothers Holding, Inc. (Lehman Brothers) became clear.⁵ The shock waves sent through the economy after Lehman Brothers’ bankruptcy and the government bailouts of other companies revealed a lack of preparation for the unwinding of these failed financial institutions.⁶

One way Congress responded to these resolution problems was § 165(d) of The Dodd-Frank Wall Street Reform and Consumer

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². Id.
³. Id.
⁴. Id.
Protection Act (Dodd-Frank). This section requires certain large financial institutions to regularly report “the plan of such company for rapid and orderly resolution in the event of material financial distress or failure.” These resolution plans became popularly known as “living wills.” Many financial institutions and their advocates agreed that living wills were a prudential measure to avoid the resolution problems of the 2008 crisis. But when the FDIC announced a proposed rule for the living will requirements on April 22, 2011, observers voiced serious concerns over the proposed regulations.

With these concerns in mind, the FDIC and the Board of Governors of the Federal Reserve System (Federal Reserve Board) published a final rule with regard to living wills under Dodd-Frank on November 1, 2011 (Final Rule). The Final Rule applies to bank holding companies with more than $50 billion in assets and nonbank financial institutions supervised by the Federal Reserve Board, collectively known as “Systemically Important Financial Institutions” (SIFIs). Although designations of systemically important nonbank institutions are currently unknown, at least 124 bank holding companies are designated as SIFIs. In conjunction with the Final Rule, the FDIC announced an interim final rule governing living wills for any FDIC insured depository institution (IDI) exceeding $50 billion in assets. The significance of separate living wills for IDIs is explored in Part III. This Note argues that the Final Rule successfully addresses some of the key substantive issues raised by the proposed rule by

8. Id.
11. Id.
12. Id. at 67,323.
13. Id. at 67,335 (to be codified at 12 C.F.R. § 243.2(f)).
15. Id.
17. See infra Part III.
implementing a flexible approach to living will requirements but cautions regulators to continue to exercise discretion to ensure the efficacy of living wills and the minimization of undue regulatory burden.  

The Note will chronicle the development of living wills, identify some of the key concerns raised after the proposed rule, and analyze the extent to which the Final Rule addresses these concerns. Also, readers should gain perspective for developing the resolution planning process into the future. Part II reviews the background and reasoning behind requiring living wills for financial institutions, while recognizing the potential benefits and detriments of these plans at a broad level. Part III highlights key concerns raised after the announcement of the proposed rule and analyzes the extent to which the flexible approach implemented in the Final Rule addresses these concerns. Part IV concludes by identifying some of the unresolved issues surrounding living wills beyond the scope of this Note’s analysis.

II. THE NEED FOR LIVING WILLS – DODD-FRANK RESPONDS

The 2008 financial crisis and subsequent government bailouts revealed problems associated with effectively resolving large complex financial institutions. The idea for living wills as a measure to prepare for effective resolution of financial institutions began to gather support internationally during 2008. The United Kingdom led the way in adopting the first regulations pertaining to living wills, and § 165(d) of Dodd-Frank confirmed that the United States would follow suit.

18. See infra Part III.
19. See infra Part II.
20. See infra Part III.
21. See infra Part IV.
While requiring living wills sounds like a prudent practice, the effectiveness of the plans is far from certain.26

A. The Problems of Resolving Large Complex Financial Institutions

The interconnectedness of banks and financial institutions can be overwhelming for regulators or courts in attempting to unwind these entities through bankruptcy proceedings or other insolvency regimes.27 Lehman Brothers had over 3,000 legal entities internationally when it became insolvent.28 Regulators allowed Lehman Brothers to go into bankruptcy, creating problems throughout national and international markets due to the interconnections and credit exposures of such a large company.29 Conversely, several large financial institutions were bailed out because government officials determined the failure of such organizations presented too great of a risk to economic stability.30 The result in either case was unfavorable: the facilitation of "chaos" in the market, or the creation of taxpayer burden and moral hazard.31 With an effective method of planning for such failures and subsequent wind-downs, these negative consequences could be avoided.32

B. Dodd-Frank Seeks to Facilitate the Resolution Planning Process

United States regulators first attempted to address resolution problems even before Congress enacted Dodd-Frank.33 In May 2010, the FDIC proposed living wills as a requirement for large IDIs, most of

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26. See generally Packin, supra note 24 (discussing the shortcomings and possible negative effects of living wills on financial institutions and markets).
27. See, e.g., Bovenzi, supra note 1.
28. Id.
29. See, e.g., Richard J. Herring, Wind-down Plans as an Alternative to Bailouts: The Cross-Border Challenges, in ENDING GOVERNMENT BAILOUTS AS WE KNOW THEM 125, 125-126 (Kenneth E. Scott et. al. eds., 2009).
30. See id. at 125.
31. See id. at 125-26.
32. See Avgouleas, supra note 22, at 2.
which were subsidiaries of bank holding companies. Ultimately, the proposed rule for these IDIs was not finalized in anticipation of future resolution planning legislation. This other legislation came in the form of § 165(d) of Dodd-Frank, requiring resolution plans for SIFIs.

Section 165(d) provides the framework for living wills. Its main purpose is to require institutions to form their own plan for "rapid and orderly resolution in the event of material financial distress or failure." The section requires firms to provide: (1) an assessment of the protection of depository institutions from the nonbanking entities and operations of the organization; (2) a description of the organization’s structure and component parts; and (3) an analysis of the institutions exposure to other parties. The legislation also allows regulators to expand these informational requirements "by rule or order." Finally, Dodd-Frank requires a "credit exposure report" as a part of the living will, which includes an analysis of credit extended to the institution and by the institution.

Through Dodd-Frank, Congress afforded regulators the ability to impart stiff penalties on institutions that failed to comply with the requirements set out above. Section 165(d) requires the Federal Reserve Board and the FDIC to notify companies of any deficiencies with respect to the credibility of their living wills. Upon notice of such deficiency, the company is required to resubmit the plan with appropriate changes. A failure to resubmit a "credible plan" allows

34. Id.
35. See Fabian, supra note 14.
37. Id.
38. Id. § 5365(d)(1).
39. Id. § 5365(d)(1)(A).
40. Id. § 5365(d)(1)(D).
41. Id. § 5365(d)(2); see also Client Newsflash, Davis Polk & Wardwell LLP, Counterparty Credit Risk Management: Links Between Supervisory Guidance, Dodd-Frank and Basel (July 11, 2011), http://www.davispolk.com/publications/ (follow “More Publications” hyperlink; then follow “Counterparty Credit Risk Management: Links Between Supervisory Guidance, Dodd-Frank and Basel” hyperlink) [hereinafter Counterparty Credit Risk] (describing some of the main goals of credit exposure reports under 165(d) as assessing aggregate risk exposure across an institution and risk exposures of individual entities or lines of business within the institution).
43. Id. § 5365(d)(4).
44. Id. § 5365(d)(4)(B).
regulators to “impose more stringent capital, leverage, or liquidity requirements, or restrictions on the growth, activities, or operations of the company, or any subsidiary thereof...”\textsuperscript{45} After imposition of any of these penalties, a continued failure to resubmit a credible plan within two years can result in forced divestiture of assets or operations.\textsuperscript{46} Thus, the consequences of noncompliance are potentially very severe.

\textbf{C. Living Wills as a Way to End “Too-Big-to-Fail”}

Many, such as former FDIC Chairman Sheila Bair, touted living wills as a tool to end the “too-big-to-fail” phenomenon by providing means to effectively resolve a failed company under bankruptcy proceedings or other insolvency regimes.\textsuperscript{47} At this stage, it is not totally clear the extent to which living wills would be operational in the actual event of an institution’s failure, but the plans at least serve as a means of deriving valuable information from institutions.\textsuperscript{48} Some describe a successful living will as a sort of “playbook,” which would give regulators options based on the particular conditions surrounding the failure.\textsuperscript{49} In whatever manner living wills end up being used, supporters claim such planning and preparation for resolution will allow institutions to fail with less harm to the broader market.\textsuperscript{50}

Furthermore, observers recognize living wills as a tool to limit systemic risk and encourage prudential practices on the part of financial institutions before failure occurs.\textsuperscript{51} Supporters see living wills as an evaluation tool for institutions and regulators that could result in the simplification of an institution’s organizational structure or reduced risk exposure.\textsuperscript{52} For instance, at least one observer argues that living wills

\begin{itemize}
  \item \textsuperscript{45} Id. § 5365(d)(5)(A).
  \item \textsuperscript{46} Id. § 5365(d)(5)(B).
  \item \textsuperscript{47} See Thecla Fabian, \textit{FDIC Proposed Rule Outlines Living Will Needs for Systemically Significant Firms}, \textit{Banking Daily} (BNA), Mar. 30, 2011.
  \item \textsuperscript{48} Feibelman, \textit{supra} note 23, at 94.
  \item \textsuperscript{50} See generally Avgouleas et al., \textit{supra} note 22 (providing a comprehensive overview of the potential benefits of living wills before and after the failure of a financial institution).
  \item \textsuperscript{51} See id. at 3 (“The drawing up of a Living Will could act as a catalyst for thinking and taking action.”).
  \item \textsuperscript{52} See, e.g., Richard Herring, \textit{The Central Role of Resolution Policy in Dealing with}
could work to limit institutional risk exposure— even more so than regulations designed to directly limit the scope of banking activities. The idea is that effective living wills would force institutions to separate their risky activities, such as proprietary trading, and simplify their organizational structures in order to create viable plans for resolution. Beyond reorganization, an institution’s analysis of sources of funding and capital adequacy in living wills would prompt them to respond to these needs earlier on. In case institutions fail to respond to inadequacies on their own, Dodd-Frank provides regulators the power to take their own actions, including restrictions on operations or increased capital requirements.

In addition, at least one scholar underscores the possibility for living wills to enhance the predictability surrounding an institution’s potential insolvency, since a guide for winding down is established. With this increased predictability, creditors should be able to price credit extended to institutions more accurately to reflect the risk associated with the institution’s failure. Of course, this predictability will be most relevant if living wills become actionable plans that are obtainable by relevant counterparties. While it remains to be seen the extent to which living wills are actionable or accessible by counterparties, these benefits should certainly be kept in mind.

Finally, living wills can provide a supplementary tool to some of the newest powers provided to regulators in Dodd-Frank. Ideally, institutions would be in a position to resolve themselves under
bankruptcy proceedings. But where government officials must step in, living wills can help avoid a bailout by providing valuable information for resolving the SIFI under the newly formed "Orderly Liquidation Authority," created in Dodd-Frank and implemented by the FDIC.

D. Do the Costs of Living Wills Outweigh Their Utility?

While potential benefits of resolution plans exist, negative consequences for financial institutions are almost inevitable, and poorly implemented requirements could certainly undermine the value of living wills. Undoubtedly, institutions will face immense regulatory costs in preparing and complying with the living will requirements of Dodd-Frank. The development of credible plans will likely require substantial outside expertise and counsel, especially for the largest institutions.

Even worse, some observers question the usefulness of such plans due to the impossibility of foreseeing all potential sources of stress placed on an institution. More specifically, it is likely that the


65. See Eric Dash, Feasting on Paperwork, N.Y. TIMES, Sept. 9, 2011, at B1 (discussing the huge amounts of money lawyers and accountants are making in servicing recent regulatory requirements, including living wills).

66. See id. (describing Barclays spending in excess of $48 million on staffing and outside counsel to satisfy the United Kingdom’s living will requirements).

next source of economic distress will develop much differently than that of the most recent financial crisis, making successful planning for such distress a difficult undertaking.\textsuperscript{68} If the plans fail to prove useful, living wills could "become expensive projects with no practical value beyond compliance for its own sake."\textsuperscript{69}

In addition to the cost-benefit questions of living wills, a plan of resolution for institutions does not ensure the end of too-big-to-fail or government bailouts.\textsuperscript{70} In fact, the landscape of financial institutions is more consolidated than ever after the mergers of the financial crisis.\textsuperscript{71} Even after the heightened regulatory environment following the enactment of Dodd-Frank, the market and rating agencies continue to indicate that the failure of a financial giant could still prompt government support.\textsuperscript{72} Thus, it is unclear that a plan for the resolution of financial institutions, or other regulatory measures for that matter, will actually impact the too-big-to-fail phenomenon.\textsuperscript{73}

\textbf{E. Proposed Rule Evokes Concern}

The FDIC published its proposed rule to implement Dodd-Frank's resolution planning requirements on April 22, 2011.\textsuperscript{74} The proposal was met with uncertainty and concern,\textsuperscript{75} eliciting twenty-two comment letters from a broad range of individuals and organizations within the financial industry.\textsuperscript{76} The FDIC categorized these comments into four main areas including: (1) substantive requirements of plans; (2) credit exposure reports; (3) the rule's application to foreign-based

\begin{footnotesize}

\textsuperscript{68} See Packin, \textit{supra} note 24, at 45.


\textsuperscript{70} See Packin, \textit{supra} note 24, at 46-49.

\textsuperscript{71} See id. at 47.

\textsuperscript{72} See id. at 49.

\textsuperscript{73} See id.


\textsuperscript{75} See generally Thomas P. Vartanian, \textit{Set to Go Live with Living Wills, for Better or Worse}, \textit{Am. Banker}, Aug. 29, 2011, available at 2011 WLNR 16954436 (elaborating on the concerns surrounding resolution planning).


\end{footnotesize}
institutions; and (4) confidentiality of plan contents. While each of the other foregoing concerns is important, this Note focuses on concerns related to substantive requirements, with the assumption that these substantive aspects have the greatest impact on the effectiveness of living wills. Specifically, several key substantive issues are addressed: (1) the timing of initial living will submissions; (2) the ability of living wills to supplement insolvency regimes other than bankruptcy; (3) the requirements for smaller and less complex institutions; (4) the economic scenarios under which resolution planning is to occur; and (5) the determination of a “credible” living will. Ultimately, the flexibility adopted in the Final Rule goes a long way in addressing these issues, but regulators and institutions must continue to develop the process to lessen regulatory burden and enhance the efficacy of living wills.

III. ADDRESSING KEY CONCERNS THROUGH A FLEXIBLE APPROACH TO RULEMAKING

As members of the financial industry waited apprehensively, the Federal Reserve Board approved the Final Rule for living wills on November 1, 2011. The Final Rule postponed one of the foremost concerns by delaying the implementation of credit exposure reports. Credit exposure reports are designed to act as a companion-reporting requirement to living wills, mapping in detail the credit extended to an institution and by an institution. Regulators felt that credit exposure reports would be more appropriately addressed in coordination with other credit exposure requirements to be announced at a later point. These credit exposure reports will play a large role in analyzing the interconnections of an institution and the viability of any plan for its

77. \textit{Id.}
78. See Douglas et al., \textit{supra} note 69, at 1 (describing the potential of living wills to be successful “if designed and implemented properly” but warning that “poorly designed” plans could be neither “risk mitigating nor efficient”).
79. See Vartanian, \textit{supra} note 75.
81. \textit{Id.} at 67,327.
83. Resolution Plans Required, 76 Fed. Reg. at 67,327; \textit{see also} Counterparty Credit Risk, \textit{supra} note 41 (describing some of the other legislation directed at monitoring the credit exposures of financial institutions).
resolution. As for the other requirements, the Final Rule exhibited a change from the proposed rule, and while it did not eliminate all concern, the rule significantly eased some key concerns of financial institutions.

A. Initial Living Will Submissions – More Time for Smaller Institutions

One substantive issue within the proposed rule that troubled many was the time period during which initial plans would be due for submission. The proposed rule required covered institutions to submit their resolution plans within 180 days of the Final Rule’s effective date. Commenters believed the short time frame would prove inadequate, and some observers recommended that regulators extend the deadline for initial living will submissions up to eighteen months after rule enactment. Others took a different approach, suggesting a “pilot program” with only the largest and most complex institutions.

The FDIC responded to these suggestions by implementing a “staggered” approach. Instead of one deadline applicable to all institutions, the Final Rule requires an initial submission of living wills based on the size of financial institutions. The largest institutions – holding over $250 billion in nonbank assets – must submit initial plans by July 1, 2012; institutions with over $100 billion in nonbank assets

84. See Resolution Plans and Credit Exposure Reports Required, 76 Fed. Reg. 22,648, 22,649 (proposed April 22, 2011) (to be codified at 12 C.F.R. pt. 381) ("The credit exposure reports required by the statute will also provide important information critical to ongoing risk management and advance planning processes by identifying the company’s significant credit exposures and other key information across the entity and its related entities.").


86. See Resolution Plans Required, 76 Fed. Reg. at 67,324 ("Commenters suggested that submissions of the resolution plan be phased in to allow firms sufficient time to prepare and collect the extensive information required as part of the plan.”).


88. See Resolution Plans Required, 76 Fed. Reg. at 67,324 ("Commenters argued that the requirement to submit initial plans 180 days from the effective date of the final rule is too short.”).


91. See id. at 67,335-36 (to be codified at 12 C.F.R. § 243.3).
must submit initial plans by July 1, 2013; and those covered institutions with less than $100 billion in nonbank assets must submit plans by December 31, 2013.92

The staggered submission of living wills can facilitate an ongoing discourse between institutions and regulators.93 For regulators, the feasibility of reviewing the initial submissions of numerous covered institutions for compliance was “unrealistic,” commented one industry expert.94 Implementing the submissions in stages will afford regulators the chance to develop the process and learn the things to look for.95 For institutions in the second or third stage of submission, the approach will provide greater preparation time and knowledge of expectations, since the “iterative process” has already begun.96 For instance, certain parts of the first-stage institutions’ plans will be necessarily made public pursuant to the Final Rule.97 Second and third stage institutions will likely be able to leverage this information to their advantage in determining the credibility of their own living wills. Thus, the staggered submission of initial plans will potentially lessen the burden and improve the process for institutions and regulators, especially in the second and third stages.

Even with this more flexible approach, the obvious question remains: what about the large institutions who must submit their plans first?98 These institutions will face the most uncertainty and the possibility of shifting standards.99 However, the approach is partially justified based on the large size of these institutions, making them more equipped to withstand regulatory costs that could result from initial inefficiencies.100 Furthermore, these institutions pose the most

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92. Id.
93. Id.
94. Borak, supra note 85 (quoting Randy Guynn, partner and head of the financial institutions group at Davis Polk & Wardwell LLP).
95. See id.
96. See id. (“So, we are in some ways in uncharted territory, an iterative process to develop and maintain credible plans.”).
97. See Resolution Plans Required, 76 Fed. Reg. at 67,340 (to be codified at 12 C.F.R. § 243.8(c)).
98. See Borak, supra note 85 (“The difficulty is banks first in line may wonder whether the requirements and the standards the agencies will use would change over time.”).
99. See id.
immediate risk to the economic stability of the United States due to their size and interconnections.\textsuperscript{101} Accordingly, they should garner the most immediate attention in terms of planning for their failure.\textsuperscript{102}

While placing large institutions first in line is partially justified based on their size, regulators should still ensure that first stage institutions are not unfairly burdened. The FDIC recognized this burden and stressed that “the process of submission and review of the initial resolution plan iterations is to include an ongoing dialogue with firms.”\textsuperscript{103} Regulators have the authority to facilitate this “ongoing dialogue” through tools provided in the Final Rule.\textsuperscript{104} For instance, one section of the Final Rule allows regulators to extend time periods for institutions to cure defects in initial submissions.\textsuperscript{105} Also, the determination of a deficient plan appears to be largely discretionary in a plain reading of the language.\textsuperscript{106}

In fact, regulators should exercise greater tolerance and lenience in reviewing all institutions’ first submissions – after all, initial submissions are but one part of a much larger ongoing process.\textsuperscript{107} After these first living wills are formed, institutions must still update them annually, taking into account any “material events” that might affect previous submissions.\textsuperscript{108} If a material event is deemed important enough, regulators may require an “interim update.”\textsuperscript{109} In addition, regulators are granted the discretion to require resolution updates more


\textsuperscript{102.} See id. at 1 (arguing the risks associated with large financial institutions outweigh the benefits from their economies of scale).


\textsuperscript{104.} See id. at 67,339 (to be codified at 12 C.F.R. § 243.5).

\textsuperscript{105.} Id. (“Upon their own initiative or a written request by a covered company, the Board and Corporation may jointly extend any time period under this section.”).

\textsuperscript{106.} Id. (describing the determination of deficiency based on a finding that the plan “is not credible or would not facilitate an orderly resolution,” but failing to provide any specific guidelines).

\textsuperscript{107.} See id. at 67,328; Regulators Looking for Quality, supra note 49 (detailing early developments in the resolution planning process and highlighting the numerous uncertainties that remain).

\textsuperscript{108.} See Resolution Plans Required, 76 Fed. Reg. at 67,335-36 (to be codified at 12 C.F.R. § 243.3(b)(2)).

\textsuperscript{109.} See id. at 67,335 (to be codified at 12 C.F.R. § 243.3(b)(1)).
frequently or to extend the time period for an institution’s next submission.\textsuperscript{110} Thus, institutions and regulators will have numerous opportunities to make these plans useful and efficient.\textsuperscript{111} And while a good faith effort on the part of the institution is certainly important, regulators should keep in mind that initial submissions are only the first iteration of many.\textsuperscript{112}

B. Can Living Wills Supplement Insolvency Regimes Other than Bankruptcy?

The proposed rule for living wills raised concerns regarding the extent to which institutions must take into account other applicable insolvency regimes in their analysis.\textsuperscript{113} A single institution might be subject to a multitude of insolvency regimes as a result of the diverse entities it holds.\textsuperscript{114} Obviously, bank holding companies would be subject to the Federal Deposit Insurance Act (FDIA), which would place the insolvent bank in receivership with the FDIC.\textsuperscript{115} But other entities might be subject to other regimes, such as state or internationally enacted insolvency guidelines.\textsuperscript{116} Commenters recognized the potential burdens of creating a resolution strategy for entities subject to these insolvency regimes outside of the Bankruptcy Code.\textsuperscript{117} Consideration of these other regimes could significantly increase both the complexity and cost of creating an effective living will.\textsuperscript{118}

\textsuperscript{110} Id. at 67,336 (to be codified at 12 C.F.R. § 243.3(c)).

\textsuperscript{111} See id. at 67,335-36 (to be codified at 12 C.F.R. § 243.3) (signifying the possibility of multiple iterations of living wills, even within the same year).

\textsuperscript{112} See id. at 67,328 (describing the formation of living wills as a process that will require multiple iterations).

\textsuperscript{113} Id.

\textsuperscript{114} See id. at 67,328 (providing examples of other potential insolvency regimes).

\textsuperscript{115} See Lissa L. Broome & Jerry W. Markham, Regulation of Bank Financial Service Activities: Cases and Materials 595-596 (4th ed. 2010).


\textsuperscript{117} See id. at 67,328.

1. Limiting the Consideration of Other Insolvency Regimes

The Final Rule first addresses these concerns by limiting the extent to which institutions must account for other applicable insolvency regimes.\textsuperscript{119} Under the requirements of the Final Rule, institutions may exclude from their "strategic analysis"\textsuperscript{120} any entity subject to a regime other than the Bankruptcy Code to the extent such entity has less than $50 billion in assets and does not conduct "critical operations."\textsuperscript{121} Thus, institutions can at least avoid analysis involving other insolvency regimes for insubstantial parts of the company.\textsuperscript{122}

This concession on the part of regulators is a prudent measure towards minimizing undue regulatory burden. Certainly, the task of preparing credible living wills in line with bankruptcy proceedings will be an expensive undertaking in itself.\textsuperscript{123} To add a multitude of other insolvency regimes into the mix would entail even more expertise and complication.\textsuperscript{124} For example, under the proposed rule, a financial institution might need to analyze its insurance subsidiaries under all relevant state insolvency laws, since insurance is an industry generally regulated at the state level.\textsuperscript{125} The Final Rule eliminates this possibility if the entity is not of substantial size or importance.\textsuperscript{126} This is at least a

\begin{itemize}
  \item \textsuperscript{119} See Resolution Plans Required, 76 Fed. Reg. at 67,337 (to be codified at 12 C.F.R. § 243.4(c)(1)(v)).
  \item \textsuperscript{120} Id. (to be codified at 12 C.F.R. § 243.4(c)) (“Each resolution plan shall include a strategic analysis describing the covered company’s plan for rapid and orderly resolution in the event of material financial distress or failure of the covered company.”).
  \item \textsuperscript{121} Id. (to be codified at 12 C.F.R. § 243.4(c)(1)(v)); id. at 67,335 (to be codified at 12 C.F.R. § 243.2(g)) (“Critical operations means those operations of the covered company, including associated services, functions and support, the failure or discontinuance of which, in the view of the covered company or as jointly directed by the Board and the Corporation, would pose a threat to the financial stability of the United States.”).
  \item \textsuperscript{122} See id. at 67,337 (to be codified at 12 C.F.R. § 243.4(c)(1)(v)) (eliminating consideration of insolvency regimes other than the Bankruptcy Code so long as the entity does not have $50 billion in assets or conduct a critical operation).
  \item \textsuperscript{123} See Dash, supra note 65 (indicating the large financial burden associated with preparing living wills).
  \item \textsuperscript{124} See, e.g., Lynyak, supra note 118, at 4 (describing the specialized expertise in common insolvency regimes required to meet living will requirements).
  \item \textsuperscript{126} See Resolution Plans Required, 76 Fed. Reg. at 67,336 (to be codified at 12 C.F.R. § 243.4(c)(1)(v)).
\end{itemize}
small step on the part of regulators in avoiding unneeded regulatory burden.

2. Special Treatment for Resolution of Insured Depository Institutions

On the other hand, regulators did pay special attention to the insolvency regime established for IDIs under the FDIA. As noted in Part I, the FDIC released the Final Rule, as required by Dodd-Frank, for the resolution plans of SIFIs (SIFI Plan) in conjunction with an interim final rule for the resolution plan of IDIs (IDI Plan). The IDI Plan rules were finalized on January 23, 2012 and are applicable to IDIs with greater than $50 billion in assets. The two plans resemble each other in many ways, but differ with regard to some objectives. Of course, the Final Rule for SIFI Plans applies to financial institutions, including bank holding companies and nonbank financial institutions, whereas the final rule for IDI Plans applies solely to depository institutions. Thus, a bank holding company could be subject to two living will requirements – one for the institution as a whole and one for the subsidiary depository institution.

The IDI Plan focuses directly on the insolvency regime applicable to depository institutions, pursuant to the FDIA. Under the FDIA, the FDIC generally acts as a receiver to failed IDIs, with the goals of insuring depositors’ interests and the viability of the FDIC’s

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131. Compare Resolution Plans Required for Insured Depository Institutions With $50 Billion or More in Total Assets, 77 Fed. Reg. at 3084 (to be codified at 12 C.F.R. § 360.10(a)) (applying solely to FDIC insured depository institutions), with Resolution Plans Required, 76 Fed. Reg. at 67,323 (applying to “nonbank financial compan[ies]” and “bank holding compan[ies]”).

132. At the time of the release of the Final Rule, thirty-four companies were subject to both rules. See Smith et al., supra note 130, at 2.

133. See id.
insurance fund under the “least-cost” method.\textsuperscript{134} Since these goals are
different from those of bankruptcy law, the strategic analysis for
resolution differs accordingly. In sum, the IDI Plan directs institutions
to provide their strategic analysis with the specific goals of assisting the
FDIC in its receivership duties and protecting the interests of
depositors.\textsuperscript{135}

The requirement of separate IDI Plans is likely a sensible
measure. Protecting the FDIC insurance fund is certainly one of the
necessities in ensuring the viability of the banking industry and
economic stability.\textsuperscript{136} Considering the FDIC fund’s recent issues – with
fund reserves falling below zero in 2009\textsuperscript{137} – IDI Plans seem like an
extra requirement worth the added cost. In addition, the added
regulatory costs should prove minimal. In the final rule for IDI Plans,
the FDIC acknowledges that the two plans will substantially overlap
and provide similar informational requirements.\textsuperscript{138} Thus, these IDI
Plans can provide extra protection to the FDIC’s funding, while not
substantially adding to the informational burden of living will
requirements.\textsuperscript{139}

\textsuperscript{134} See LISSA L. BROOME & JERRY W. MARKHAM, supra note 115, at 595-96.
\textsuperscript{135} See Resolution Plans Required for Insured Depository Institutions With $50 Billion
or More in Total Assets, 77 Fed. Reg. at 3085 (to be codified at 12 C.F.R. § 360.10(a))
(“This rule is intended to ensure that the FDIC has access to all of the material information
it needs to resolve efficiently a covered insured depository institution in the event of its
failure.”).
\textsuperscript{136} See id. at 3075 (“In implementing the deposit insurance program and in efficiently
and effectively resolving failed depository institutions, the FDIC strengthens the stability of,
and helps maintain public confidence in, the banking system in the United States.”).
\textsuperscript{137} See, e.g., Karey Wutkowski, FDIC Fund Falls into Red, Bair Urges Lending,
idUSTRE5AN36P20091124.
\textsuperscript{138} See Resolution Plans Required for Insured Depository Institutions With $50 Billion
or More in Total Assets, 77 Fed. Reg. at 3085 (to be codified at 12 C.F.R. §
360.10(c)(1)(iv)) (providing for the incorporation of data from the SIFI Plan into the IDI
Plan); id. at 3076 (“The Rule is intended to complement the resolution plan requirements of
the Dodd-Frank Act.”).
\textsuperscript{139} See, e.g., Client Memorandum from Davis Polk & Wardwell LLP, Credible Living
Wills Under the U.S. Regulatory Framework 9 (Sept. 19, 2011),
http://www.davispolk.com/publications/list.aspx (follow “Credible Living Wills Under the
U.S. Regulatory Framework” hyperlink) (indicating a belief that institutions may be able to
simply submit one integrated resolution plan to satisfy IDI and SIFI requirements).
3. Preparing for Resolution under the Orderly Liquidation Authority

Surprisingly, the newly formed insolvency regime in Dodd Frank – the Title II “Orderly Liquidation Authority” – received little attention in the proposed rule or the Final Rule.\(^\text{140}\) Under this new authority, the FDIC may act as a receiver for large bank holding companies and other non-bank SIFIs.\(^\text{141}\) Essentially, it gives the FDIC the power to resolve these financial institutions under its own power, if it determines bankruptcy proceedings or other insolvency measures are inadequate.\(^\text{142}\) After the announcement of the proposed rule for resolution plans, observers questioned the practical value that living wills would have in the exercise of this Orderly Liquidation Authority.\(^\text{143}\) Yet the Final Rule fails to require any analysis by institutions with regard to the Orderly Liquidation Authority.\(^\text{144}\)

Instead, the Final Rule recognizes Dodd-Frank’s resolution plans as a supplement to regulatory authorities in planning for the exercise of this Orderly Liquidation Authority.\(^\text{145}\) In particular, the FDIC has asserted that IDI Plans and SIFI Plans are only two of the three plans to be created – the third will be a plan created by regulators for resolution of institutions under the Orderly Liquidation Authority.\(^\text{146}\) In creating this plan, regulators will leverage information from the


\(^{141}\) See id. § 5384(b).

\(^{142}\) See, e.g., Mark A. McDermott, Analysis of the Orderly Liquidation Authority, Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, 1 (2010), http://www.skadden.com/newsletters/FSR_A_Analysis_Orderly_Liquidation_Authority.pdf (suggesting the purpose of the Orderly Liquidation Authority as improving financial stability and ending bailouts by providing an insolvency regime with the FDIC acting as receiver).

\(^{143}\) See, e.g., The Sec. Industry and Fin. Markets Ass’n et al., supra note 89, at 8 (describing the necessity for other resolution planning tools since SIFI Plans are statutorily unable to address other insolvency regimes, including those under Title II).


\(^{145}\) See id. at 67,323 (“The resolution plan required of covered companies under this final rule will support the Corporation’s planning for the exercise of its resolution authority under the Dodd-Frank Act and the Federal Deposit Insurance Act (‘FDI Act’) by providing the Corporation with an understanding of the covered companies’ structure and complexity as well as their resolution strategies and processes.”).

\(^{146}\) See, e.g., FDIC Not Waiting, supra note 61 (describing regulators forming their own resolution plans for financial institutions).
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institutions' own living will. Therefore, it appears planning for the exercise of the Orderly Liquidation Authority will be a task for regulators, rather than institutions.

Eliminating the consideration of the Orderly Liquidation Authority on the part of institutions is necessary at this stage. Some analysts argue the Bankruptcy Code is inadequate to facilitate the resolution of large financial institutions, and therefore, living wills should reflect resolution under an authority that is more aptly designed for this purpose. While this may be the case, the Orderly Liquidation Authority is currently too underdeveloped to put the burden on institutions to plan for its use. To require institutions to speculate into the logistics of this authority would likely prove unfruitful and burdensome, as the effectiveness of the Orderly Liquidation Authority has yet to be proven. Instead, institutions should focus their living wills on other insolvency regimes, as the Orderly Liquidation Authority is an insolvency method of "last resort." Furthermore, there is nothing in the Final Rule to preclude analysis of the Orderly Liquidation Authority in the future. Thus, it seems appropriate to allow regulators, rather than institutions, to plan for the new Orderly Liquidation Authority.

Nonetheless, regulators must exercise caution in relying on information in institution-formed living wills in their planning for use of the Orderly Liquidation Authority. Inaccurate or faulty living wills could undermine the planning process. Critics of living wills point out that the supervisors of institutions do not necessarily have the greater

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147. See Resolution Plans Required, 76 Fed. Reg. at 67,323 (recognizing institution-formed resolution plans as a supplement to regulators' own planning).
148. See FDIC Not Waiting, supra note 61.
150. See Diane Davis, Bankruptcy: Bankruptcy Code's Effectiveness in Resolving Failed Complex Financial Institutions Unclear, BANKING DAILY (BNA), Jul. 21, 2011 (describing an analysis that proved inconclusive in comparing the effectiveness of bankruptcy with other regimes such as the Orderly Liquidation Authority).
151. See id.
interest of the public in mind,\textsuperscript{154} and this could lead to inaccurate reporting for the sake of compliance. In addition, the discretion that lends to the flexibility of the Final Rule presents more possibilities for inaccuracy.\textsuperscript{155} For instance, the institution’s assessment of the resources it will have available in times of financial distress will require a level of appraisal that cannot be exact.\textsuperscript{156} Regulators address these concerns by providing oversight and requiring institutions to provide a “detailed description” of how such conclusions were reached.\textsuperscript{157} Even with this oversight, the assessment of living will credibility will likely be a process on its own. And the importance of this process is underscored by the negative impact that inaccurate living wills could have on the regulators’ own plans for orderly liquidation.\textsuperscript{158}

C. \textit{Can the Flexibility in the Final Rule Provide Relief to Less Complex Institutions?}

Another issue raised by commenters after the FDIC released the proposed rule was the fact that living wills had the same minimum requirements, irrespective of the size or complexity of the particular institution.\textsuperscript{159} Commenters argued that simply organized institutions were subject to the same requirements as large and complex institutions solely because they held more than $50 billion in assets.\textsuperscript{160}

In a change from the proposed rule, the Final Rule implements less comprehensive content requirements for institutions with nonbank

\begin{footnotes}
\item[155.] See, \textit{e.g.}, Resolution Plans Required, 76 Fed. Reg. at 67,337 (to be codified at 12 C.F.R. § 243.4(c)(1)(iii)) (allowing institutions to assess their own “needs” in the event of “financial distress” – an inquiry that appears highly discretionary).
\item[156.] See id.
\item[157.] \textit{Id.} at 67,337 (to be codified at 12 C.F.R. § 243.4(c)(1)).
\item[158.] \textit{See id.} at 67,323 (recognizing that institutions’ plans will be relied upon in the regulators’ own planning).
\item[159.] See Joe Adler, \textit{Relief from Living Will Rules Sought By Midsize Firms}, AM. BANKER, Sept. 9, 2011 [hereinafter Relief from Living Will Rules], available at 2011 WLNR 17828061 (describing the concern less complex firms expressed in being subject to the same rules as those much larger and more complex).
\item[160.] \textit{See id.} (“‘You could have a relatively plain-vanilla, less complex operation but be $50 billion and you’re under these requirements,’ said Lawrence Kaplan, an attorney at Paul, Hastings, Janofsky & Walker LLP.”).
\end{footnotes}
assets of less than $100 billion and insured depository assets that make up greater than eight-five percent of the institution’s total assets.\textsuperscript{161} This "tailored plan" is a designed concession on the part of regulators to lessen the informational burden for these institutions since their smaller size and less complex structure do not warrant such strenuous requirements.\textsuperscript{162} Most notably, the tailored plan requires information regarding only the nonbanking aspects of the institution in four of the "strategic analysis" categories.\textsuperscript{163} This change was likely a welcome surprise to "midsize firms" that felt their structures did not necessitate the same living will requirements as large complex institutions.\textsuperscript{164}

Upon further inspection, it seems the tailored plan’s benefit to less complex institutions is largely illusory.\textsuperscript{165} The alleged benefit of the tailored plan is the allowance for these institutions to analyze only their nonbanking operations in their living wills.\textsuperscript{166} But keep in mind, most of these same institutions eligible for the tailored plan are also subject to IDI Plan requirements, which focus solely on depository institutions’ banking operations.\textsuperscript{167} Hence, the same institutions exempted from providing information on banking operations under their SIFI Plan would still have to analyze banking activities under their IDI plan.\textsuperscript{168} It’s unclear how these tailored plans provide any substantial regulatory relief for less complex firms. Perhaps, these institutions should be totally exempt from SIFI Plan requirements, considering their nonbanking assets comprise at most fifteen percent of the institution.\textsuperscript{169} If nonbanking operations did pose a risk to the resolution of the

\textsuperscript{161} Resolution Plans Required, 76 Fed. Reg. at 67,336 (to be codified at 12 C.F.R. § 243.4(a)(3)).
\textsuperscript{162} See Borak, supra note 85.
\textsuperscript{163} See Resolution Plans Required, 76 Fed. Reg. at 67,336 (to be codified at 12 C.F.R. § 243.4(a)(3)).
\textsuperscript{164} See Relief from Living Will Rules, supra note 159.
\textsuperscript{165} See Dwight C. Smith et al., supra note 130, at 6 ("The IDIs of these Covered Companies will still be required to file IDI Plans, which will likely involve the same level of detail and information as the DFA Plan otherwise demands for Covered Companies of similar size and complexity in the discussion of banking operations.").
\textsuperscript{166} See Resolution Plans Required, 76 Fed. Reg. at 67,336 (to be codified at 12 C.F.R. § 243.4(a)(3)).
\textsuperscript{167} See Dwight C. Smith et al., supra note 130, at 6.
\textsuperscript{168} See id.
\textsuperscript{169} See Resolution Plans Required, 76 Fed. Reg. at 67,336 (to be codified at 12 C.F.R. § 243.4(a)(3)) (requiring the "total insured depository institution assets" to make up "85 percent or more of the covered company’s total consolidated assets" in order to be eligible for the tailored plan).
institution, these problems would presumably be discovered in the IDI’s strategy to unwind from the holding company.\textsuperscript{170}

While the tailored plan’s advantages are unclear, regulators can still work to lessen the burden for less complex bank holding companies through the discretion provided in the final rule for IDI Plans.\textsuperscript{171} The final rule for IDI Plans explicitly states “[t]he resolution strategy should be tailored to the size, complexity and risk profile of the institution.”\textsuperscript{172} Presumably, regulators should review the strategy of depository institutions with a level of assessment proportional to the banks’ risk to the economy and the FDIC Insurance Fund.\textsuperscript{173} Obviously, smaller institutions pose less of a risk and should accordingly require less onerous detail and analysis in their living wills.\textsuperscript{174} Hopefully, such measures will be exercised by regulators to minimize undue regulatory burden while still providing the benefits of living wills.

D. Final Rule Provides Guidance for Economic Scenarios to be Considered in Living Wills

A primary concern of some commenters to the proposed rule involved the practicality of considering the numerous possible economic conditions under which failure might occur.\textsuperscript{175} The proposed rule provided little guidance on the type of external conditions to be considered in a credible plan.\textsuperscript{176} The Final Rule responded by allowing

\textsuperscript{170}. IDIs must “[p]rovide a strategy to unwind or separate the CID or its subsidiaries from the organizational structure of its parent company in a cost-effective and timely fashion.” See Resolution Plans Required for Insured Depository Institutions With $50 Billion or More in Total Assets, 77 Fed. Reg. 3075, 3085 (Jan. 23, 2012) (to be codified at 12 C.F.R. pt. 360).

\textsuperscript{171}. See Dwight C. Smith et al., supra note 130, at 6 (“In practice, greater regulatory relief should be available regardless of whether a Covered Company is filing a standard or tailored DFA Plan.”).

\textsuperscript{172}. Resolution Plans Required for Insured Depository Institutions With $50 Billion or More in Total Assets, 77 Fed. Reg. at 3081.

\textsuperscript{173}. See Relief from Living Will Rules, supra note 159 (suggesting that plans should vary depending on the size and complexity of institutions).

\textsuperscript{174}. See id.

\textsuperscript{175}. See, e.g., Thomas P. Vartanian, et. al., Living Will Requirements Come into Focus, DECHERT LLP 2 (Sept. 15 2011), http://www.dechert.com/publications/ (follow “Featured Publications” hyperlink; then follow “Living Will Requirements Come into Focus” hyperlink).

\textsuperscript{176}. See Resolution Plans and Credit Exposure Reports Required, 76 Fed. Reg. 22,648 (Apr. 22, 2011) (to be codified at 12 C.F.R. pt. 252) (providing little guidance throughout the document on what economic scenarios are to be considered in resolution planning).
firms to assume that failure will occur under certain economic scenarios provided pursuant to § 165(i) of Dodd-Frank's stress testing requirements.\textsuperscript{177}

Stress tests under Dodd-Frank include a “baseline scenario,” an “adverse” scenario, and “a severely adverse” scenario that regulators will use to assess a bank’s position and stability under varying negative external conditions.\textsuperscript{178} These same economic scenarios will provide the backdrop under which resolution planning is to occur.\textsuperscript{179} For the initial submission of living wills, institutions are permitted to assume failure will occur only under the baseline scenario.\textsuperscript{180} In subsequent submissions, the FDIC will expand the scenarios to be considered to include the “adverse and severely adverse economic conditions.”\textsuperscript{181}

The Final Rule’s use of these stress test scenarios in living wills should provide a more workable and useful model.\textsuperscript{182} With no guidance on what scenarios to consider in the proposed rule,\textsuperscript{183} institutions were placed in a situation where they must foresee economic uncertainty. Under the Final Rule, the role is placed more squarely in the hands of regulators to evaluate possible economic circumstances.\textsuperscript{184}

While the use of stress test scenarios is likely beneficial, the value of these economic scenarios is largely dependent on the ability of regulators to predict and anticipate economic trouble and market


\textsuperscript{179} Resolution Plans Required, 76 Fed. Reg. at 67,328 (“Take into account that such material financial distress or failure of the covered company may occur under the baseline, adverse and severely adverse economic conditions provided to the covered company by the Board pursuant to 12 U.S.C. 5365(i)(1)(B) . . . . “).

\textsuperscript{180} Id. at 67,336-37 (to be codified at 12 C.F.R. § 243.4(a)(4)(i)).

\textsuperscript{181} Id.

\textsuperscript{182} See Resolution Plans Required, 76 Fed. Reg. at 67,328 (describing the use of these economic scenarios as a way to “assist” institutions in their planning).


conditions.\textsuperscript{185} While stress test rules are not yet finalized,\textsuperscript{186} observers have provided recommendations on future stress testing rules, and many of these recommendations may enhance the efficacy of living wills.\textsuperscript{187} A primary goal among observers is that these stress tests provide “plausible” scenarios.\textsuperscript{188} Commenters observe that “the more extreme and unrealistic a scenario is, the less useful it is as a management tool.”\textsuperscript{189} In contrast, some observers question the utility of past stress testing attempts due to scenarios that are not sufficiently adverse.\textsuperscript{190} In either case, an implausible or unrealistic scenario would undermine the value of living wills by making the scenarios institutions must consider burdensome or potentially ineffectual. Thus, as regulators seek to finalize rules with regard to stress testing,\textsuperscript{191} they should keep in mind the implications that such rulemaking could have on the viability of living wills.

E. What is a Credible Plan?

The proposed rule left many financial industry members wondering exactly what a credible living will looks like.\textsuperscript{192} For institutions, their uneasiness was justified given the potential for stiff

\begin{itemize}
  \item \textsuperscript{185} See, e.g., The Financial Services Roundtable et. al., Re: Proposed Guidance on Stress Testing, THE CLEARING HOUSE 3 (Jul. 29, 2011), www.theclearinghouse.org/index.html?f=072616 (indicating that the scenarios considered in stress tests are foremost concerns in developing effective and efficient stress testing).
  \item \textsuperscript{187} See, e.g., The Financial Services Roundtable et. al., supra note 185 (providing comment on proposed guidelines for stress testing rules).
  \item \textsuperscript{188} See id. at 4.
  \item \textsuperscript{189} See id. at 3.
  \item \textsuperscript{190} See Nouriel Roubini, Stress Testing the Stress Test Scenarios: Actual Macro Data Are Already Worse than the More Adverse Scenario for 2009 in the Stress Tests. So the Stress Tests Fail the Basic Criterion of Reality Check Even Before They Are Concluded, ECONOMONITOR (Apr. 13, 2009), http://www.economonitor.com/nouriel/2009/04/13/stress-testing-the-stress-test-scenarios-actual-macro-data-are-already-worse-than-the-more-adverse-scenario-for-2009-in-the-stress-tests-so-the-stress-tests-fail-the-basic-criterion-of-reality-check-e/ (“Thus, the stress test results are meaningless as actual data are already running worse than the worst case scenario.”).
  \item \textsuperscript{191} See Enhanced Prudential Standards and Early Remediation Requirements for Covered Companies, 77 Fed. Reg. 594 (announcing proposed standards for stress testing rules).
\end{itemize}
penalties upon failure to submit a credible living will.\textsuperscript{193} The Final Rule did little to ease these concerns, leaving most of the specifics of living wills undetermined.\textsuperscript{194} Some in the industry recognized that detailed compliance with the Final Rule's requirements could require thousands of pages of reporting, prompting questions as to the usefulness of preparing or reviewing such an onerous document.\textsuperscript{195}

As the process for developing living wills begins, initial reports indicate that regulators are working to ease the burden of the lack of specificity in the Final Rule.\textsuperscript{196} Among other things, regulators emphasize the organic nature of the process, recognizing initial submissions will not be perfect.\textsuperscript{197} There is some indication as to the components of the plans that require the most attention, and law firms have wasted little time developing comprehensive guides to creating effective resolution plans.\textsuperscript{198} Reports further indicate the likelihood that the most serious penalties will not be levied against institutions on initial submissions.\textsuperscript{199} Thus, the concern over the lack of clarity in the Final Rule is at least temporarily eased.\textsuperscript{200}

Nonetheless, the process needs to develop to the point where institutions and regulators know what to expect. Doing so will allow living wills to become a preventive measure, rather than simply a guide for failure.\textsuperscript{201} If institutions understand the requirements of a credible living will and the potential penalties, they will be prompted to engage in self-regulation, preventing them from becoming too big or too complex.\textsuperscript{202} For instance, if an institution found it too costly or uneconomical...

\textsuperscript{193} See id. at 67,339 (to be codified at 12 C.F.R. § 243.6) (providing for penalties such as increased capital requirements or even divestiture in extreme cases).

\textsuperscript{194} See, e.g., Regulators Looking for Quality, supra note 49 (noting various uncertainties that remain with regard to living will submissions).

\textsuperscript{195} See id.

\textsuperscript{196} See id. (indicating that regulators are looking more to the quality of living wills, with specific emphasis on certain component parts).

\textsuperscript{197} See id.


\textsuperscript{199} Regulators Looking for Quality, supra note 49.

\textsuperscript{200} Id.

\textsuperscript{201} See, e.g., Banker, supra note 53, at 428 (suggesting that living wills could provide a means to making financial institutions safer and less complex).

\textsuperscript{202} See id. at 464-65 (suggesting that living wills would require institutions to "fence off" risky parts of their business in order to comply with planning requirements).
to create a plan for resolution under its current structure, the institution would have the incentive to downsize or reorganize itself to the point where such resolution is possible.\textsuperscript{203} A failure to do so would allow regulators to impart their own penalties on institutions not meeting these expectations.\textsuperscript{204} But much work is needed to develop the process to the point where living wills can provide such results.\textsuperscript{205} As regulators continue the discourse with institutions, the development of a framework for credible living wills should be a primary goal.

\textbf{IV. CONCLUSION}

The foregoing discussion highlights several of the key issues and concerns raised by living will requirements. Nonetheless, there are a number of other issues – beyond the scope of this Note – that remain unresolved. Namely, questions remain regarding the confidentiality of living wills, as institutions’ plans will undoubtedly contain sensitive information.\textsuperscript{206} The Final Rule provides that plans will contain a “public section and a confidential section.”\textsuperscript{207} The rule lays out some information that will necessarily be public such as the executive summary.\textsuperscript{208} Beyond these required public sections, the Final Rule declares that the confidentiality of certain sections will be determined under applicable laws.\textsuperscript{209} Companies may petition for confidential treatment of information, but it remains to be seen how these laws affecting disclosure – such as exemptions in the Freedom of Information Act – will interplay with living will submissions.\textsuperscript{210} The intermingling of these informational disclosure laws with resolution planning will certainly be an area of interest for financial institutions moving forward.

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\item \textsuperscript{203} See id.
\item \textsuperscript{204} See Resolution Plans Required, 76 Fed. Reg. at 67,339 (to be codified at 12 C.F.R. § 243.6) (describing the possible penalties).
\item \textsuperscript{205} See generally Regulators Looking for Quality, supra note 49 (signifying that much uncertainty exists in regulators expectations for living wills).
\item \textsuperscript{206} See, e.g., Lynyak, supra note 118, at 4 (noting that resolution plans will likely contain “highly proprietary” information regarding the subject institutions).
\item \textsuperscript{207} See Resolution Plans Required, 76 Fed. Reg. at 67,340 (to be codified at 12 C.F.R. § 243.8(c)).
\item \textsuperscript{208} Id.
\item \textsuperscript{209} See id. (to be codified at 12 C.F.R. § 243.8(d)(1)).
\item \textsuperscript{210} See, e.g., Lynyak, supra note 118, at 4.
\end{itemize}
\end{footnotesize}
In addition, issues remain regarding the effect of living will requirements on foreign-based institutions.\textsuperscript{211} Currently, the Final Rule does provide some concession to these foreign-based institutions.\textsuperscript{212} They are only required to submit information pertaining to their entities and operations “that are domiciled in the United States or conducted in whole or material part in the United States.”\textsuperscript{213} The foreign institution must describe how resolution planning for these domestic operations is a part of the institution’s resolution planning as a whole.\textsuperscript{214} This concession still places a considerable burden on these companies, especially with similar resolution planning requirements in other countries.\textsuperscript{215} Thus, it seems a consolidated international approach would be beneficial to all firms, but the coordination of these efforts does not yet exist.\textsuperscript{216}

Issues of confidentiality and the impact on foreign-based institutions are only two of the various issues unaddressed in this Note.\textsuperscript{217} Hopefully, the analysis provided in Part III will work as a starting point for considering the implications of the flexibility in the Final Rule on these and other issues. Regulators must strive to reach

\begin{itemize}
\item \textsuperscript{211} See Kate Davidson, \textit{Foreign Banks Grow Uneasy Over Dodd-Frank – Those With Small U.S. Operations Fear High Compliance Cost}, AM. BANKER, May 24, 2011, available at 2011 WLNR 10275897 (describing the fears that foreign banks have expressed regarding the high compliance costs associated with a presence in the United States).
\item \textsuperscript{212} See Resolution Plans Required, 76 Fed. Reg. at 67,336 (to be codified at 12 C.F.R. § 243.4(a)(2)) (providing special treatment to “[f]oreign-based covered companies”).
\item \textsuperscript{213} \textit{Id.} (to be codified at 12 C.F.R. § 243.4(a)(2)(i)).
\item \textsuperscript{214} \textit{Id.} (to be codified at 12 C.F.R. § 243.4(a)(2)(ii)).
\item \textsuperscript{215} See \textit{Andrew Hickley, UK Urged to Slow Resolution Plans}, GFS NEWS (Nov. 10, 2011), http://www.gfsnews.com/article/3549/1/ (describing calls to slow living will requirements in the United Kingdom, in order to align the plans with international initiatives).
\item \textsuperscript{216} See Sylvia Mayer et. al., \textit{FSB Issues Recommendations on Global Resolution Planning}, BANKRUPTCY BLOG (July 26, 2011), \url{http://business-finance-restructuring.weil.com/dodd-frank/fsb-issues-recommendations-on-global-resolution-planning/#axzz1ekw8HxsV} (encouraging initiatives for global resolution planning but recognizing the unlikelihood of a “comprehensive international resolution regime”).
\item \textsuperscript{217} See \textit{generally} Packin, supra note 24 (providing an analysis of many of the remaining unanswered issues surrounding the implementation of living wills).
\end{itemize}
the balance between effective resolution planning and minimized regulatory burden by working with institutions and allowing the process to develop. While it may take time, living wills could one day serve as a valuable tool for limiting systemic risk and the problems associated with the too-big-to-fail phenomenon.\footnote{See, e.g., Avgouleas et al., supra note 22, at 2.}