Americans for Financial Reform Education Fund

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

November 30, 2023

Re: The Federal Deposit Insurance Corporation's (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 (FDIC-2023-0060-0001)

Dear Mr. Sheesley:

Americans for Financial Reform Education Fund (AFREF) appreciates this opportunity to comment on the Federal Deposit Insurance Corporation's (FDIC) proposed rule that strengthens the required resolution plans for banks with $100 billion or more in total assets and that requires informational filings for banks with at least $50 billion but less than $100 billion total assets (RIN 3064–AF90).[1] AFREF is a nonpartisan and nonprofit coalition of more than 200 civil rights, consumer, labor, business, investor, faith-based, and civic and community groups dedicated to advocating for policies that shape a financial sector that serves workers, communities and the real economy, and provides a foundation for advancing economic and racial justice that includes the impact of bank resiliency on the economy, communities, consumers, and small businesses.

Resolution plans are playbooks that facilitate the orderly resolution of systemically important banks if they fall into insolvency. The plans provide strategies and other critical information necessary for the FDIC to oversee orderly bank resolutions. The proposed rules would require these plans to include information on the value of key asset portfolios and liabilities that inform FDIC's decisions about the path to a least cost resolution, identifying obstacles in the way of an orderly resolution, delineating mitigating actions that can be taken, and other aspects of an effective resolution plan. This information and accompanying protocols, for example marketing strategies for sale of key business lines and communications plans,

[1] Proposed Rule by the Federal Deposit Insurance Corp. 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. September 19, 2023 at 64579 et seq.

inform the FDIC's decisions about appropriate strategies and different options and potential actions for implementing those strategies.

The proposed rule strengthens the resolution plan requirements for institutions with more than $100 billion in total assets (designated as group A in the proposed rule). The agencies' 2019 implementing rules for the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA) raised the threshold for resolution plan submissions to $100 billion from the $50 billion level in the original Dodd-Frank regulations. The proposed rule would partially restore regulatory coverage by requiring an informational filing for insured depository institutions (IDIs) with total assets of $50 to $100 billion (designated as group B in the proposed rule) but would not restore the full resolution planning requirement for these institutions. It limits group B's requirements to an informational filing that would not be assessed by a regulator and would not require group B to identify failure strategies. AFREF recommends that FDIC require all insured depository institutions over $50 billion in total assets to file full resolution plans (see below).

The proposed rule would introduce clearer expectations and higher quality information that would strengthen the FDIC's playbook and tools for achieving the desired outcomes of an orderly resolution, one that provides depositors speedy access to their money, reduces the cost of resolution, and limits the draw-down of the Deposit Insurance Fund. Additionally, the proposed rule would require institutions to propose a strategy that does not rely upon a systemic risk exception that could force the sale to a single large acquirer, further concentrating banking assets in the hands of a few megabanks. The systemic risk exemption allows the FDIC to waive certain resolution considerations for failed banks that pose systemic risks. This approach should be the very last resort in the event of a bank failure because it encourages selling failed bank assets at steep discounts that can harm depositors, creditors, and the Deposit Insurance Fund.

Resolution plans are by necessity increasingly complex as depositories get larger, more complex, and more interconnected with other large banks or nonbank financial firms. The failure of these large, complex, and interconnected firms has the potential to disrupt key markets or delivery of critical services on a greater scale. After the 2008 financial crisis, banking supervisors began requiring resolution plans as part of the regulatory imperative to improve safety and soundness for systemically important banks — along with capital planning, liquidity, stress testing, and other enhanced prudential standards. More recently, the 2023 series of bank failures and associated financial crisis revealed weaknesses in the existing rules in planning for an orderly resolution.[2]

Proposal resolves obstacles identified in 2023 that are critical for preventing continued misuse of systemic risk exception: The 2023 cascading failures of Silicon Valley Bank, Signature Bank, and First Republic Bank underlined the importance of resolution plan guardrails for large insured depository institutions. The proposed regulation improves the disclosure of key risks and failure scenarios (such as

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[2] GRIP, Global Relay, FDIC's Gruenberg calls for tougher resolution plans for large regional banks, Julie DiMauro, August 16, 2023.

the concentration of uninsured deposits that could compromise liquidity) and requires more robust resolution strategies to prevent a contagion from spreading from one precarious large depository institution to others. Banking regulators need better tools to prevent another cluster of bank failures as happened this year that could have devastating consequences for the individuals, businesses, and communities served by the failed banks as well as the public which could have to shoulder the costs of resulting bailouts.

The three failed banks' resolution plans lacked important resolution plan information to facilitate the marketing of the depository institution and details on the obstacles to an orderly resolution that is least costly to the Deposit Insurance Fund, protects depositors and maximizes return. The inadequate resolution plans further contributed to the FDIC's not executing the resolutions according to its orderly liquidation authority. The Office of the Comptroller of the Currency approved the FDIC's exercise of its systemic risk authority to arrange the sale of the failed First Republic Bank to JPMorgan Chase in May 2023, at least in part, because of inadequate resolution planning by the failed bank that limited credible options.

Banks must prepare more useful and flexible submissions to give the FDIC the tools and options to overcome obstacles to orderly resolutions: The proposal would require group A institutions (those with $100 billion or more in total assets) to submit more flexible resolution plans that do not rely on a weekend sale to a single buyer as the primary resolution plan strategy. Instead, the default resolution plan would need to be more elaborate, requiring the establishment of a bridge depository institution (BDI) to allow greater flexibility, for example navigating a more complex sale of portions of the failed bank to multiple acquirers versus conveniently assuming one giant institution would buy up the wreckage of a failed bank. The FDIC creates a BDI that receives the deposits and assets of a failed institution and operates the bank for an interim or bridge period while an orderly resolution and sale (including to multiple buyers) can be completed. The proposal would strengthen the FDIC's assessment of the credibility of submissions, the oversight of IDI-supervisor engagement and capabilities testing, and the enforcement of IDIs' compliance with the rule. Flexible plans with more strategic options are more practical and more useful to FDIC and increase the likelihood of an orderly resolution outcome. These changes would better position the FDIC to return deposits to their deposit holders, maximize returns on sale of assets, minimize losses to creditors and address the risks of adverse effects of the CDI failure on the economy and financial stability.

The FDIC should require all covered institutions over $50 billion in total assets to file resolutions plans (Questions 1 and 6): The FDIC should not exempt Group B institutions from filing resolution plans. The proposed rule would only require group B institutions to make informational filings on elements most important for resolution rather than full and detailed resolution plans. This informational filing would not require the $50 to $100 billion depository institutions to present failure scenarios, provide resolution strategies, demonstrate valuation capabilities, or other elements of resolution plans necessary for the FDIC to facilitate an orderly resolution in the event of failure. Asset size may be an appropriate metric for some regulatory distinctions, but it should not be the basis for exempting group B institutions from filing resolution plans. The FDIC should recognize that the supervisors are unlikely to provide the same level of scrutiny to purely informational filings that could perpetuate a false sense of security among depositors, investors, and creditors that regulatory cops were on the beat.

The regulators are unlikely to closely review these informational filings. For example, the Federal Reserve Board's (FRB) Silicon Valley Bank report[3] noted that agency heads during the Trump administration sought to avoid burdening the supervised banks as a matter of policy. In 2018, the FRB issued Guidance on Guidance (subsequently reversed in 2021[4]) that discouraged examiners from raising issues with supervised banks that were not grounded in specific statutory requirements.[5] As a result, bank leaders tended to resist supervisors' concerns, input, or advice regarding safety and soundness. The FDIC should require group B institutions to file formal resolution plans for primary regulator's review and assessment consistent with group A filers.

Proposal keeps FDIC informed in advance of material internal change impacting the resolution plan, not just externally driven events (Question 7): The proposal requires firms to inform the FDIC in advance of material changes, including internal organizational changes that could affect resolution plans. The current rule requires reporting abstract material events that can have effects on resolution plans. The proposed rule clarifies specific kinds of material changes to its business entities, critical services, franchises, core business lines, structure, size, or complexity, including through mergers or acquisitions that could affect the supervisory assessment of safety and soundness. Material changes, whether internally or externally driven, would appropriately require filing to the FDIC within 45 days of material changes. The proposed rule requires the firms to provide timely updates to the FDIC about material changes that could impact the effectiveness of resolution plans. The rule changes give the FDIC information with which to better evaluate resolution plans and capabilities and consider structural or organizational changes that could impair or obstruct an orderly resolution.

Timely access to good quality information is essential to marketing failed IDIs and maintaining client access to critical services (Questions 9, 10, and 11): The proposal requires banks to submit updated resolution plans every other year, along with interim updates in off-years of the most essential data, with the FDIC and the institution engaging more formally and testing the capacities of the resolution plans between full plan filings. This cadence allows the needed time for the FDIC to review formal submissions and conduct more robust engagement and testing exercises.

The proposal's change in full submission frequency from annual to every other year makes sense. Annual reviews do not give the FDIC enough time for in-depth assessment of a plan's viability. Also, the revised submission schedule allows for meaningful engagement between the FDIC and the institution for

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3 Review of the Federal Reserve's Supervision and Regulation of Silicon Valley Bank. Key Takeaways, p. iii, April 28, 2023.

4 The Board of Governors of the Federal Reserve System. Staff Memorandum on Rule on the Role of Supervisory Guidance, March 12, 2021.

5 The Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, National Credit Union Administration, and Office of the Comptroller of the Currency. Joint Interagency Statement Clarifying the Role of Supervisory Guidance. September 11, 2018.

resolution capabilities testing (whether the institution can perform the elements of its plan and strategy in the event of a failure). The FDIC would split Group A filers into half to have the same number of filers submit plans each year. In contrast, all members of group B are in the same cohort. Since the FDIC should eliminate the group A and B distinction and require all insured depository institutions with more than $50 billion in total assets to file resolution plans, the FDIC should split all filers into two groups of even-year and odd-year resolution plan submission cohorts and consider further half year or quarterly breakdowns to facilitate orderly review.

Strategy seeks maximum flexibility and options for a wide range of scenarios, aided by a bridge depository institution (Questions 16, 17): The proposed rule requires IDIs to identify a resolution strategy that includes the use of a bridge bank and provides the FDIC with needed flexibility and options to take over a failed bank and maintain operations in pursuit of the least cost alternative while seeking to avoid the systemic risk exception and related costs to the Deposit Insurance Fund. The proposed rule appropriately requires each IDI to identify a default strategy, and that the default strategy must include the use of a bridge depository institution (BDI). The resolution plan must describe the resolution from the point of failure through the sale and disposition of assets and liabilities. The description considers the IDI's organization, structure, business lines, and obstacles the FDIC may face when implementing the BDI strategy. This information is essential for the FDIC to be able to support the identified strategy that maximizes value and minimizes losses.

A BDI enables the FDIC to continue banking operations of the failed bank during a brief marketing period. The FDIC established BDIs for Signature and First Republic Bank that provided flexible bidding options with respect to businesses and assets acquired. This was an important aspect of the strategy to address accelerated transmission of stress through social media and other channels that greatly shortened the FDIC's resolution preparation runway and compressed the agency's ability to market the institutions pre-failure. The proposal allows large, complex institutions to offer alternate strategies in addition to a strategy including BDI(s), but they cannot have a single acquirer, weekend sale as their resolution strategy.[6]

Consideration of the most severe outcomes is essential to robust resolution planning (Questions 18 and 19): The proposal would require IDIs to delineate severely adverse scenarios for economic conditions and an identified strategy based on a failure scenario in which the IDI is experiencing material financial distress. The failure scenario would require a demonstration that IDI has experienced a deterioration of its asset base and depleted or pledged its high-quality assets due to increased liquidity requirements from counterparties and deposit outflows.

Focusing on a single scenario characterized by severely adverse economic conditions makes sense. The FDIC has found based on experience that the most valuable submissions are those based on an

[6] More complex firms and affiliates may fail and / or enter bankruptcy not in a single case or event but in multiple entities and this "multiple point of entry" would require a plan that resolved the firm in multiple sales, including the insured depository institution entities.

assumption that the depository would fail due to material financial distress from capital depletion or illiquidity. The proposal requires institutions not only to identify failure scenarios but also justify failure assumptions, and it requires the resolution plan to account for the ability to sell the institution in market conditions at the time of sale under conditions of substantial economic distress. The failure scenario would require a demonstration of asset-based losses, including high-quality asset losses that have been depleted to meet liquidity pressure from counterparties and depositors, and also the assumption that its parent is already in bankruptcy. Currently IDIs must provide failure scenarios for baseline, adverse, and severely adverse conditions, but that has distracted IDIs and the FDIC from the more severe economic conditions that can threaten the viability of depository institutions. Focusing on these severely adverse impacts encourages the IDIs and the FDIC to have greater understanding of more difficult obstacles and impediments that may occur under the more severely adverse scenarios that are likely to lead to failure.

Resolution plans must identify available capital and funding sources in resolution for the FDIC to be successful in least cost resolution (Question 23, 24)***:*** The proposed rule appropriately requires the identification of resources that would be available in resolution, for example unsecured, non-deposit liabilities. Leaving these liabilities in receivership would enhance the BDI's capital resources and help to stabilize the bridge bank operations after bankruptcy. The proposed rule would appropriately require all IDIs to provide more detail than the current rule requires, including liability details and composition and a description of funding processes used to identify the liquidity and capital available to material IDI subsidiaries. These details are essential to informing the FDIC's decisions as it seeks to achieve the least cost outcome. (See AFREF's comment letter on the agencies' parallel long-term debt proposal for more on capital structure and funding resources and the primacy of equity capital in achieving safety and soundness goals and a more stable financial system.)

Fragmented systems can present a substantial obstacle to the movement of capital and liquidity, as system ownership and access to key processes and controls can break down in the immediate aftermath of a bank failure with personnel departures. Mergers, acquisitions, affiliations, and other organizational changes over time can create complex and fragmented organizational architecture at large banks. Too often, legacy business, information, and risk systems are not fully integrated due to a lack of investment in new systems. Often legal structures have evolved for business lines' convenience with no thought about the impact of a new legal entity on the resolvability of the depository and its non-depository business.

Cross border obstacles require an understanding of foreign laws, rules and regulations and a specialized knowledge of processes and systems for moving capital and liquidity across jurisdictions (Question 26, 27, and 28): The proposed rule adds requirements for IDIs to identify and analyze obstacles to moving capital and liquidity across jurisdictional borders, including information on any mitigating actions that can be taken in advance to facilitate such transfers. The proposed rule would provide necessary context by requiring a description of the cross-border activities of the parent and affiliates expected to present the greatest obstacles. The proposal would require the IDI to identify hurdles to divestiture or continued operation of branches, subsidiaries, and offices during resolution. These changes would improve the FDIC's ability to identify and overcome jurisdictional obstacles to securing capital and liquidity to facilitate the orderly operation of the institution throughout the resolution.

Proposal strengthens central component of resolution planning related to defining and maintaining critical services for clients (Question 31): The proposal requires IDIs to undertake a review of critical services to be maintained for clients in resolution and identify impediments to their delivery. The current rules implicitly encourage but do not explicitly require IDIs to have a plan to maintain critical services. This requires an assessment of clients' access to deposit accounts and payments and analysis of mitigation actions available in resolution and a demonstration of capabilities. For example, an IDI may demonstrate the ability to maintain continuity through the establishment of a bridge bank or a shared services entity structured to maintain critical services in resolution. The rule requires information on critical services and areas of client support that are most at risk of interruption in order for the FDIC to be able to collect and monitor contracts essential for delivery of critical services. This should include a clear indication of where third parties contribute to the delivery of essential services. The proposal would explicitly require institutions' resolution plans to demonstrate the ability to maintain critical services throughout the resolution. Preparedness for maintaining the operation of critical services in a resolution is beneficial for the clients and businesses that rely on those services.

Strong financial valuations necessary to least cost sale of business lines and estimation of bridge bank capital and liquidity needs in resolution (Questions 40 and 41): The proposal would require IDIs to describe independent price verifications and other controls that provide evidence of reliable valuations underlying financial reports and estimates of the price at which the FDIC should begin marketing key business lines and asset portfolios. Sound valuation processes, reporting and controls for business and risk financial exposures are important to resolution planning. The FDIC relies on the quality of valuations and the robustness of related processes and controls to more reliably assess a least-cost resolution strategy and to estimate losses to the Deposit Insurance Fund under different strategies. Reliable valuations of business and risk exposures are also important to establish trust with potential buyers of asset or liability portfolios. The proposal would improve and strengthen the FDIC's ability to resolve failed banks in an orderly manner and more confidently market businesses or asset portfolios and, on the liability side, deposit portfolios to interested buyers.

Communications playbook helps FDIC facilitate time-sensitive decisions on capital, liquidity, and valuations in the face of shortened runways (Question 45): The proposed rule requires IDIs to include communications plans and governance protocols in their resolution plans. In 2014, the FDIC issued guidance for IDIs' resolution plans that required resolution plans to include a communications playbook to meet governance requirements in resolution, provide timely and accurate information to stakeholders, reduce adverse market reactions and address employee concerns about the failure and resolution.[7] A key example of a governance requirement that would appropriately be included in the communications playbook, in the pre-resolution phase (based on Regulation YY, Enhanced Prudential Standards)[8] is for the

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[7] Issued by the Federal Deposit Insurance Fund, *Guidance for Covered Insured Depository Institution Resolution Plan Submissions*, December 17, 2014.

[8] Regulation YY, Enhanced Prudential Standards. CFR-2021-title12-vol4-sec252-34, *Liquidity risk-management requirements*, p. 463.

treasurer and liquidity risk control officer, with their respective authorities for liquidity and funding risk, to inform the depository's board and the regulators in advance about liquidity related developments, decisions and mitigating actions in the runway period before resolution. The communications playbook should clarify key communications roles and responsibilities among leadership, functional oversight, regulators, and other stakeholders.

Reliable supporting data and reasonable assumptions are essential for credible plans (Question 55): A key lesson from historical bank failures is that effective resolution plans must be based on reliable data and credible underlying assumptions. The proposal would improve resolution plans and the FDIC's ability to perform orderly resolutions by requiring institutions to specify credibility criteria based on a robust two-pronged standard. The first criterion would stipulate that a credible plan must provide timely access to deposits, maximize value from the sale or disposition of assets, minimize loss realized by creditors, or address the risk of adverse effects on U.S. economic conditions. The second prong requires that the full set of information and analysis be supported with observable and verifiable capabilities and data. These strong credibility criteria should guard against informational inconsistencies and overly optimistic assumptions about the IDI's availability of financial resources at the time of a bankruptcy filing as well as the ability of a firm to access financial assistance before and during resolution.

Proposal introduces more formal engagement and capability testing for effective planning (Question 65): The proposed rule requires IDIs to engage with the FDIC for capabilities and testing focusing on the legal, financial, operational regulatory actions and decisions that accompany the initial, middle, and tail end stages of the FDIC advancing a failed bank through resolution. Engagement and testing exercises serve as simulations of a large bank's own failure. On a similar note, since the 2008 financial crisis, large banks have routinely simulated the financial impact on the firm of a large financial client's failure. The proposed rule would clarify expectations about engagement and increase the FDIC's understanding of resolution content and its application to the resolution strategy. The current rule requires an IDI to provide information on and access to the personnel necessary to assess the credibility of the resolution plan and the ability of the FDIC to implement a plan. The proposed rule appropriately goes further to require the IDI to provide information at the discretion of the FDIC, not limited to resolution plan capabilities, but also including any information on critical services agreements, asset portfolios, and key depositors. This incorporates the FDIC's receiver role into the plan and requires the identification of personnel with expertise to address information and data requirements with whom the FDIC would engage in resolution. The proposal improves resolution plans by formalizing the process of iterative supervisory engagement for all institutions that can strengthen and road test the resolution plans long before the point of failure.

FDIC should expand periodic capability testing component to entire resolution plan to validate information and capabilities throughout the plan (Question 69): The proposed rule clarifies the supervisory expectations for how an IDI can demonstrate that it can perform certain capabilities in resolution. Capabilities testing enables the FDIC to better understand challenges to continuity, franchise separation, marketing, establishing virtual due diligence rooms, and valuation analysis. Capabilities testing should provide evidence that capabilities are adaptable to a range of scenarios. The FDIC should expand capability testing to the entire rule, and not just the capability to provide reliable data underlying the resolution plan. This may include demonstrating that the resolution plan has identified key employees necessary for maintaining client access to critical services, or that it has mapped its critical services to material entities correctly, and therefore has a clear understanding of their relationships and any related obstacles to maintaining clients' access to critical services.

AFREF commends the FDIC for proposing this rule for insured depository institution resolution plans. This proposal, together with guidance jointly issued by the FRB and FDIC on consolidated firms' resolution plans and the interagency long-term debt proposal, can be an important complement — but not a substitute — for the higher capital standards currently under consideration. As elaborated in comments in response to the interagency long term-debt proposal, more robust capital standards provide the best regimen to strengthen safety and soundness and provide resiliency against systemic risk. Thank you for the opportunity to comment and for the consideration of these recommendations in the development of this resolution planning rulemaking.

Sincerely

Americans for Financial Reform Education Fund