Living Wills and Section 165(d) of the Dodd-Frank Act: A BLUEPRINT
Each U.S. bank holding company and foreign banking organization with more than $50 billion in consolidated assets and each nonbank financial institution deemed systemically important by the FSOC must submit a resolution plan, or “living will” for the “rapid and orderly resolution in the event of material financial distress or failure.” A likely deadline is July 21, 2012.

Each institution required to submit a resolution plan also must submit, on a periodic basis, a credit exposure report. These reports will be critical in the assessment of systemic risk.

The Federal Reserve and FDIC have proposed rules with more detailed plan requirements and specifics on credit exposure reports. A final rule is due by January 21, 2012.

The plan must explain:

- The structures and procedures in place to protect an insured depository institution subsidiary from the risks arising from activities of any nonbank affiliate
- Ownership structure, assets, liabilities, and contractual obligations
- Cross-guarantees tied to different securities, major counterparties, and a process for determining to whom the collateral of the company is pledged
- Reorganization or liquidation in bankruptcy

The plan should anticipate the needs and duties of the Federal Reserve and the FDIC and support two functions:

- Ongoing supervision
  - Identify material exposures to major counterparties
  - Describe the riskier components of the institution
  - Identify market and liquidity risks
  - Gather information to perform horizontal supervision
  - Develop stress scenarios and potential solutions

- Resolution planning
  - Describe a hypothetical Chapter 7 and Chapter 11 proceeding
  - Consider which businesses to market pre-liquidation
  - Analyze the usefulness of a bridge bank
  - Assess short-term liquidity needs
  - Identify and prepare for impact of failure on other institutions
PLANNING

☐ Appoint full-time living will team
☐ Establish a reporting and oversight structure that includes input from enterprise risk management, treasury and finance, and legal
☐ Designate board members to monitor process
☐ Organize data collection

MAJOR TASKS

Strategic analysis

☐ Identify likely stressors
☐ Analyze failure of particular entities, and that of the whole institution
☐ Assess private sector solutions
☐ Devise bankruptcy alternatives
☐ Establish methods for protection of the bank

Corporate governance structure for resolution planning

☐ Develop central planning function headed by senior management
☐ Coordinate communications and reporting to board of directors

Overall organizational structure

☐ Describe material entities and core business lines
☐ Explain inter-affiliate relationships, including risk transfers
☐ Provide financials, including on- and off-balance sheet items

Management information systems

☐ Develop a process for efficient and timely data gathering
☐ Determine who will maintain access to specific data

External risks

☐ Describe capital and liquidity sources
☐ Identify exposures to major counterparties, including short-term funding, derivatives and other “qualified financial contracts,” and collateral arrangements
☐ Determine the effect of a failure of a major counterparty

Internal risks

☐ Analyze reliance of one affiliate on another for capital, funding, or services
☐ Identify cross-guarantees
SELECT LEGAL ISSUES

BANK REGULATORY
- Does the plan sufficiently address management of the institution’s risks, especially liquidity, counterparty, and market risks?
- How would other supervisory tools affect execution of the plan?
- How will emerging regulations affect the operations of the institution?
- Should any restructuring be considered?
- How will cross-border operations be addressed in the plan?

BANKRUPTCY AND RESTRUCTURING
- How would the institution be liquidated under Chapter 7 or restructured under Chapter 11 of the U.S. Bankruptcy Code?
- What authority and duties would current directors and officers have?
- How would counterparty rights in bankruptcy differ from those under Title II of the Dodd-Frank Act?
- How does the institution avoid a replay of the Lehman bankruptcy?
- What should the plan include in order to minimize the likelihood that Title II’s Orderly Liquidation Authority will apply?

CAPITAL MARKETS
- What are the creditor relationships underlying outstanding debt instruments?
- Which instruments are realistically available to recapitalize the institution?

CORPORATE GOVERNANCE
- What duties do directors and officers owe in preparing the plan?
- What duties apply when an institution is failing?

DERIVATIVES
- What are the material counterparty relationships?
- Are there unusual considerations in unwinding particular positions?
- What law governs each of the trading agreements and any credit support arrangements?
- To what extent are close-out and netting provisions enforceable in the relevant jurisdictions?

TAX
- What is the effect of a restructuring on deferred tax assets?
- How do intercompany tax sharing agreements work in stress scenarios?

TECHNOLOGY TRANSACTIONS
- Do technology contracts provide maximum protection in a liquidation or restructuring?
We have organized an interdisciplinary team to advise our clients on the preparation of resolution plans. Our team includes U.S., U.K., and Japanese lawyers from the bank regulatory, bankruptcy and restructuring, capital markets, corporate governance, derivatives, tax, technology, and litigation practices. Each of these practice groups is recognized at the top levels by the various law firm rankings compiled by the Chambers guides, IFLR1000, U.S. News & World Report, and The Legal 500.

Our team includes the following practice groups:

- **Bank Regulatory**, which advises U.S. and foreign banks on the full range of laws that affect wholesale and retail operations. Our clients include the majority of the U.S. banking organizations that will be required to file resolution plans as well as many of the foreign banking organizations also subject to the requirement. Our lawyers are located in Washington, D.C., New York, and Los Angeles and include former senior lawyers at the Federal Reserve and the OCC.

- **Bankruptcy and Restructuring**, which represents the full range of participants in insolvency proceedings. Headquartered in New York, the group is a market leader in several specialty areas, including the restructuring of financial institutions and cross-border insolvencies.

- **Capital Markets**, which advises financial institutions on their funding and liability management plans and has developed many of the financial products used by banks and insurance companies to obtain favorable regulatory capital treatment.

- **Derivatives**, which assists financial institutions with evaluating the regulatory requirements applicable to derivatives transactions and market participants, including those under Title VII of the Dodd-Frank Act, and documenting derivatives transactions under standard industry forms and bespoke customized agreements.

- **Corporate Governance**, which advises public and private companies and their directors and officers on the entire breadth of governance requirements, best practices, and fiduciary duties. The group is led by the former Chief Counsel of the Division of Corporation Finance at the SEC.

- **Tax**, which (among many other things) assists with creation and restructuring of tax efficient capital structures (e.g., hybrid securities) and with the preservation of tax attributes in stress scenarios.

- **Technology Transactions**, which advises clients on complex information technology issues and business process outsourcing transactions.

- **Litigation**, which assists with complex commercial litigation and bankruptcy litigation (both domestic and cross-border), and advises clients on the strategic use of litigation to protect assets and reemerge with a strong, workable plan of reorganization.