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COVER STORY

Regulators Offer Flexibility On Living Will Requirement

BY DONNA BORAK

WASHINGTON — Banking regulators did not erase every worry aired by the largest financial firms over a requirement to provide "living wills," but by giving them more time to complete such plans they eased a lot of the pain.

Observers said the Federal Deposit Insurance Corp. and Federal Reserve Board showed more flexibility than in their initial proposal released in April and that it was clear they listened to the comment letters filed by large institutions and their representatives.

"Regulators learned from the comment process and talking to people about some of the things in the proposal that were less measured and less realistic," said Randy Guynn, a partner and head of the financial institutions group at Davis & Polk. "This final proposal shows more sensitivity. It is more usable and effective."

The FDIC voted 3-to-0 Tuesday to approve the final rule, which gave the largest institutions more time to draft and submit living will plans. The Fed is expected to approve the rule this month.

Living wills, required under the Dodd-Frank Act, are designed to help regulators get an idea how otherwise healthy firms could be cleaned up if they failed, allowing the government to be more prepared for a crisis.

The law also gave the FDIC vast new resolution powers to seize and dismantle firms deemed too big to be wound down through bankruptcy.

The final rule will apply to 124 financial firms. The FDIC approved a separate interim rule that would subject 37 federally insured banks and thrifts not subject to the bankruptcy code to similar resolution planning.

Under the initial April proposal, firms would have had to submit their living will plans no later than 180 days after the rule took effect But regulators opted to provide institutions more time under staggered phase-in periods. Under the final rule, the largest, most complex firms will be required to go first, helping to inform the process. "They were going to have everybody submit resolution plans — 124 institutions — at one time and review them in 60 days. That was always going to be unrealistic," Guynn said. "It will give the regulators some time to learn about the process from the largest institutions doing it first."

Now institutions with consolidated nonbank assets of $250 billion or more must submit their plans by next July 1. Those with assets of $100 billion to $250 billion must file their living wills by July 1, 2013. The rest have until Dec. 31, 2013, to comply.

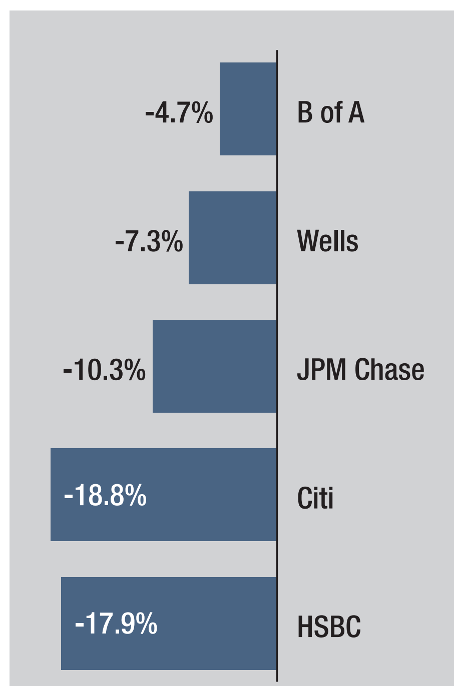
The rule would apply to systemically important nonbanks overseen by the Fed, bank holding companies with at least $50 billion in assets and foreign bank holding companies with U.S. financial operations.

After firms submitted their initial plans, the FDIC said, all would comply with an anniversary date thereafter for their annual reports.

Regulators made clear that Tuesday's agreement on the final rule would be the first of many steps in the process. The

Susan Krause Bell
Promontory Financial

rule aims to help regulators prevent the chaos seen in the financial markets after



Source: SNL Financial

Regulators Show Flexibility On Living Will Requirement

Lehman Brothers' collapse in September 2008.

"This notion of resolution planning is a new idea that has emerged out of the crisis, and in the way that it's proposed in Dodd-Frank it has quite substantial remedies and penalties' that could be associated with failure to achieve it," Acting Comptroller of the Currency John Walsh said. "So, we are in some ways in uncharted territory, an iterative process to develop and maintain credible plans. I do appreciate the fact the various checkpoints included in the rule are a sensible approach to testing the regime … as we go forward."

Susan Krause Bell, a managing director at Promontory Financial Group, agreed regulators are taking a cautious approach, but she said that might create uncertainty. "Regulators recognize that living wills will continue to improve over time, and they don't necessarily expect the first one submitted by an institution to be as good and complete as the next one, and the next one after that," she said. "The difficulty is banks first in line may wonder whether the requirements and the standards the agencies will use would change over time."

The FDIC issued another rule to clarify that government insured banks with total assets of $50 billion or more, which are not subject to the bankruptcy code, would also have to make their own resolution plans under the Federal Deposit Insurance Act.

FDIC Acting Chairman Martin Gruenberg said the agency's rule complements its joint regulation with the Fed: "These two rules will ensure the comprehensive and coordinated resolution planning for both the insured depository and its holding company and affiliates in the event that an orderly liquidation is required."

Insured depository institutions whose parent companies are subject to the living will rule would be required to submit their plans simultaneously.

Additionally, nonbank financial institutions that may be designated as systemically important by the **Financial Stability Oversight** Council and overseen by the Fed also saw some relief. Under the new rule, those that will become subject to the new requirements will have 270 days to comply. Previously regulators planned to give them 180 days.

Regional banks also got a break after regulators specified that those institutions that are less systemically important could provide a tailored, less extensive living will plan for that reason. "They've gone a fair distance on the concerns by tailoring the requirements a bit more on the size and complexity," Krause Bell said. "But it remains a very significant requirement."

The FDIC didn't change its language to allay foreign institutions' concerns, but it did give them additional time under its phase-in system. Foreign firms wanted regulators to specify that the threshold of $50 billion be applied only to total U.S. assets, not on a global basis, in order to seek possible exemption.

Confidentiality was another concern. Firms worried that proprietary information included in their living will plans would become publicly available, causing competitiveness concerns. Regulators opted provide guidelines on which information would be made public and which would be kept confidential. FDIC officials said any information now considered private would remain so.

Observers said more work would be needed. "I don't think the debate is really over in terms of whether it's going to satisfy the concerns of the banks," Krause Bell said.

"They still have to see how it plays out."

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