November 30, 2023

Via Electronic Mail

Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429
Attention: James P. Sheesley, Assistant Executive Secretary
RIN 3064-AF90

Re: Request for Public Comment on Proposed Revisions to 12 C.F.R. Part 360

Ladies and Gentlemen:

The Bank Policy Institute[1] submits these comments in response to the Federal Deposit Insurance Corporation's proposal entitled *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*.[2]

I. Executive Summary

If adopted as proposed, the proposal would mark a significant shift in how covered insured depository institutions (**CIDIs**)[3] approach resolution submissions under 12 C.F.R. Part 360 (the **IDI Rule**). While it is understandable that the FDIC would want to address lessons learned from the March 2023 banking turmoil, the result has been to overload the IDI Rule with entirely new or heightened requirements that, in some cases, are unnecessary to achieve the goal of improving the resolvability of CIDIs, and, in other cases, may actively hinder that goal. The alternatives proposed in these comments aim to streamline the proposal and to make the

[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] FDIC, *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), https://www.govinfo.gov/content/pkg/FR-2023-09-19/pdf/2023-19266.pdf.
[3] Under the proposal, CIDIs would be divided into two groups that would be subject to different filing requirements, depending on size. CIDIs with total assets of $100 billion or more (**Group A CIDIs**) would be required to submit a full IDI plan containing all content elements described in the proposal, and CIDIs with total assets of at least $50 billion and less than $100 billion (**Group B CIDIs**) would be required to make an informational filing. As a general matter, we refer to resolution plans submitted by Group A and Group B CIDIs as IDI plans throughout this letter.

resolution planning process more efficient and effective. These improvements will help CIDIs that are subject to the IDI Rule provide the information necessary to facilitate resolutions, while also having the time and resources to enhance operational capabilities and respond to feedback.

Our comments proceed as follows:

- Section II addresses the form and timing of resolution planning submissions;

- Section III addresses revisions or additions to the content requirements under the proposal;

- Section IV addresses the requirements for capabilities testing and engagement; and

- Section V addresses the proposed assessment criteria for CIDIs' IDI plan submissions and related processes.

Throughout, we recommend that the FDIC's approach should be guided by the following objectives:

- **The two U.S. resolution planning frameworks—the IDI Rule and 165(d) Rule—should complement each other.** BPI respectfully submits that the IDI Rule should be designed so that it complements 12 C.F.R. Part 381 (the **165(d) Rule**). The 165(d) Rule addresses the resolution of an entire banking organization, which includes any CIDIs. A resolution plan submitted pursuant to Section 165(d)[4] therefore necessarily addresses the treatment of a CIDI in a resolution scenario and involves capabilities and elements that could be harmonized across both plans. Given that the FDIC has responsibility for both the IDI Rule and the 165(d) Rule, the proposal is an opportunity for the FDIC to harmonize elements of the two frameworks and create synergies. Reducing duplicative or inconsistent requirements in the proposal will ultimately make the process more efficient and effective for the FDIC and CIDIs. Such efforts include not requiring IDI plans from Multiple-Points-of-Entry (**MPOE**) and Single-Point-of-Entry (**SPOE**) 165(d) plan filers.

- **The proposal should be streamlined where appropriate.** BPI respectfully requests that the FDIC consider ways to streamline the proposal's requirements for CIDIs. A constant churn of full submissions, interim supplements, material change notices, capabilities testing, engagement and feedback is likely to be counterproductive and risk overwhelming both FDIC staff and CIDIs with unimportant details, rather than contributing to core resolution planning. The parent banking organizations of many CIDIs are also required to submit a 165(d) plan and are subject to capabilities testing exercises. The combined impact of these overlapping requirements may make it more

[4] Section 165(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (**Dodd-Frank Act**), as amended by the Economic Growth, Regulatory Relief, and Consumer Protection Act, 12 U.S.C. § 5365(d).

difficult for CIDIs to thoughtfully respond to feedback and enhance resolution capabilities.

- **The IDI Rule should set clear expectations for CIDIs.** CIDIs and their parent organizations devote significant time and effort to the planning, resourcing, operations, testing and governance of resolution capabilities and processes. There are several opportunities where the FDIC can provide additional clarity or guidance about these requirements. Clear and timely guidance would allow CIDIs to more effectively manage their resolution planning capabilities, processes and expectations.

- **Resolution planning should be a cooperative process.** Since the original IDI Rule was adopted in 2012, CIDIs and the FDIC have engaged in a collaborative process to improve resolution planning because both the agency and the industry have an interest in a stable U.S. financial system where banks can be resolved in an orderly manner.[5] Instead of continuing with this paradigm in which CIDIs and the FDIC build, assess and strengthen CIDIs' resolution capabilities, the proposal would implement a regime more focused on grades than outcomes. In addition, the first prong of the credibility standard under which certain CIDIs would be evaluated would further hinder the cooperative nature of this process, as it is subjective and could leave CIDIs and the FDIC at odds on whether the standard has been appropriately met. BPI respectfully urges the FDIC to reconsider this change and return instead to the longstanding iterative and cooperative process of improving CIDIs' resolution capabilities.

The FDIC should also consider whether it needs to build out its own capabilities so that resolution planning can be a cooperative endeavor. Even before the March 2023 banking turmoil, the Office of the Inspector General (**OIG**) had spotlighted concerns around potential staffing shortages at the FDIC that could have an impact on the agency's ability to manage future crises.[6] And as spotlighted in Vice Chairman Hill's statement regarding the proposal, in a business-as-usual (**BAU**) and non-crisis context, the FDIC "has repeatedly struggled to provide firms meaningful, timely feedback on IDI resolution plans."[7] The quality of review and the ability of FDIC staff to respond in a timely manner is even more important as the FDIC has proposed novel and more intense resolution planning expectations and has proposed an assertive timeline for IDI plan submissions. While the FDIC builds out its staffing and internal resolution planning capabilities, we encourage the FDIC to promptly publish an updated version of its Resolution Handbook[8] so that filers can take into consideration the FDIC's baseline expectations and

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[5] *See, e.g.*, FDIC, *Statement by Jonathan McKernan, Director, FDIC Board of Directors, on the Proposed Long-term Debt Requirements for Certain Banking Organizations* (Aug. 29, 2023), https://www.fdic.gov/news/speeches/2023/spaug2923e.html ("[W]e should acknowledge that bank failures are inevitable in a dynamic and innovative economy. We should plan for those bank failures by focusing on . . . an effective resolution framework . . . .").
[6] OIG, *Top Management and Performance Challenges Facing the Federal Deposit Insurance Corporation* (Feb. 2023), https://www.fdicoig.gov/sites/default/files/reports/2023-02/TMPC%20Final%202-16-23_0.pdf.
[7] FDIC, *Statement by Vice Chairman Travis Hill on the Proposed Amendments to the IDI Resolution Planning Rule* (Aug. 29, 2023), https://www.fdic.gov/news/speeches/2023/spaug2923k.html (**Hill Statement**).
[8] The Resolution Handbook webpage has noted since 2021 that the Handbook has been in the process of being revised. FDIC, *Resolutions Handbook*, https://www.fdic.gov/resources/resolutions/bank-failures/reshandbook/index.html (last accessed Nov. 29,

processes when preparing their resolution plans. The FDIC should actively consider measures it might take to put itself in the best position to resolve failed banks in the future. For instance, it should consider seeking public comment on ways to provide more appealing transaction terms to potential acquirers of failed banks in order to maximize the price received for a failed bank in compliance with its statutory obligation to resolve failed banks in a manner that results in the least cost to the DIF. The FDIC should also consider maintaining relationships with outside investment banking advisory firms that would then be prepared to help the FDIC maximize the price received for a failed bank consistent with its least-cost duty in any possible resolution sales and engage these firms early in the process.

Moreover, because it is ultimately the FDIC alone that would carry out the resolution of any failed CIDI under the FDI Act—since there is no concept in the FDI Act like the debtor-in-possession model under the Bankruptcy Code—the FDIC should also develop and publicly disclose its own resolution strategies for each category of CIDIs, explaining what the FDIC has done or plans to do to be operationally ready to execute those strategies successfully if and when needed. The resolution authorities in most of the other G7 countries have developed and publicly disclosed the broad outlines of how they expect to resolve systemically important banks over which they have jurisdiction if and when needed, and the FDIC should follow and even surpass their good examples by developing and publicly disclosing more details about its expected strategies.[9] The FDIC should also perform regular simulations to identify weaknesses in its own capabilities and evaluate its own operational readiness. By providing insured and uninsured depositors, investors and other market participants with more certainty and predictability concerning how the FDIC would expect to resolve each category of CIDIs if and when needed, the FDIC will reduce the incentive for panics and runs caused by uncertainty about the FDIC's likely approach to resolving any category of CIDIs.[10]

2023).

[9] *See, e.g.*, Bank of England, *The Bank of England's Approach to Resolution* (Oct. 2017), https://www.bankofengland.co.uk/-/media/boe/files/news/2017/october/the-bank-of-england-approach-to-resolution.pdf; Single Resolution Board, *Expectations for Banks* (Oct. 4, 2020), https://www.srb.europa.eu/system/files/media/document/efb_main_doc_final_web_0_0.pdf; Office of the Superintendent of Financial Institutions & Canada Deposit Insurance Corporation, *Guide to Intervention for Federally Regulated Deposit-Taking Institutions*, https://www.cdic.ca/what-happens-in-a-failure/resolution-coordination/guide-to-intervention-for-federally-regulated-deposit-taking-institutions/; FINMA, *Resolution Report 2023: Focus on the Large Global Swiss Banks*, https://www.finma.ch/en/enforcement/recovery-and-resolution/resolution-report-2023/focus-on-the-large-global-swiss-banks/; and Financial Services Agency, *The FSA's Approach to Introduce the TLAC Framework* (Apr. 13, 2018), https://www.fsa.go.jp/en/news/2018/20180413/01.pdf.

[10] This would not tie the FDIC's hands if any particular plan did not fully anticipate the circumstances of the failure of a particular CIDI or group of CIDIs because the FDIC could reserve the right to carry out a different strategy if unforeseen circumstances warranted it. For example, the Swiss Financial Markets Authority (**FINMA**) had publicly stated well before the failure of Credit Suisse that it expected to resolve any Swiss GSIB using a single-point-of-entry bail-in (recapitalization) strategy. Yet, when Credit Suisse failed earlier this year, FINMA decided to resolve Credit Suisse through a quick sale to UBS because it decided that unforeseen circumstances warranted deviation from the previously announced presumptive path.

II. BPI's Overarching Comments on the Form and Timing of IDI Plans

A. The IDI Rule should be designed to complement the 165(d) Rule and not create duplicative or inconsistent requirements for banking organizations subject to both rules.

The 165(d) Rule and the IDI Rule are intended to "work in tandem and complement each other. Both of these resolution plan requirements will improve efficiencies, risk management and contingency planning at the institutions themselves."[11] In practice, however, the coexistence of these two regimes has resulted in many CIDIs having to comply with inconsistent or duplicative requirements. To that end, the FDIC should consider how it can streamline the resolution planning process for CIDIs whose parent banking organizations are also subject to the 165(d) Rule. The most elegant solution would be to exempt 165(d) plan filers from IDI plan requirements. GSIBs and the largest banking organizations are not only subject to the extensive resolution planning requirements and credibility determinations under the 165(d) Rule and framework, but also they are, or are likely soon to be, required to hold significant loss absorbing resources necessary to support their resolution strategies under TLAC and long-term debt requirements.[12]

Requiring banks to prepare two resolution plans that may have differing (in the case of filers relying on an SPOE strategy) or duplicative (in the case of filers relying on an MPOE strategy) strategies, or where agency determinations on credibility are redundant or may be contradictory, would not be a productive use of FDIC or CIDI resources. In addition, multiple plans with different strategies by the same organization could result in market confusion about the likely course of regulatory action during times of stress, further exacerbating risks that are intended to be addressed through the development and regulatory review of the resolution plans themselves.

The vast majority of banking organizations are not subject to the 165(d) Rule, and BPI does not believe that should change. Instead, resolution planning requirements should operate on a spectrum. IDI plans should be on one end of the spectrum, applying to the less-complex CIDIs that are not part of a banking organization that is required to submit a 165(d) plan. The requirements for IDI plans should accordingly be simpler than those for 165(d) plans, reflecting the smaller size and simpler structure of the institutions that are subject only to the IDI plan requirements. As a CIDI grows and becomes more complex, it should then be subject to more fulsome resolution planning requirements, as the FDIC contemplates with the Group A CIDI category.

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[11] Martin J. Gruenberg, Acting Chairman, FDIC, *Remarks to George Washington University Law School* (Mar. 2, 2012), https://fraser.stlouisfed.org/title/statements-speeches-martin-j-gruenberg-6968/remarks-george-washington-university-law-school-629813.

[12] The federal banking agencies also recently proposed imposing long-term debt requirements on all large regional banks as well as all banking organizations subject to the 165(d) Rule. Federal Reserve, OCC and FDIC, *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), https://www.govinfo.gov/content/pkg/FR-2023-09-19/pdf/2023-19265.pdf.

Those banking organizations that reach the level of complexity the 165(d) Rule is intended to address should grow out of IDI plans and into 165(d) plans. On this end of the spectrum, parent banking organizations that file 165(d) plans should not be required to also file IDI plans. The 165(d) plans are required to credibly resolve the entire organization, including the CIDI. The FDIC, together with the Federal Reserve, reviews 165(d) plans and thus assesses the credibility of—and provides feedback and guidance on—the resolution plan for a banking organization and its CIDI(s) that would have to file an IDI plan.

- **SPOE filers.** Banking organizations relying on an SPOE strategy for their 165(d) plans should not also be required to file an IDI plan because an SPOE strategy[13] will keep the CIDI solvent and open and operating outside of any resolution proceeding of its parent bank holding company. It is therefore not necessary to prepare and submit a separate IDI plan that is premised on the notion that the CIDI becomes insolvent because that will not be the case under an SPOE strategy. IDI plans should be unnecessary for CIDIs whose parent organizations have determined in their 165(d) plans that the best strategy for an orderly resolution of the entire banking organization is SPOE and where the FDIC and the Federal Reserve already make determinations on the credibility of these SPOE strategies and plans. Requiring 165(d) plan filers with an SPOE strategy to separately submit an IDI plan may undermine the viability of that SPOE strategy in the minds of the banking organization's foreign regulators or create confusion as to the presumptive path in resolution.

- **MPOE filers.** Banking organizations relying on an MPOE strategy for their 165(d) plans must already address most considerations relevant to an IDI plan when explaining their strategy to resolve their CIDIs in their 165(d) plans. Because the FDIC already reviews those 165(d) plans, the requirement for firms relying on an MPOE strategy to separately have their CIDIs file an IDI plan is therefore duplicative and unnecessary. There is no compelling regulatory purpose for the FDIC to review and pass judgment on the same strategy under two different rules when the intended outcome under the strategy is the same. Firms relying on an MPOE strategy in their 165(d) plans accordingly should not have their CIDIs subject to an IDI plan requirement.

Finally, because it is ultimately the FDIC alone that will carry out any resolution of a CIDI under the FDI Act if and when the CIDI fails, without any control by the CIDI's management analogous to the debtor-in-possession model under the Bankruptcy Code, it is more important for the FDIC to develop and publicly disclose its own resolution strategies for each CIDI or category of CIDIs and what it has done or plans to do to be operationally ready to carry

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[13] An SPOE strategy goes beyond just a plan for resolution of a firm and is designed so that only the parent banking organization of a CIDI would enter bankruptcy, while the operating subsidiaries, including the CIDI, would continue their operations uninterrupted. As part of successfully preparing for the execution of an SPOE strategy, the parent holding company of a CIDI both pre-positions and maintains additional capital and liquidity resources which would be distributed to its material CIDI and other material entity subsidiaries immediately before the parent enters bankruptcy and during the resolution period from a funding entity. The operating subsidiaries would then continue in business uninterrupted outside of the parent's bankruptcy proceedings, helping to preserve their going concern value.

out its own strategies successfully than it is for the IDI plan to be part of a 165(d) plan or an entirely separate plan.

If the FDIC still chooses to continue to require CIDIs of 165(d) plan filers to make IDI plan submissions, it should harmonize the IDI Rule requirements with the 165(d) Rule to ensure an IDI plan submission is complementary to a 165(d) plan submission, where appropriate. As noted in a FDIC 2011 Staff Memorandum when the current IDI Rule was in the process of being finalized, "it is imperative that the two companion rules incorporate coordinated requirements."[14] The FDIC should take this opportunity to align certain of the IDI Rule requirements with those of the 165(d) Rule. Throughout this letter we have noted places where we believe alignment would be appropriate.

B. The two-year submission cycle set forth under the proposal should be replaced with a three-year cadence for most CIDIs, except for CIDIs that are part of banking organizations filing 165(d) plans on a biennial basis.

The proposal sets forth a two-year cycle under which CIDIs would be required to make either full IDI plan submissions (for Group A CIDIs) or informational filing submissions (for Group B CIDIs) one year and an interim supplement the intervening year. The proposed two-year cycle would represent a significant shift from the current three-year cycle of resolution planning that most CIDIs currently operate under, would dramatically increase resolution planning costs and would not provide meaningful incremental benefits. Therefore, the FDIC should not adopt the proposed two-year submission cycle.

Although nominally a two-year cycle, the proposal would actually require annual submissions because of the interim supplement requirement. Together with the IDI plan submissions, the proposed interim supplement requirement would constitute a more extensive resolution regime than under either the current 165(d) Rule or the IDI Rule. Assuming the proposal is adopted as proposed, the FDIC estimates that CIDIs will spend an average of an additional 150,000 hours annually in connection with the potential change from a triennial to a biennial filing cycle.[15] As another example, the FDIC estimates that Group A CIDIs that are not affiliated with U.S. GSIBs would require approximately 50% more time to complete a full IDI plan submission under the proposal, as compared to the current IDI Rule, and estimates that current Group A CIDIs affiliated with U.S. GSIBs would require 25% more time.[16] The FDIC further estimates that preparing interim supplements would require half of the time Group A CIDIs not affiliated with U.S. GSIBs spend preparing full submissions under the current IDI Rule.[17] As illustrated by these examples, the proposal would result in CIDIs expending materially more time to comply with the IDI Rule.[18]

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[14] FDIC, *Memorandum from FDIC Staff to the FDIC Board of Directors regarding Resolution Plans Required for Insured Depository Institutions with $50 Billion or More in Total Assets – Interim Final Rule* (Sept. 9, 2011), https://www.fdic.gov/news/board-matters/2011/sept13no3.pdf.
[15] The proposal, *supra* note 2, at 64612.
[16] *Id.* at 64610.
[17] *Id.* at 64610–612.
[18] *See also infra* note 33 for further discussion on this point.

The FDIC, together with the Federal Reserve, has already made the policy choice that a triennial cadence of filings for most banking organizations is sufficient under the 165(d) Rule. The proposal also includes requirements for notices of "material changes" which, along with the proposal's interim supplement requirement, would provide the FDIC with "critical up-to-date information."[19] In addition, the FDIC itself had recently noted in its June 2021 Policy Statement that the IDI Rule's "default annual cycle has not historically provided sufficient time for submission review, the development of meaningful feedback, and a CIDI's incorporation of that input into its next submission."[20]

BPI therefore recommends that the FDIC extend the submission cycle for most full IDI plans to match the 165(d) Rule (assuming that the FDIC does require CIDIs of banking organizations that file 165(d) plans to submit an IDI plan). The requirement to submit a streamlined, data-focused version of the interim supplement in the intervening years (see Section III.A of this letter) and provide notices of material changes (see Section III.C of this letter) would still provide the FDIC with timely information, while providing more time for the FDIC to provide feedback and allowing filers to make enhancements. BPI shares Vice Chairman Hill's concerns that "[h]istorically, the FDIC has repeatedly struggled to provide firms meaningful, timely feedback on IDI resolution plans. Moving the submission cycle from three years to two virtually guarantees the FDIC will not be able to engage with, and provide meaningful feedback to, every firm each cycle, and also means the FDIC staff will devote more time to reviewing plans, and less time to firm engagement."[21] It is therefore crucial that the FDIC commit to significantly expanding its resources and staffing for resolution planning, in connection with adopting the alternative submission cycles, let alone moving to a two-year cycle.

If the FDIC requires CIDIs with banking organizations that file 165(d) plans on a biennial basis to submit an IDI plan, BPI believes that it makes more sense to retain the two-year submission cycle structure, while staggering the timeline so that those firms submit a 165(d) plan and a full IDI plan in different years. Biennial 165(d) plan filers all rely on an SPOE strategy under which the CIDI would continue to operate as the parent company goes through bankruptcy proceedings and so would be separately preparing a different strategy for their CIDI under an IDI plan, making the two-year cycle more practical from the standpoint of not having IDI plan submissions migrate across 165(d) plan submissions over time given that preparing these two plan submissions will require engagement from the same resolution planning resources.

BPI therefore proposes these alternative submission cycles, which are described below and depicted in visuals included as **Appendix 1** and would depend, in part, on whether the CIDI forms part of a banking organization that files a 165(d) plan on a triennial or biennial basis. This proposed cadence would apply to CIDIs whose parent banking organizations are triennial or biennial 165(d) plan filers *only if* the FDIC determines that they should continue to submit IDI

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[19] *Id.* at 64585.
[20] FDIC, *Statement on Resolution Plans for Insured Depository Institutions* (June 25, 2021) (the **June 2021 Policy Statement**), https://www.fdic.gov/resources/resolutions/resolution-authority/idi-statement-06-25-2021.pdf.
[21] Hill Statement, *supra* note 7.

plans, rather than exempt them from the requirement to submit an IDI plan for the reasons set forth above in Section II.A.

- **Submission cycle applicable to CIDIs (1) with parent banking organizations that are triennial 165(d) plan filers and not exempt from the IDI Rule; and (2) that do not have parent companies subject to the 165(d) Rule.** As a general matter, a three-year submission cycle, complemented by streamlined interim supplements in each intervening year, [22] more appropriately balances the FDIC's need for critical up-to-date information and the need for sufficient time for the FDIC to provide feedback and for CIDIs to develop capabilities and to respond and address this feedback in their next full submissions. Moreover, the three-year submission cycle should be aligned with the 165(d) Rule's requirements for triennial filers, which the majority of CIDIs' banking organizations comprise, with IDI plans due on December 15th each year.[23] Aligning the timing of the two rules would promote efficiency and reduce costs by permitting filers to incorporate relevant information from their 165(d) plans into their IDI plans, if applicable.[24] For any triennial 165(d) plan filers that in the future shift to an SPOE strategy, the IDI Rule should shift the due date for the CIDI's IDI plan back a year so that the IDI plan and the 165(d) plan are not due the same year.[25]

- **Submission cycle applicable to CIDIs with parent banking organizations that are biennial 165(d) plan filers and are not exempt from the IDI Rule.** A two-year IDI plan cycle is more appropriate for CIDIs that are part of banking organizations that file 165(d) plans on a biennial basis. In this case, IDI plans should be staggered with 165(d) plans so that IDI plans would be submitted in the years when 165(d) plans are <u>not</u> due, with no interim supplement required as the FDIC would be receiving an IDI plan or 165(d) plan every year.[26] This cadence would be beneficial to biennial filers that rely on SPOE strategies because this model would enable them, and the FDIC, to

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[22] As discussed in Section III.A below, the FDIC should consider whether an interim supplement requirement is necessary as a threshold matter. If the FDIC determines that an interim supplement should be required, then BPI believes that the submission of an interim supplement each intervening year in which an IDI plan is not due for CIDIs on a triennial cycle would be appropriate *only if* the FDIC scales back the content of the interim supplement requirement in line with BPI's proposed approach in Section III.A. If the structure of the interim supplement included in the proposal is retained, then it would be more appropriate to have capabilities testing and engagement conducted during only one of the intervening years, with an interim supplement due the other intervening year. This cadence would allow CIDIs to devote sufficient resources and personnel to the resolution planning process each year, while fully addressing feedback received on their submissions, processes and capabilities.

[23] 165(d) plans are due on July 1st.

[24] The proposal allows CIDIs to incorporate materials from certain other sources, including the most recent 165(d) plans submitted by CIDIs' parents or a regulatory filing made by CIDIs to the FDIC. BPI believes that the FDIC should explicitly update the IDI Rule to clarify that CIDIs can incorporate information from these sources if they are submitted in a different year than the IDI plans or under a different year-end date, as long as the CIDI affirms no material changes have occurred in the intervening period.

[25] Currently all domestic triennial 165(d) plan filers rely on an MPOE strategy, which would allow their CIDIs to incorporate information from the 165(d) plan, as discussed above. If the parent companies of these CIDIs shift to an SPOE strategy, however, this synergy would decrease. In this instance, the IDI Rule should shift the due date for the CIDI's IDI plan to the year after the parent company's 165(d) plan is due. A streamlined interim supplement would then be due the year when neither the 165(d) plan nor IDI plan is due.

[26] The discussion in *supra* note 22 also applies here. If the FDIC determines that an interim supplement should be required, interim supplements for CIDIs of biennial 165(d) plan filers should be submitted the same year as a 165(d) plan.

> alternate their focus between Section 165(d) and IDI plans which contemplate different outcomes for the CIDI. SPOE filers can incorporate some information from the 165(d) plan into the IDI plan, but not to the same extent as MPOE filers, so there would be less benefit to having both plans due the same year. Biennial 165(d) plan filers would also not want a cadence where, over time, an IDI plan could be due the same year as a 165(d) plan submission.

Additionally, given the significant changes and increases to IDI plan content requirements,[27] the FDIC should not require the first submissions under the revised IDI Rule from both Group A and Group B CIDIs until the December that is *at least* 12 months after the IDI Rule is finalized, rather than the proposed 270-day period.[28] Subsequent submissions—whether IDI plan or interim supplement—should be due on December 15th each year.

III. IDI Plan Content Requirements

The rapid failures of Silicon Valley Bank and Signature Bank in March 2023 illustrated the importance of the FDIC's ability to resolve banks in an orderly fashion. However, the significantly expanded scope of the proposal swings the pendulum too far in the other direction and risks inundating filers and the FDIC with information that does not support this objective. The proposal would greatly increase the information required from CIDIs, creating more prescriptive—or entirely new—requirements, substantially adding to the time and resources required to prepare IDI plans, as reflected in the FDIC's own projections.[29] Further, several of the proposed requirements are overbroad and vague, which could lead to discrepancies between IDI and 165(d) plans and yield less useful information for the FDIC. While it is important to apply lessons learned from recent bank failures, we urge the FDIC to streamline and rationalize the required content before finalizing a version of this proposal.

BPI supports the proposal to require filers to include content only "if and to the extent those elements are relevant."[30] BPI also supports the FDIC retaining general authority to grant waivers under the proposal, but respectfully requests that the FDIC also reiterate in the preamble to the final IDI Rule its policy of granting generally applicable or routine case-by-case exemptions from certain requirements, as was done in the June 2021 Policy Statement.[31] This

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[27] This increase is in part evidenced by the significant increase in the number of hours that CIDIs are expected to devote to their IDI plans and interim supplements as set forth in the proposal.
[28] For clarity and assuming that the proposal is finalized in 2024, CIDIs of biennial 165(d) plan filers would first file a full IDI plan under the finalized IDI Rule on December 15, 2026. This timing would be because the next 165(d) plan submission for biennial 165(d) plan filers is due in 2025 and, under BPI's proposed approach, the IDI plan submission of the CIDIs of biennial 165(d) plan filers would be staggered so as to fall on years in which a 165(d) plan is *not* due. Meanwhile, for CIDIs of triennial 165(d) plan filers, their first IDI plan submission under a finalized version of the IDI Rule would be due on December 15, 2027. This timing would align with the year in which the next 165(d) plan of these CIDIs' parent banking organization is due. For other Group A CIDIs, as well as Group B CIDIs, their first IDI plan should be no earlier than the December 15th that is at least one year after the IDI Rule is finalized.
[29] *See supra* Section II.B.
[30] The proposal, *supra* note 2, at 64610.
[31] *See* June 2021 Policy Statement, *supra* note 20, at 9–10.

approach will facilitate tailoring of the requirements for each CIDI based on its business model and ensure that expectations regarding the content of a CIDI's submission are aligned.

A. The FDIC should focus the interim supplements on core elements, and the information should be based on year-end data.

The FDIC should consider the threshold question of whether an interim supplement should be necessary in all cases. For example, if an IDI plan is required from a 165(d) plan filer, under BPI's proposed approach, the CIDIs of biennial 165(d) plan filers would make a full IDI plan submission one year and their parent organizations would make a 165(d) plan submission the next year, which the FDIC also receives. In this case, the interim supplement may not be necessary.

To the extent that the FDIC does require interim supplements, the current scope of information required in the interim supplement, when combined with the capabilities testing and engagement, would be excessive and potentially tantamount to a full plan submission every year. The proposal estimates that preparing an interim supplement would require approximately 197,000 hours annually for Group A CIDIs. The proposal further estimates that preparing a full IDI plan would require an average of approximately 141,000 additional hours annually, or 26 percent more hours than required under the current IDI Rule.[32] The hours necessary to address the proposed content requirements, together with the effort involved in interim supplements, would amount to a significant increase to the required reporting burden hours under the proposal compared to the existing IDI Rule, particularly assuming a two-year submission cycle as the FDIC proposes.[33] Moreover, when combined with the fact that capabilities testing and engagement requirements may take place in years when an interim supplement is required, CIDIs would still be dedicating significant time and resources to resolution planning in years in which interim supplements are due. Imposing these requirements on a continuous basis could impair a CIDI's ability to respond to and implement FDIC feedback or self-identified improvements to its resolution planning capabilities.

BPI believes that interim supplements should be highly targeted and focused primarily on updates to data regarding core elements. These elements would include updates to key personnel and select financial data otherwise unavailable to the FDIC (e.g., financial data not included in call reports), and changes with potentially material impacts to the resolution of a CIDI, including, for example, material changes[34] to the CIDI's organizational structure. Accordingly,

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[32] The proposal, *supra* note 2, at 64612 ("For group A CIDIs submitting resolution plans in the upcoming and subsequent biennial filing cycles, the FDIC estimates that, over the six-year period of analysis, the changes within the proposed rule solely related to the group A content requirements will result in an average increase in reporting burden hours of approximately 141 thousand hours annually (26 percent).").

[33] If 141,000 hours represent a 26 percent increase compared to the current IDI Rule, then the FDIC estimate of the hours required to complete an IDI plan under the existing IDI Rule is approximately 542,000 hours. Adding to the baseline of 542,000 hours currently required, (i) the 197,000 hours required for interim supplements and (ii) the 141,000 additional hours required to complete an IDI plan for Group A CIDIs set forth in the proposal, yields 880,000 hours, an increase of approximately 60 percent over the existing IDI Rule. This does not even factor in the hours required in connection with capabilities testing and engagement.

[34] Here we use "material" in the traditional sense of the term to set a threshold for the types of changes that should be included in the interim supplement. We do not mean "material change" as defined in the proposal or under the heightened standard of

any narrative description should generally be limited to a summary of material changes. This structure would be similar to that used by the European Union's Single Resolution Board to ensure that it has "high quality, complete and timely data."[35] This format would still provide the FDIC with updates to critical information, while easing the gathering and internal review of the interim supplement submission for CIDIs.

We propose specific adjustments to the content requirements for interim supplements and justifications for doing so as **Appendix 2** to this letter. In summary, these changes would maintain the quality of the information provided to the FDIC—by focusing on important changes to core elements—while reducing the quantity of information in the interim supplements because, in many instances, that information is already otherwise available to the FDIC. To the extent information may be obtained elsewhere—for example, through call reports, regulatory filings or other public filings such as Form 10-Qs and 10-Ks—BPI urges the FDIC to leverage that information and avoid imposing duplicative requirements.

Finally, the interim supplement should be based on prior year-end data, rather than data as of the end of the most recent fiscal quarter. Internal governance processes for many CIDIs would make the timing for approval of an interim supplement based on quarter-end data challenging as a practical matter. The use of year-end data would provide sufficient time to prepare and approve the interim supplement. It would also align with the requirement that IDI plans be based on year-end data, better facilitating the comparison of change over time.

B. The FDIC should narrow the scope of Group B CIDIs' informational filings, which, as proposed, would largely overlap with the requirements of the Group A CIDIs' full IDI plan.

BPI supports the FDIC's stated objective to tailor the proposal for Group B CIDIs, but the proposed tailoring is insufficient. Of the 27 content requirements that Group A CIDIs would be required to complete for the full IDI plan, the proposal would exempt Group B CIDIs from only four.[36] As further evidence that informational filings are insufficiently tailored, the proposal estimates that the burden associated with informational filings would be 67 hours per billion dollars in assets, which is only about 7% less than the 72 hours per billion dollars in assets that the proposal estimates for a full IDI plan. The FDIC should also be mindful of the baseline, minimum amount of work hours that would be required to stand up and sustain the necessary capabilities for informational filings, particularly in light of Group B CIDIs' more limited resource pools. Insufficient tailoring under the proposal would likely mean that Group B CIDIs would have to devote a greater proportion of their resources to complete the informational filing requirements as compared to Group A CIDIs.

The FDIC appropriately observes that, as a general matter, Group B CIDIs are less complex and pose fewer resolution challenges compared to Group A CIDIs. As a result, the

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"extraordinary event" that we propose the FDIC adopt for the notice requirement, as discussed in *infra* Section III.C.

[35] See Single Resolution Board, *2023 Resolution Reporting*, https://www.srb.europa.eu/en/content/2023-resolution-reporting.

[36] Under the proposal, Group B CIDIs are exempted from the identified strategy, failure scenario, executive summary and least costly resolution requirements.

FDIC has expressed a desire in the proposal to make the informational filing requirements correspondingly proportionate. To do so properly, the FDIC should consider additional opportunities to focus Group B informational filings on only the most important and appropriate information for the resolution of Group B CIDIs. Informational filings required by Group B CIDIs should generally be just that—informational—and should be primarily aimed at providing the FDIC with the data and core information necessary to resolve the institution in an orderly fashion. Wherever possible, the FDIC should therefore evaluate whether narrative requirements under the IDI Rule are appropriate for Group B CIDIs in light of their lower levels of complexity, reduced resolution challenges and the fact that a failed Group B CIDI is more likely to be acquired by a single purchaser. For instance, the narrative requirements for overall deposit activities, franchise components, asset portfolios and employee benefit plans should not be required, as they can be satisfied by more data-focused requirements. In recognition of the meaningful differences between Group A and Group B CIDIs, the FDIC should also similarly consider tailoring the engagement and capabilities testing for Group B CIDIs.

Below are several specific areas where the informational filing requirements for Group B CIDIs could be further tailored. In other parts of the letter, we have made similar suggestions or adjustments to certain requirements as are reflected here; to the extent that the FDIC does not grant a full exemption to Group B CIDIs as requested below, it should apply the requested relief noted elsewhere in the letter to both Group A and B CIDIs.

- **Franchise components and VDRs.** Under the proposal, Group B CIDIs must demonstrate that franchise components are separable and marketable in resolution. However, Group B CIDIs should not be required to provide detailed processes for the marketing of, and identification of prospective bidders for, franchise components. Group B CIDIs may not have the extensive M&A expertise to provide details on these processes and are subject to resource constraints that may limit their capabilities in these areas. In addition, the franchise components for smaller institutions will likely have more potential purchasers given their comparatively smaller size, making it less essential that Group B CIDIs have the full set of virtual data room (**VDR**) capabilities applicable to Group A CIDIs. Group B CIDIs should also not be required to indicate the number of days it would take to populate each section of the VDR, given their more limited experience with regular VDR production and population. The VDR requirement is further discussed in Section IV.C.

- **Economic effect of resolution.** Group B CIDIs should be entirely exempt from the "economic effect of resolution" requirement. As a threshold matter, because Group B CIDIs generally have a smaller scope of operations than Group A CIDIs, it is less likely that their activities or business lines would be material to a geographic area or region, a business sector or product line in that geographic area or region or other financial institutions. Group B CIDIs are less well-placed to complete the requisite analysis for this requirement, given their more limited resources and staffing, which could make the information provided speculative in nature. Therefore, for similar reasons as are outlined below in Section III.I, Group B CIDIs should be generally exempt from this requirement.

- **Material asset portfolios.** As discussed in more detail in Section III.I, the requirement to identify material asset portfolios is generally redundant and unnecessary for all CIDI filers as the concept of material asset portfolios should be captured within the concept of franchise components. In other words, if an asset portfolio is not sufficiently material so as to be categorized as a franchise component, then it should not be regarded as material. Imposing this kind of duplicative requirement on Group B CIDIs, which have more limited resources, is particularly unnecessary.

- **QFCs.** Group B CIDIs should be exempt from the proposal's requirement to provide information about Qualified Financial Contracts (**QFCs**). In the past, the "FDIC has . . . exempted this content element for certain CIDIs, with the view that for certain firms, understanding the CIDI's use of QFCs is not a significant element in resolution planning."[37] Because Group B CIDIs occupy only a small portion of the trading and derivatives market,[38] QFCs would generally not be "a significant element in resolution planning" for these institutions. Group B CIDIs should therefore be generally exempted from the QFC requirement.

- **Employee benefit programs.** While Group B CIDIs may be required to identify and list employee benefit programs provided to key personnel, Group B CIDIs should not be required to provide a narrative description of these employee benefit programs. As noted above, the informational filing requirement should be data-focused wherever possible. A list of key personnel, corresponding employee benefit programs and key contacts for such programs should be sufficient for this requirement for Group B CIDIs.

C. The standard used for a notice of material change under the proposal should be revised to align with the standard used for notice of an extraordinary event under the Section 165(d) Rule.

The definition of material change that would trigger the 45-day notice requirement under the proposal is overinclusive.[39] Instead, the IDI Rule should use a threshold equivalent to "extraordinary events" under the 165(d) Rule. As currently proposed, <u>any</u> change to <u>any</u> of the elements in the definition of material change would trigger a notice requirement to the FDIC. The lack of a true materiality threshold would likely result in an inundation of notices that would help neither CIDIs nor the FDIC from a resolution planning perspective. The 165(d) Rule, on the other hand, takes a more calibrated approach and only requires notice within 45 days of

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[37] The proposal, *supra* note 2, at 64596.

[38] *See, e.g.*, OCC, *Quarterly Report on Bank Trading and Derivatives Activities Second Quarter 2023* at 1, (Sept. 2023), https://www.occ.gov/publications-and-resources/publications/quarterly-report-on-bank-trading-and-derivatives-activities/files/pub-derivatives-quarterly-qtr2-2023.pdf (noting that four GSIBs currently account for 87.0 percent of the total U.S. banking notional amounts for derivatives and trading activities).

[39] Under the proposal, a "material change" would include (1) a change to the CIDI's organizational structure, core business lines, size or complexity that may have a significant impact on the identified strategy; (2) a change in the CIDI's identification of material entities, critical services or franchise components; or (3) a change in the CIDI's capabilities. The proposal, *supra* note 2, at 64618.

"extraordinary events"—i.e., any material merger, acquisition of assets or similar transaction or fundamental change to a filer's resolution strategy[40]—a much higher threshold than the proposal's requirement.

To better align with the 165(d) Rule, the IDI Rule should use a notice requirement triggered by a "fundamental change to the CIDI's resolution strategy" standard that mirrors the "extraordinary events" standard and change the terminology to "extraordinary change" to minimize potential confusion as to the standard being used. Under this revised standard, CIDIs would be required to provide 45-day notice to the FDIC in the case of "(1) a fundamental change to the CIDI's organizational structure, core business lines, size or complexity that may have a significant impact on the resolution strategy; (2) a fundamental change in the CIDI's identification of material entities, critical services or franchise components that may have a significant impact on the resolution strategy; or (3) a fundamental change in the CIDI's capabilities that may have a significant impact on the resolution strategy." The FDIC would still receive information on changes that do not rise to the level of the heightened standard; those events would be captured as part of CIDIs' next submission—whether in an IDI plan or interim supplement.

If the FDIC were to adopt the broader definition of "material change" as set forth under the proposal, there would likely be negative effects. For example, a lower threshold for notifications would waste resources of CIDIs in reporting and the FDIC in tracking a variety of changes that are not material to the resolution of the CIDI. The inclusion of critical services, franchise components and capabilities under the proposed definition could potentially lead to many material change filings that, on a practical level, would not have an actual impact on CIDIs' overall resolution strategies or the ability of the FDIC to resolve CIDIs. Using a lower "material change" threshold could also have the perverse effect of discouraging CIDIs from making improvements to critical services or other resolution capabilities until close to a submission in order to minimize notices and the internal governance necessary to submit such notices. In addition, the FDIC will likely be receiving updated information on a more frequent basis than it does under the current IDI Rule because of the annual interim supplement requirement, which weighs against retaining such a low threshold for a material change under the proposal.

D. The identified strategy requirement should not be adopted.

The proposal would require Group A CIDIs to provide an identified strategy that describes a CIDI's resolution from the point of failure through the sale or disposition of the franchise in a manner that meets the proposed credibility standard, and, in particular, the first prong of the credibility standard.[41] The identified strategy requirement would also mandate that CIDIs implement a bridge bank strategy as the default. The proposal would simultaneously require the identified strategy to still have "meaningful optionality" and be adaptable to a range

[40] 12 C.F.R. § 381.4(d)(4).
[41] BPI's concerns related to the first prong of the proposed credibility standard are discussed below. *See infra* Section V.A.1.

of resolution scenarios. The requirement to implement an identified strategy would mark a shift in some CIDIs' resolution strategies and be more limiting than under the current IDI Rule.

The FDIC should revert to its approach under the June 2021 Policy Statement, which requires presenting a range of options for resolving a CIDI and relies on the identification of franchise value components, instead of one identified strategy. BPI believes that the current approach would provide the FDIC with the meaningful optionality that it seeks—without requiring a specific identified strategy. In the context of an actual resolution of a CIDI, the resolution strategy would be wholly under the exclusive control of the FDIC because the relevant provisions of the FDI Act do not contemplate any role for a CIDI's management or its creditors the way the Bankruptcy Code does for debtors-in-possession or creditors' committees, and thus the FDIC would not be bound to follow any particular pre-identified strategy. In addition, unless the FDIC reverts to the current approach under the June 2021 Policy Statement, the requirement to have "meaningful optionality" for a specific bridge bank disposition under the proposal would be a vague and difficult standard[42] against which CIDIs would be required to measure themselves.

E. The proposed failure scenario content requirement should not be adopted, and the FDIC should be able to vary the failure scenario requirement only with sufficient advance notice.

The FDIC should also revert to its approach under the June 2021 Policy Statement with regards to failure scenarios and should not include any failure scenario content requirement in the final IDI Rule.[43] This requirement has not proven useful in the past, especially in light of the significant time and resources involved in developing the scenario that is highly dependent on speculative assumptions. Furthermore, the focus on failure scenario distracts from what should be the focus of the IDI plan—a discussion of resolution capabilities. If, however, the FDIC chooses to retain the failure scenario requirement, it should consider several adjustments.

Under the proposal, the failure scenario upon which the identified strategy would be based includes more granular requirements[44] compared to the current requirement under the IDI Rule, as qualified by the June 2021 Policy Statement, that CIDIs base their resolution strategy on

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[42] Meaningful optionality is defined to mean "an expectation that an identified strategy be flexible so that it can be adapted to a change in the failure scenario or an unexpected obstacle to its execution."

[43] June 2021 Policy Statement, supra note 20, at 9.

[44] For instance, the proposal would require a CIDI to use a failure scenario that demonstrates that:

> *[T]he CIDI is experiencing material financial distress, such that the quality of the CIDI's asset base has deteriorated and high-quality liquid assets have been depleted or pledged in the stress period prior to failure due to high, unexpected outflows of deposits and increased liquidity requirements from counterparties that would impact the CIDI's ability to pay its obligations in the normal course of business prior to the FDIC's appointment as receiver. Though the immediate failure event may be liquidity-related and associated with a lack of market confidence in the financial condition of the CIDI prior to the final recognition of losses, the identified strategy must also consider the depletion of capital at the time of the appointment of the FDIC as receiver. The CIDI may not assume any regulatory waivers in connection with the actions proposed to be taken prior to or in resolution. The resolution plan must support any assumptions that the CIDI will have access to the discount window or other borrowings during the period immediately prior to failure.*

"severely adverse economic conditions."[45] Adopting a more granular failure scenario under the proposal runs the risk of having a strategy that is less adaptable to changing circumstances.

If the failure scenario requirement is retained, BPI believes that the FDIC's discretion to vary failure scenarios for a specific filer or cohort of filers could pose significant issues for Group A CIDIs'[46] resolution planning processes and internal governance, unless adequate notice is provided. As noted above, modeling failure scenarios is an intense undertaking requiring significant planning, development, modeling, review and challenge, appropriate governance and resourcing and affects numerous aspects of a resolution plan. Owing to these myriad dependencies, CIDIs need certainty, and sufficient notice, of the assumptions upon which they will be modeling early in the submission cycle. The FDIC should therefore provide any changes to failure scenario assumptions at least 12 months prior to the IDI plan due date. All proposed changes to the failure scenario should be public and apply equally across all Group A CIDIs submitting a resolution plan in that submission cycle. The FDIC should also take into consideration whether existing scenarios (e.g., CCAR, BHC Severely Adverse) could be leveraged to achieve its goals, instead of developing another set of failure scenarios that would need to be subject to the extensive internal governance processes that most CIDIs have over models.

F. The change to the material entities definition to capture significance to franchise components should be removed as it has illogical results.

The proposal would add "significance to a franchise component" to the definition of material entity. The inclusion of franchise component within the scope of material entity would likely result in many small bank subsidiaries being categorized as material entities, running counter to the idea that a resolution plan should focus primarily on material aspects of an organization. For example, an entity that accounts for 10% of the revenue of a franchise component which in turn comprises only 10% of a CIDI's revenue may need to be labeled as a material entity, even though it would account for just 1% of the CIDI's overall revenue. This result would appear to be illogical. Furthermore, it would cause the definition of material entity under the IDI Rule to meaningfully diverge with the equivalent definition of material entity under the 165(d) Rule,[47] leaving many banking organizations to decide whether to have different material entities for each type of plan or to functionally adapt their 165(d) plans to the broader standard that would be set forth under the IDI Rule.

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[45] June 2021 Policy Statement, *supra* note 20, at 2 n.12. Under the current IDI Rule, CIDIs must base their resolution strategy on "baseline, adverse and severely adverse economic conditions." *See* 12 C.F.R. § 360.10(c)(2). However, the June 2021 Policy Statement qualifies this requirement by permitting CIDIs to base their resolution strategy on "severely adverse economic conditions" only.

[46] Only Group A CIDIs are required to develop an identified strategy based on a failure scenario under the proposal. Group B CIDIs are exempt from this requirement.

[47] *See* 12 C.F.R. § 381.2 ("Material entity means a subsidiary or foreign office of the covered company that is significant to the activities of an identified critical operation or core business line, or is financially or operationally significant to the resolution of the covered company.").

As a result, the FDIC should not adopt this change to the material entity definition and should maintain the current IDI Rule's definition of this term.[48]

G. The information requirements for "regulated subsidiaries" that are not material entities should be limited in scope.

The proposal would create a new defined term, "regulated subsidiary," and would require significant information on each.[49] The proposal also considers whether to request processes to identify liquidity and capital needs, inter-affiliate exposures and other information for regulated subsidiaries. The FDIC should not impose such significant information requirements, which overlap with the information that would be required of a material entity, on any subsidiary that holds any type of regulatory license, regardless of the subsidiary's size or importance to the CIDI. Instead, the FDIC should rely upon CIDIs' descriptions of their material entities for detailed information on the regulated subsidiaries which actually matter to a CIDI's resolution. If a regulated subsidiary is not a material entity, then the information required should be streamlined to a list of these regulated subsidiaries with information on each subsidiary's jurisdiction, regulator(s) and asset size.

H. There should not be a specified timing requirement for the sale of franchise components under the IDI Rule.

The proposal wisely does not specify a timing requirement for the divestment of a CIDI's franchise components. One of the questions in the proposal does, however, suggest that the FDIC may be considering imposing a time frame for such divestments.[50] BPI agrees with the current treatment of this issue under the proposal—that the imposition of a time period, especially a short period, such as 60 or 90 days, within which franchise components must be divested would not be appropriate or, in some cases, realistic. For instance, such a short timeline likely does not work for any CIDI that proposes a multiple acquirer strategy. A multiple acquirer strategy may require at least several months to achieve a full divestment of certain major divestitures (e.g., non-asset portfolio franchise component) and one to two years to fully divest each franchise component. [51] As a general matter, the precise circumstances and context of a resolution scenario

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[48] 12 C.F.R. § 360.10(b)(8) ("Material entity means a company that is significant to the activities of a critical service or core business line.").

[49] CIDIs would be required to: (1) map franchise components and core business lines to regulated subsidiaries; (2) identify *each* regulated subsidiary and provide its address and asset size; (3) provide a breakdown of assets within a material asset portfolio that are held by a regulated subsidiary; (4) provide financial statements for each regulated subsidiary; (5) describe all regulated subsidiaries that are based or located outside of the United States which contribute to the parent's value, revenues, or operations; and (6) identify regulatory or other impediments to the divestment of regulated subsidiaries under item (5).

[50] The proposal, *supra* note 2, at 64594 ("*(35) Is the proposed language clear with respect to the expectation for franchise components that can be timely divested, both for the purpose of identifying franchise components that are ''currently'' and ''quickly'' separable and for separation of franchise components where more restructuring or other actions would be necessary to implement an identified strategy, such as in a multiple acquirer exit? Would establishing prescribed time requirements, such as 60 or 90 days for divestiture of most franchise components, be appropriate or useful? If so, what time range would be appropriate for the most currently actionable franchise components, and what time range would be appropriate for execution of a more complex exit strategy, such as a multiple acquirer exit?*").

[51] While there are not many data points for the length of time for the operation of a bridge bank prior to full divestment, IndyMac Federal Bank, FSB, the bridge bank for IndyMac Bank, FSB, for example, operated for approximately eight months before its sale to OneWest Bank, FSB. FDIC, *Failed Bank Information: Information for IndyMac Bank, FSB, and IndyMac Federal Bank,*

are unpredictable such that the imposition of any particular timing requirement would not be useful.

I. Many of the new content requirements or concepts introduced under the proposal would result in subjective or duplicative requirements, which should be reconsidered.

The proposal would introduce several content requirements or concepts that would be largely new to the IDI Rule. Many of these additional requirements introduce subjective or duplicative requirements, as discussed below.

- **Valuation.** Under the proposal, Group A CIDIs would be required to demonstrate the capabilities necessary to produce valuations that the FDIC can use to conduct the statutorily required least-cost analysis at the time of an actual failure. To demonstrate valuation capabilities, Group A CIDIs would be required to describe their valuation processes in their resolution plans and include a valuation analysis that includes a range of quantitative estimates of value. BPI supports replacing the least-cost analysis test with a valuation requirement. However, the FDIC should not require quantitative analysis as part of this requirement. Such an analysis would require an ability to determine the potential behavior of (a) depositors and (b) potential acquirers in an extreme counterfactual scenario with many unknown variables and thus would be inherently subjective and likely to add little-to-no value to the FDIC.

  As an example, the proposal would require a "qualitative and quantitative analysis" of "the destruction of franchise value that may result from not transferring any uninsured deposits to the [bridge bank]." The requirement to conduct a quantitative analysis in this case would present serious difficulties, given the significant number of variables that CIDIs would be required to consider and the fact that some foreign regulators, such as the European Banking Authority, would require local depositors to be treated similarly to those in the home jurisdiction of a failed banking organization.[52] Here a qualitative analysis would be more appropriate. In addition, the quantitative analysis required is not well adapted to CIDIs that are not active in the investment banking space or lack M&A experience or large M&A teams because they do not regularly conduct this type of analysis, nor do they have in-house teams with this expertise. This requirement would therefore be a more expensive undertaking for these CIDIs, potentially requiring them to retain and provide commercially sensitive information to third parties.

FSB, Pasadena, CA (last updated Sept. 10, 2020), https://www.fdic.gov/resources/resolutions/bank-failures/failed-bank-list/indymac.html#Acquire%20Fin. If a multiple acquirer strategy is pursued, the length of time required to achieve full divestment of the bridge bank could be even longer than a whole bank sale. The expectation of a two-year window to fully divest the bridge bank is consistent with the statutory length of a bridge bank charter, which is two years, subject to three one-year extensions. 12 U.S.C. § 1821(n)(10).

[52] *See* Directive 2014/59/EU, art. 95, 2014 O.J. (L. 173) 190.

- **Economic effect of resolution.** Under the "economic effect of resolution" requirement as set forth in the proposal, CIDIs would be required to identify any activities or business lines that provide a material service or function to a U.S. geographic region, a business sector or product line or other financial institutions. However, CIDIs are often not in a position to assess how significant their offerings are to a product line or other financial institution. These elements of the requirement would accordingly make CIDIs engage in a speculative exercise, as opposed to an objective assessment based on market share data that would apply to the same analysis for geographic regions or business sectors. The reference to product line or other financial institution should accordingly be removed from this requirement. Similarly, references to providing information on business sector and geographic region should be qualified so that the analysis is required only to the extent that such market share data is readily and publicly available. Moreover, CIDIs' discussion of their franchise components already should provide the FDIC with information similar to what this proposed requirement would cover. Therefore, the other elements to this requirement should only be necessary to the extent the CIDI believes material information on the economic effects of resolution are not covered elsewhere in a submission.

- **Material asset portfolio.** Under the proposal, the concept of material asset portfolios (i.e., "a pool or portfolio of assets, including loans, securities or other assets that may be sold in resolution by the [bridge bank] or the receivership and is significant in terms of income or value to a core business line") would appear to be captured within the concept of franchise components. Franchise components under the proposal consist of "a business segment, regional branch network, *major asset or asset pool, or other key component* of a CIDI's franchise that can be separated and sold or divested." Therefore, a separate requirement to identify material asset portfolios is redundant and unnecessary. The FDIC should accordingly remove this requirement.

- **Digital services and electronic platforms.** Under the proposal, CIDIs would be required to include a description of all "digital services and electronic platforms" offered to depositors to support banking transactions for customers and identification of the entity that maintains them. This requirement is vague, lacks any threshold for significance and, for many CIDIs, is likely duplicative of what CIDIs must already disclose under the critical services, payment, clearing and settlement (**PCS**) system and management information system (**MIS**) requirements, among others. As a result, the FDIC should remove this requirement as duplicative. If this content element is adopted, the FDIC should further define the types of digital services and electronic platforms that are included and are not already covered in the final rule as a critical service, PCS system or MIS; the FDIC should also include a materiality threshold further clarifying the types of services and platforms that would need to be included.

IV. Capabilities Testing

BPI supports appropriate engagement and capabilities testing as part of an iterative process that can strengthen and improve resolution planning capabilities. However, the FDIC should provide more structure and clarity on these requirements, in collaboration with CIDIs, as described below. Moreover, capabilities testing and engagement should not be the basis for punitive action, as doing so would undermine the collaborative nature of IDI resolution planning.

A. Capabilities testing requirements and expectations should be clear.

The proposal does not provide sufficient clarity on the timing and scope of capabilities testing, which is inconsistent with a collaborative approach and would not allow CIDIs to plan and resource in an efficient manner. For instance, the proposal's capabilities testing provision provides that "CIDI[s] must perform . . . capabilities testing promptly [when asked by the FDIC], and provide the results in a time frame and format acceptable to the FDIC." This provision leaves CIDIs guessing as to the format and time frame within which capabilities testing may occur, undercutting the requirement that CIDIs describe what their capabilities are within their IDI plans and the implicit understanding that they will be evaluated on that basis. In addition, the proposal's preamble further notes that "certain capability expectations for some or all CIDIs . . . can reasonably be inferred from the content requirements of the resolution submission . . . ." This "reasonably inferred" standard is highly subjective and does not provide sufficient notice or clarity to CIDIs on the capabilities that the FDIC expects them to have.

To provide CIDIs with clarity on capabilities testing requirements and sufficient information about when and how capabilities testing would proceed, BPI respectfully submits that the FDIC should provide minimum standards, adequate notice and clear expectations on the scope of capabilities testing in the final IDI Rule. Following the finalization of the IDI Rule, CIDIs should also be afforded sufficient time to update or build out their resolution planning capabilities, as applicable, to comply with the final IDI Rule's requirements. Furthermore, the FDIC should consult with the industry when developing minimum standards and guidance for capabilities testing through a review and comment process. These changes would be consistent with an iterative and collaborative approach to the resolution planning process that BPI believes is appropriate and productive for resolution planning.

- **Advance notice of capabilities testing.** CIDIs should have sufficient advance written notice and information about the capabilities testing that the FDIC plans to undertake. For capabilities testing to proceed as planned, written notice should be provided at least three months prior to the FDIC's intended start date for such testing. As part of this notice, the FDIC should provide clear, concrete details on the types of capabilities to be tested, the scenarios or simulation under which testing will occur, the expected time frame of the testing and the expected deadline by which CIDIs must produce results or a submission to the FDIC. This kind of notice requirement would allow CIDIs to ensure that the appropriate people and resources are available to the FDIC for their testing plans, including the appropriate subject matter experts; to manage people and resources in light of planned internal capabilities testing or other possible, ongoing examination activities; to minimize impacts to BAU activities; and to coordinate with their primary federal banking supervisors.

- **Minimum standards.** Instead of asking CIDIs to "reasonably infer" the capabilities that the IDI Rule requires, the FDIC should proactively provide CIDIs with (1) a comprehensive list of the capabilities that it expects for CIDIs to maintain; and (2) a description of minimum standards expected for each capability. For example, minimum standards for VDR capabilities could specify, among other things, the precise format for the data that the FDIC requires, how to organize files on the VDR, how quickly CIDIs would be expected to populate the VDR and how often data should be updated. This list of capabilities and minimum standards could be provided to CIDIs as separately issued guidance that the FDIC may revise over time as it responds to best practices observed during testing cycles. Such guidance should be developed in collaboration with the industry through a review and comment process. In the event of a change to FDIC guidance, CIDIs should have an appropriate amount of time—for example, at least six months—to implement any changes required to bring their capabilities in line with updated standards.

  The FDIC should provide information about its expectations for capabilities testing for several reasons. First, minimum standards for resolution planning capabilities would create opportunities for the industry to engage with the FDIC and to develop common solutions and best practices, resulting in efficiencies for CIDIs. (As noted above, the FDIC should consider whether it needs to calibrate these minimum standard requirements to the size and risk profile of the CIDIs. For example, it may not be appropriate to hold Group B CIDIs to the same standards as Group A CIDIs or to hold smaller Group A CIDIs to the same standards as CIDIs held under GSIB organizations.) Second, supplying CIDIs with information about capabilities testing would be consistent with the practices of U.S. and foreign banking regulators in similar circumstances. For example, the Federal Reserve and FDIC have provided similar guidance through notice and comment to 165(d) plan filers,[53] and the Canadian Deposit Insurance Corporation has clarified capabilities expectations under its resolution planning scheme as well.[54] Finally, more specific guidance on required capabilities and minimum standards would enable FDIC personnel responsible for conducting capabilities testing to do so in a consistent manner across institutions.

- **Harmonization across IDI and 165(d) plans.** To the extent that the IDI Rule continues to apply to CIDIs of 165(d) plan filers, the FDIC should harmonize its expectations for resolution planning capabilities and testing across the IDI and 165(d) Rules for those CIDIs that are subject to both. While BPI recognizes that in certain instances capabilities under the IDI plan and 165(d) plan may necessarily differ, to the extent there is overlap, the FDIC should clarify that capabilities required under the IDI Rule may leverage those developed to address corresponding requirements under

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[53] *See, e.g.*, Federal Reserve, FDIC, *Guidance for Resolution Plan Submissions of Domestic Triennial Full Filers*, 88 Fed. Reg. 64626 (Sept. 19, 2023), https://www.govinfo.gov/content/pkg/FR-2023-09-19/pdf/2023-19267.pdf; Federal Reserve, FDIC, *Guidance for Resolution Plan Submissions of Foreign Triennial Full Filers*, 88 Fed. Reg. 64641 (Sept. 19, 2023), https://www.govinfo.gov/content/pkg/FR-2023-09-19/pdf/2023-19268.pdf.
[54] *See, e.g.*, Canadian Deposit Insurance Corporation, *CDIC Resolution Plan Guidance for Domestic Systemically Important Banks, Appendix O* (June 2022), https://www.cdic.ca/wp-content/uploads/CDIC-Resolution-Plan-Guidance-for-DSIBs.pdf.

the 165(d) Rule, as well as BAU systems and processes of the entire banking organization.

- **Conclusion letter.** The proposal does not require the FDIC to issue a letter notifying CIDIs of the conclusion of capabilities testing and only provides that the FDIC "may send" such a notification. The final IDI Rule should require the FDIC to issue a conclusion letter within one month of the conclusion of testing that would include any feedback that it has on the tested capabilities. The FDIC should ensure that it provides CIDIs with adequate time to incorporate any feedback prior to its next IDI plan submission. Such a requirement would increase predictability, facilitate CIDIs' ability to improve or adjust capabilities and plan for future testing and ensure basic accountability with respect to the FDIC's testing program.

- **Evaluation of capabilities.** The proposal does not specify how the FDIC would evaluate CIDIs' capabilities, which is essential for CIDIs to understand as they design, build and enhance such capabilities. The FDIC should provide clear expectations and revise the IDI Rule to clarify that it would evaluate CIDIs' required capabilities on the basis of (1) minimum standards set forth in separately issued guidance, subject to review and comment by the industry; and (2) whether the capabilities as tested are aligned with the description of the CIDIs' capabilities set forth in the IDI plan.

- **Transition period.** In many cases, the proposal would require CIDIs to revamp existing capabilities or build new capabilities from scratch. Many CIDIs—in particular, Group B CIDIs that have not been required to submit an IDI plan for many years—will require time to build out, improve and test capabilities prior to undergoing the full rigor of capabilities testing. Therefore, the FDIC should not conduct full capabilities testing during a CIDI's initial submission cycle under the new IDI Rule, though some form of engagement to provide interim feedback may be appropriate. In addition, the FDIC should endeavor to coordinate its IDI Rule capabilities testing with other existing stress and resolution testing obligations to enable consistent and streamlined testing across a CIDI's organization.

Finally, it would be helpful for the FDIC to provide clarity and guidance on the engagement requirement. For example, as part of the engagement requirement under the proposal, CIDIs would be required to provide access to "any personnel of the CIDI as the FDIC in its discretion determines is relevant to any of the provisions of this section." Providing unqualified access to such personnel, without notice and for unspecified periods of time, could potentially compromise the day-to-day activities of a CIDI or interfere with the availability of personnel for other supervisory activities. Furthermore, the FDIC should commit to coordinating engagement with other agencies that may also be engaging with the CIDI or its parent banking organization on separate matters, as is the case for joint examinations in the usual course, to minimize disruption to a CIDI or its personnel. Therefore, this requirement should be subject to advance notice, and access to such personnel should be provided to the extent that it does not materially affect such personnel's abilities to complete their BAU responsibilities.

B. Capabilities testing and engagement should be part of a collaborative process to enhance CIDIs' resolution readiness. Therefore, enforcement actions for "failure to comply" are not an appropriate tool in the context of engagement and capabilities testing requirements.

In the proposal, the FDIC asserts it could bring an enforcement action against CIDIs for "failure to comply" with engagement and capabilities testing requirements.[55] Although the proposal states that it does "not add any new enforcement authority or power to the FDIC's or any other Federal banking agency's current enforcement capabilities," the "failure to comply" standard is an inappropriately low bar to instigate an enforcement action. For example, absent the change to the access to personnel requirement for engagements described above in Section IV.A, under this broad formulation, a CIDI could be at risk of an enforcement action if an individual happens to be unavailable when the FDIC makes a sudden request for access. Further, combined with the highly subjective "reasonably inferred" standard discussed above, the proposed enforcement approach would raise concerns that the FDIC may bring an enforcement action for capabilities for which CIDIs had no notice.

The use of this power in such a manner—and in general—runs counter to the idea that capabilities testing and engagement should generally be part of a cooperative and iterative process between the FDIC and the CIDI to build out and enhance resolution readiness. On this basis, BPI strongly believes that enforcement is not an appropriate tool to use with respect to capabilities testing and engagement requirements, and the final rule should provide more tailored procedural mechanisms to address any capabilities limitations.

For example, the FDIC should implement procedural mechanisms so that any appropriate and authorized enforcement actions are taken only after other attempts at improvement have proven insufficient. Unlike for IDI plans where CIDIs would have the opportunity to resubmit a plan that is deemed non-credible, the proposal does not provide a CIDI with the explicit ability to cure an issue that arises during engagement or capabilities testing. The IDI Rule should, at a minimum, provide a CIDI with a second opportunity to demonstrate capabilities before any enforcement action under existing FDIC enforcement authority can be brought against the CIDI for issues identified during engagement or capabilities testing. This provision should also provide a procedure for CIDIs to remediate gaps and request re-testing, as applicable, and introduce a concept of an intermediate level of feedback for capabilities testing.[56] These mechanisms would support a collaborative and iterative approach that would be more productive for enhancing CIDIs' resolution capabilities.

BPI also objects to the elimination of the requirement that the FDIC consult with a CIDI's appropriate federal banking agency before finding that "the CIDI's capability to produce the information and data underlying its resolution plan is unacceptable."[57] To align regulatory expectations across agencies and at least ensure they do not conflict, the FDIC should retain the

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[55] The proposal, *supra* note 2, at 64605.
[56] For more on this intermediate level of feedback under the IDI Rule, please refer to Section V of this letter.
[57] 12 C.F.R. § 360.10(d)(2).

obligation to coordinate with a CIDI's appropriate federal banking agency[58] and should commit to coordinating engagement and capabilities testing and institute a process pursuant to which a CIDI can appeal adverse findings or inappropriate testing requirements.

C. The scope of the VDR capabilities requirement should be clearly aligned with the Rule 165(d) equivalent requirement and further clarified.

Additional clarity regarding the VDR capabilities requirement under the proposal would be particularly helpful for CIDIs. The proposal would require a resolution submission to "describe the CIDI's *current capabilities and processes* to establish a [VDR] promptly in the run-up to or upon failure of the IDI that could be used to carry out a sale of the IDI franchise and the CIDI's franchise components, including a description of the organizational structure of information within the [VDR]." As a threshold matter, the proposed requirement could be interpreted as more burdensome than the standard laid out in guidance provided for the 165(d) Rule. This result is because the proposal refers to a CIDI's "current capabilities and processes to establish" a VDR, whereas the VDR capabilities guidance under Rule 165(d) is that the firm be able to demonstrate that it *has* the capability, rather than actively having a *current* capability and process, to promptly establish a VDR.[59] The FDIC should align its VDR capabilities requirement with the requirement applicable under the 165(d) Rule.

Moreover, BPI strongly believes that the VDR capabilities requirement should not be understood to require CIDIs to maintain VDRs on an ongoing basis and the final IDI Rule should affirmatively state so, similar to how the FDIC proceeded with the preamble to the guidance for the 165(d) Rule.[60] Putting aside the significant operational complexity, resourcing and other expenses required to maintain a VDR on an ongoing basis, it is worth bearing in mind the inherent data protection and cybersecurity risks if VDRs are required to be maintained on a BAU basis. Such a requirement would lead to inevitable concerns regarding cyberattacks, breaches or leaks that could happen. In light of the general risk of cyberattacks and data breaches, the VDR capabilities requirement should explicitly allow CIDIs to anonymize or otherwise protect confidential or sensitive data, such as any personally identifiable information of CIDIs' clients, to protect CIDIs and their clients during the marketing process. In addition, the FDIC should not establish a specific or prescriptive time frame for the establishment and population of a VDR. The time and complexity of populating a VDR will vary across banking organizations such that there should be no mandatory time frame beyond "an expectation that this time frame will be brief and measured in days" as stated in the proposal.

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[58] The FDIC should remain mindful of its obligation to coordinate with other agencies on examination activities to minimize disruption to an insured depository institution. *See* 12 U.S.C. § 1820(d)(6) ("To minimize the disruptive effects of examinations on the operations of insured depository institutions . . . each appropriate Federal banking agency shall . . . coordinate with the other appropriate Federal banking agencies in the conduct of such examinations . . . [and] use copies of reports of examinations of insured depository institutions made by any other Federal banking agency . . . to eliminate duplicative requests for information."). The general principle of minimizing disruption and coordinating with other agencies should similarly apply here.
[59] Federal Reserve, FDIC, *Guidance for the § 165(d) Resolution Plan Submissions by Domestic Covered Companies applicable to the Eight Largest, Complex U.S. Banking Organizations*, 84 Fed. Reg. 1438 (Feb. 4, 2019), https://www.govinfo.gov/content/pkg/FR-2019-02-04/pdf/2019-00800.pdf.
[60] *Id.* at 1476.

To further clarify the VDR requirement, the FDIC should incorporate important information from the proposal's preamble into the IDI Rule itself. For example, the rule should specify that the proposed list of content elements is indicative, such that the specific information/ data would not be expected to apply to all CIDIs or franchise components. In addition, and as discussed above in Section IV.A, the FDIC should provide clear minimum standards for VDRs.

V. FDIC's Assessment of Resolution Submissions

The proposal should remain focused on maintaining the existing process of periodic engagement in place under the IDI Rule, as envisioned by the June 2021 Policy Statement, rather than shifting to a framework of credibility determinations and enforcement mechanisms. Given that IDI plans are intended to provide the FDIC with the necessary tools to resolve CIDIs in an efficient, seamless and least-cost manner, credibility determinations and other punitive actions are unsuitable in this context. BPI therefore respectfully urges the FDIC to reconsider the proposal's emphasis on credibility determinations and suggests adjustments to the proposed feedback mechanism that are intended to continue a cooperative and iterative process going forward. In addition, elements of the FDIC's guidance under the proposal regarding when and how the FDIC provides feedback to the CIDIs should be refined.

To the extent that the FDIC does not revert to its approach set forth in the June 2021 Policy Statement, the FDIC should provide that strategies that are credible under the 165(d) plans are presumptively credible under a corresponding IDI plan. As discussed above, 165(d) plans necessarily address what will happen to a CIDI subsidiary in the event of the resolution of the banking organization and are reviewed and assessed by the FDIC, in conjunction with the Federal Reserve. A determination by the FDIC that a CIDI resolution plan is not credible may be inconsistent with the credibility determination made by the FDIC and Federal Reserve with regards to the 165(d) plan covering the same institution.

A. The proposal should focus on feedback and engagement aimed at improving CIDIs' resolution planning capabilities.

In contrast to recent FDIC guidance regarding the IDI Rule,[61] the proposal places an emphasis on the FDIC's authority to issue credibility determinations and provides a two-pronged standard for the issuance of such determination. These credibility determinations would be predicated on the finding of certain "weaknesses" with respect to an IDI plan,[62] and the issuance of a non-credibility determination could lead to punitive action against a CIDI. BPI strongly believes that the proposal's emphasis on credibility determinations represents an unwarranted shift away from the core purpose of an IDI plan, which is to provide the FDIC with the information and tools required to resolve a CIDI since it is ultimately the FDIC alone that carries out the resolution of a CIDI under the FDI Act, without any material participation and certainly with no control by the CIDI's management or creditors, unlike the debtor-in-possession model under the Bankruptcy Code where the debtor largely controls the process subject to oversight by

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[61] *See, e.g.*, June 2021 Policy Statement, *supra* note 20.

[62] Note that the term "weakness" is not specifically defined in the proposal but would be akin to a deficiency finding under the 165(d) Rule.

a bankruptcy court and where all creditors play a major role.

This goal can be better achieved through a non-adversarial process, with targeted feedback aimed at improving CIDIs' submissions and resolution planning capabilities as well as the FDIC's own capabilities, since it is the FDIC alone that will carry out the resolution of a CIDI under the FDI Act and the successful execution of that resolution depends far more on the FDIC's capabilities than on the CIDI's capabilities. As Vice Chairman Hill noted in his remarks accompanying the proposal, the FDIC should generally seek to "provide specific feedback to banks on particular issues as they arise, similar to the existing supervisory process, rather than putting every plan in its entirety up for a thumbs-up thumbs-down vote."[63]

To the extent that the FDIC determines that issuing credibility determinations is necessary, it should commit to implementing the following procedural mechanisms to encourage the productive and efficient resolution of issues that arise as part of the resolution planning process:

- The FDIC, at a minimum, should commit to providing longer than the proposed 90 days for CIDIs to prepare for resubmission of a non-credible IDI plan. CIDIs should have at least 120 days to ensure there is adequate time (including time for project planning, validation and other forms of governance) to fully and appropriately address any weaknesses identified by the FDIC.

- The FDIC should institute an intermediate level of feedback, i.e., a "limitation," that would sit between informal feedback and a formal weakness determination that could precede a non-credibility finding. The FDIC feedback scheme should not be binary, meaning that IDI plans should only be deemed non-credible because of fundamental resolvability issues and not because of issues with CIDIs' resolution capabilities that fall short of that threshold. The ability to issue this type of intermediate level of feedback with respect to IDI plans would help reinforce that perspective.

- Feedback on capabilities testing or engagement should not factor into a credibility determination, as any issues that may arise through these direct interactions between the FDIC and CIDIs should generally be resolved in a cooperative manner. Under the proposal, the relation between credibility determinations and capabilities testing/engagement is unclear. The text of the rule under the proposal (as in the current IDI Rule) merely suggests that credibility determinations would be based on a review of the IDI plan in coordination with a CIDI's primary banking regulator. It does not clarify if, how or when capabilities testing or engagement may factor into the credibility determination. The FDIC should accordingly clarify that such feedback would not factor into these determinations.

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[63] Hill Statement, *supra* note 7.

In addition, below are specific comments for each of the two prongs of the credibility determination standard set forth in the proposal.

1. *The first prong of the credibility determination standard is subjective and inappropriately emphasizes the "adverse effects" that the CIDI resolution would have on "U.S. economic conditions or financial stability" and accordingly should be removed.*

The first prong of the credibility standard, which is only applicable to Group A CIDIs, states that the FDIC may determine that a plan is not credible if "the identified strategy would not provide timely access to insured deposits, maximize value from the sale or disposition of assets, minimize any losses realized by creditors of the CIDI in resolution and address potential risk of adverse effects on U.S. economic conditions or financial stability." This standard is inherently unknowable, is susceptible to being applied inconsistently over time and "puts [the FDIC] in the position of making definitive predictions related to highly unpredictable theoretical bank failures."[64] The proposed standard is amorphous and speculative and turns entirely on a party's perception of how hypothetical events might occur in the future. The FDIC and individual CIDIs could all reasonably have different views as to what is necessary to satisfy the standard—e.g., under what circumstances value would be maximized or losses to creditors would be minimized in a hypothetical scenario. The nebulous nature of the standard would therefore undermine the cooperative aspects of the resolution planning process as CIDIs would not have sufficient notice as to how they would be expected to meet this standard. This is especially troubling in light of the emphasis on enforcement in the proposal. Enforcement actions based on such a subjective standard would be inappropriate in the absence of adequate notice of what this requirement entails. Said simply, this standard would detract from the ultimate goal of providing the FDIC with the tools and information necessary to resolve a failed CIDI.

In addition, the first prong's emphasis on requiring the identified strategy under the IDI plan to address "adverse effects on U.S. economic conditions or financial stability" significantly overlaps and even expands upon a standard applicable to 165(d) plans, which has not previously applied to IDI plans.[65] This part of the first-prong credibility determination standard under the IDI Rule is already separately addressed through the submission of 165(d) plans and does not need to be duplicated here. Any CIDI that is part of an organization required to submit a 165(d) plan is already required to meet this threshold for the organization as a whole.[66] In addition, the FDIC already has joint responsibility for determining the credibility of 165(d) plans.

Furthermore, this prong's focus on U.S. economic conditions and financial stability is overbroad and inappropriate, as it is outside of intended purposes of an IDI plan. The FDIC's key responsibility in a CIDI's resolution is to protect the Deposit Insurance Fund through the orderly

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[64] Hill Statement, *supra* note 7.

[65] Under the 165(d) Rule, banking organizations must "include a strategic analysis describing the covered company's plan for rapid and orderly resolution" in a manner "that substantially mitigates the risk that the failure of the covered company would have serious adverse effects on financial stability in the United States." *See* 12 C.F.R. §§ 381.2, 381.5.

[66] There is substantial overlap between Group A CIDIs that would be subject to the first prong of the credibility determination standard and those firms sitting above those CIDIs filing 165(d) plans.

resolution of a failing CIDI.[67] Economic and systemic risk considerations are more appropriately the purview of multiple government agencies and bodies, including the Federal Reserve and the Financial Stability Oversight Council, not just the FDIC. In its June 2021 Policy Statement, the FDIC recognized the distinctive purpose and nature of the IDI plan explicitly, noting that "[IDI plans] are distinct from those submitted under section 165(d) of the [Dodd-Frank Act], which requires plans for a covered company's resolution under the U.S. Bankruptcy Code in a manner that substantially mitigates the risk that the failure of the covered company would have serious adverse effects on financial stability in the United States."[68] Incorporating considerations relating to financial stability into the IDI plan would call into question whether the IDI plans are serving a different purpose from the 165(d) plans. In addition, including considerations on "U.S. economic conditions" would go beyond the scope of the 165(d) plans and would require more detailed economic analysis than would be required under the 165(d) Rule. Thus, the first prong of the credibility standard could cause the FDIC to overstep its boundaries in considering and evaluating IDI plans.

Based on these concerns, the FDIC should not adopt the first prong of the credibility standard as part of the final IDI Rule. The second prong of the credibility determination, with the revisions suggested below, would be sufficient for the FDIC to address plans that do not provide the information necessary for an orderly resolution of the CIDI.

2. *Though more appropriate, the second prong of the credibility determination standard requires some refinement.*

The second prong of the credibility standard under the proposal would allow the FDIC to issue a non-credibility determination on the basis that "[t]he information and analysis in [the IDI plan] is not supported with observable and verifiable capabilities and data and reasonable projections or the CIDI fails to comply in any material respect with the requirements" of the IDI Rule. While this standard generally appears more appropriate for IDI plans, the qualifiers of "verifiable" and "observable" should be removed from the standard to the extent that they apply to capabilities requirements.[69] For some capabilities, it may not be possible to fully verify or observe how they would work in the context of what would be an unpredictable, idiosyncratic event.

In addition, we again emphasize that, though this prong of the credibility determination standard is more reasonable, credibility determinations should not be the goal of the FDIC's efforts in reviewing IDI plans. The FDIC should primarily focus on providing CIDIs with feedback to improve and enhance their tools, information and capabilities to better facilitate a resolution of the CIDI, if it were to ever happen.

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[67] *See* FDIC, *Resolution Plans Required for Insured Depository Institutions with $50 Billion or More in Total Assets*, 77 Fed. Reg. 3075, 3079 (Jan. 23, 2012), https://www.govinfo.gov/content/pkg/FR-2012-01-23/pdf/2012-1136.pdf ("The purpose of the Rule is to enable the FDIC to perform its resolution functions most efficiently through extensive planning in cooperation with the CIDI and to enhance its ability to evaluate potential loss severity if an institution fails.").
[68] June 2021 Policy Statement, *supra* note 20, at 1.
[69] As discussed above in Section V.A, capabilities requirements generally should not factor in credibility determinations.

B. The FDIC should provide CIDIs with feedback in a timely manner so that CIDIs have a sufficient opportunity to improve their IDI plans.

The proposal is insufficiently clear about how and when CIDIs should expect feedback. First, the FDIC does not commit to provide feedback to CIDIs within a certain period of time, though the preamble of the proposal notes that "the FDIC expects that it *generally will* provide initial feedback within a year of a resolution submission." In addition, the proposal primarily focuses on the finding of "weaknesses" that would form the basis for a non-credibility determination and does not provide an intermediate step prior to the issuance of a "weakness" that would result in a non-credible determination.

To address these issues, the standard and timelines for feedback under the IDI Rule should be made clear and consistent, similar to the process under the 165(d) Rule. To the extent that the FDIC expects CIDIs to make improvements or implement any changes in response to feedback, the FDIC should be required under the IDI Rule to provide such feedback at least 12 months before the next submission.[70] If any feedback is provided with insufficient lead time, a CIDI should not be expected to address it until the following submission. Consistent and dependable timelines for the receipt of feedback is especially important because of the increased and novel expectations, as well as the potential for annual submissions, as envisioned in the proposal.

Additionally, and as discussed above in Section V.A, the IDI Rule should explicitly provide an option for the FDIC to issue a limitation (i.e., an intermediate level of a feedback) to serve as an intermediate step between general feedback and a weakness in an IDI plan that could lead to a non-credible determination.[71] The IDI Rule should further provide that limitations and a meaningful opportunity to remediate should come prior to any non-credibility determination.

The FDIC should also consider publicly providing aggregated guidance or FAQs[72] on common issues and best practices following each review cycle, as appropriate. This guidance would not be particular to any CIDI and instead would focus on providing ways in which IDI plans could be improved based on the FDIC's observations across a number of institutions. Similar to individual feedback, CIDIs should have at least 12 months to address general feedback.

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[70] This timing would be similar to that under the Section 165(d) Rule. *See* 12 C.F.R. § 381.8(f).

[71] *See* 12 C.F.R. § 381.8(e).

[72] *See, e.g.*, FDIC, *IDI Resolution Plan – FAQs* (Aug. 8, 2022), https://www.fdic.gov/resources/resolutions/resolution-authority/idi-res-plans-faqs-082022.pdf.

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We appreciate the opportunity to comment on the proposal and would be happy to discuss our comments with the FDIC staff if it would be helpful. If you have any questions or require any additional information, please do not hesitate to contact the undersigned by email at tabitha.edgens@BPI.com.

Sincerely,

Tabitha Edgens
Senior Vice President and
Senior Associate General Counsel
Bank Policy Institute

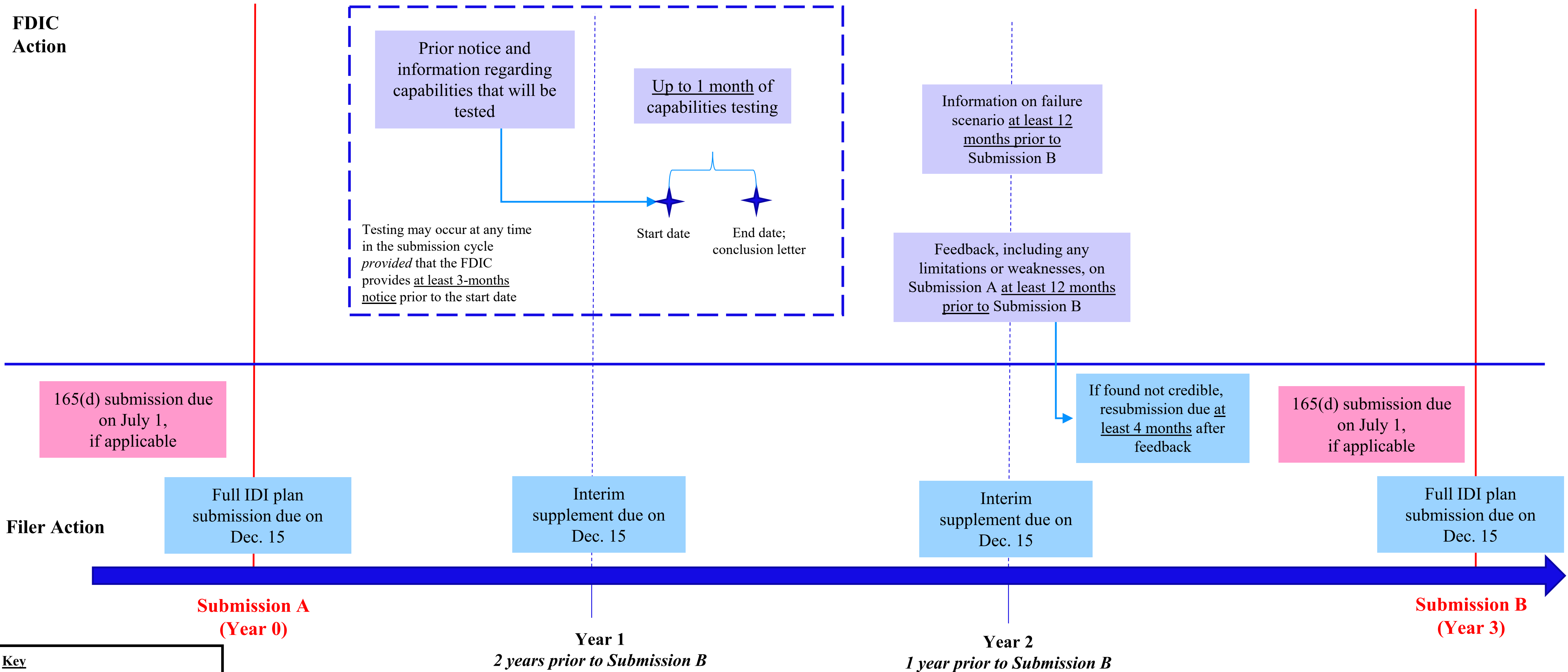
Appendix 1: Summary of BPI Proposed Timeline for IDI Plan Submissions

The visuals that follow illustrate BPI's proposed timeline for IDI plan submissions and required filer and FDIC actions. A summary of BPI's proposal is set forth below for ease of reference, but a more detailed description of BPI's proposed submission cycle is set forth in Section II.B of BPI's letter.

- **Filer Actions**: The proposal contains a two-year cycle under which CIDIs would be required to make a full IDI plan submission every two years, with an interim supplement submission in the intervening year. BPI proposes the following alternative submission cycles that are depicted in the Filer Action portion of the subsequent slides:
  - Filers whose parents (1) make a triennial 165(d) filing and are not exempt from the IDI Rule or (2) do not make a 165(d) filing would follow a three-year submission cycle for a full IDI plan submission with a data-focused version of the interim supplement* due in each of the intervening years. For filers whose parents make a triennial 165(d) filing, the IDI plan submission would be due in the same year as the 165(d) submission so they can leverage and incorporate information, as appropriate.
  - Filers whose parents make a biennial 165(d) filing and are not exempt from the IDI Rule would follow a two-year submission cycle in which the full IDI plan submission would be staggered from the 165(d) filing. A data-focused version of the interim supplement would be due the same year as a 165(d) submission.*
  - For all filers, IDI resolution submissions and interim supplements would be due on December 15th.
- **FDIC Actions**: The proposal would provide the FDIC with discretion to alter certain aspects of the IDI plan submission and related processes without notice. BPI believes that CIDIs should be given adequate notice of FDIC actions so they can plan and prepare with certainty ahead of each IDI plan submission. BPI's proposed revisions are reflected in the FDIC Actions portion of the subsequent slides and include the following:
  - The FDIC should provide sufficient notice (at least three months) prior to engaging in capabilities testing. See Section IV.A of BPI's letter.
  - The FDIC should issue conclusion letters following the conclusion of capabilities testing. See Section IV.A of BPI's letter.
  - Furthermore, the FDIC should provide feedback on prior IDI plan submissions as well as any updates to its failure scenarios at least 12 months prior to the next submission so that CIDIs have sufficient time to address any feedback or new information. See Sections III.E and V.B of BPI's letter.

* Please refer to BPI's proposed adjustments to the content requirements for interim supplements in Appendix 2 of the letter.

BPI Proposed Timeline for Triennial Submission Cycle for CIDIs

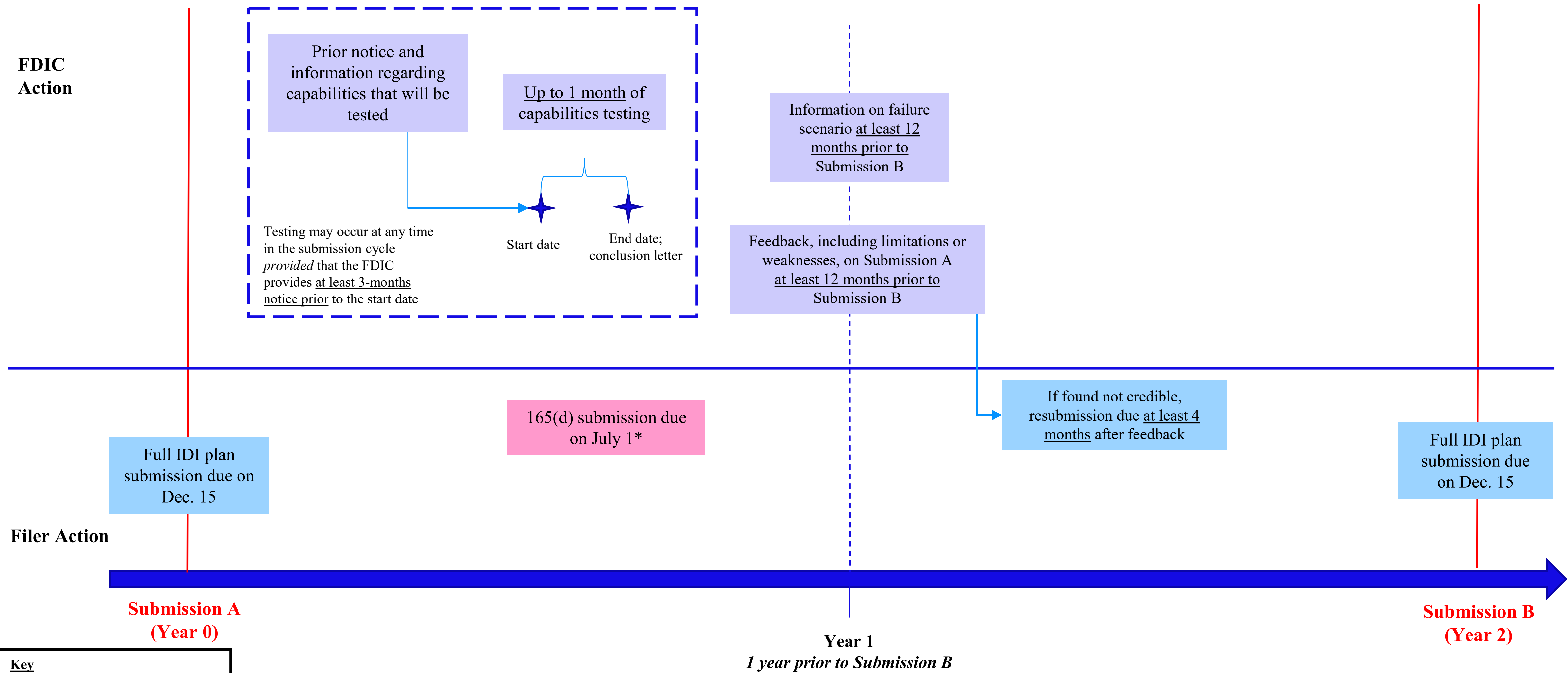


Key

- FDIC Action under IDI Rule
- Filer Action under IDI Rule
- Filer Action under 165(d) Rule

Note: If a triennial 165(d) filer replaces its MPOE strategy with an SPOE strategy, the IDI Rule should shift the due date of that filer's next IDI plan to the year after the filer's 165(d) plan is due. Such a filer's 165(d) and IDI plans would contemplate different outcomes for the CIDI, thereby reducing potential synergies between the two plans. As a result, it would no longer be as useful for the two plans to be due in the same year. A streamlined interim supplement would then be due the year when neither the 165(d) plan nor IDI plan is due.

BPI Proposed Timeline for Biennial Submission Cycle for CIDIs



* If the FDIC determines that an IDI plan is required from a biennial 165(d) plan filer, the CIDIs of biennial 165(d) filers would make a full IDI plan submission one year and their parent organizations would make a 165(d) plan submission the next year, which the FDIC also receives. In this case, BPI believes that an interim supplement is unnecessary and should not be required.

Appendix 2: BPI's Proposed Revisions to the Interim Supplement Requirement

As discussed in Section III.A of BPI's letter, the current scope of the information required to be included in the interim supplement would be excessive and would divert resources that CIDIs otherwise need to maintain and improve resolution planning processes, respond to FDIC feedback and prepare for capabilities testing and engagement. The interim supplement requirements should therefore be more narrowly tailored and data-focused, as set forth in the below table.

Content Requirement	Information Required in Proposal for the Interim Supplement Requirement	Proposed Revisions to the Interim Supplement Requirement
Organizational structure: legal entities; core business lines; and branches	Full update of the content requirement would be required.	CIDIs should only be required to provide a description of any material[1] changes to the organizational structure, legal entities, core business lines and branches section since the last submission. Many organizational changes should already be picked up through regulatory reporting.
Overall deposit activities	CIDIs would be required to update: • Description of overall deposit activities; • Identification of the total amounts of foreign deposits by jurisdiction and percentage of such deposits dually payable in the United States; • Identification and description of deposit sweep arrangements; • Identification of all omnibus, sweep and pass-through accounts; and • Report regarding key depositors.	CIDIs should only be required to provide data for any material changes to: • Omnibus, sweep and pass-through accounts; and • Key depositors. CIDIs already report the total amounts of foreign deposits (*Schedule RC-O, Item 3*), dually payable deposits (*Schedule RC-O, Memorandum Item 4*), the breakdown of uninsured and insured deposits (*Schedule RC-O, Memorandum Items 1 and 2*) and sweep deposits (*Schedule RC-E Part I, Memorandum Item 1.h*) in call reports, so they should not be required as part of an interim supplement.
Critical services	CIDIs would be required to update: • Identification and description of critical services and critical services support; and • Identification of the physical location and jurisdiction of critical service providers and critical services support located outside of the United States.	CIDIs should only be required to provide a description of any material changes to the critical services and critical services support since the last submission.
Key personnel	CIDIs would be required to update the list of all key personnel by title, function, location, core business line and employing entity.	No change to the FDIC's proposed requirement. For clarity, only updated data should be submitted, rather than any accompanying narrative description.

[1] Here we use "material" in the traditional sense of the term to set a threshold for the types of changes that should be included in the interim supplement. We do not mean "material change" as defined in the proposal or under the heightened standard of "extraordinary event" that we propose the FDIC adopt for the notice requirement, as discussed in Section III.C of BPI's letter.

Content Requirement	Information Required in Proposal for the Interim Supplement Requirement	Proposed Revisions to the Interim Supplement Requirement
Franchise components	CIDIs would be required to update: • Identification of franchise components that are currently separable and marketable in a timely manner in resolution; • Metrics depicting the size and significance of each franchise component; and • Identification of senior management responsible for overseeing business activities underlying each franchise component.	CIDIs should only be required to provide a description of any material changes to: • Identification of franchise components that are currently separable and marketable in a timely manner in resolution; and • Senior management responsible for overseeing business activities underlying each franchise component.
Asset portfolios	CIDIs would be required to update the identification of each material asset portfolio by size, and by category and classes of assets within such material asset portfolio, and include a breakdown of those assets held by a foreign branch or regulated subsidiary.	Information for material asset portfolios should not be required as the concept of material asset portfolios is redundant with that of franchise components.
Off-balance-sheet exposures	Full update of the content requirement would be required, except for mapping of exposures to core business lines, franchise components and material asset portfolios.	CIDIs are already required to include off-balance sheet items in call reports (*Schedule RC-L*), so this information should not be required as part of an interim supplement.
Unconsolidated balance sheet; entity financial statements	Full update of the content requirement would be required.	No change to the FDIC's proposed requirement. For clarity, only updated financial data should be submitted, rather than any accompanying narrative description.
Payment, clearing and settlement systems	CIDIs would be required to update the identification of payment, clearing and settlement systems of which each CIDI directly is a member or indirectly accesses that is a critical service or a critical service support.	Separate information on payment, clearing and settlement systems should not be required as this should largely be addressed in the interim supplement through the updates required for critical services.
Capital structure; funding sources	CIDIs would be required to update the description of the composition of their liabilities including the types and amounts of short-term and long-term liabilities by type and term to maturity, secured and unsecured liabilities and subordinated liabilities.	A description of capital structure and funding sources should not be required as the interim supplement will include balance sheet and financial statement information.
Cross-border elements	Full update of the content requirement would be required.	CIDIs should only be required to provide a description of any new material cross-border risks to the identified strategy since the last submission.
Management information systems; software licenses; intellectual property	CIDIs would be required to update their detailed inventory and description of key management information systems and applications.	Updates should be limited to changes in: • Legal owner or licensor; and • Personnel by title and employment at a particular legal entity needed to support key management information systems or applications. For clarity, only updated data should be submitted, rather than any accompanying narrative description.