

XVII. The Long Journey to “Adequate”: Wells Fargo’s Resolution Plan

The Federal Deposit Insurance Corporation (FDIC) and the Board of Governors of the Federal Reserve System (Federal Reserve Board) finally approved Wells Fargo’s Resolution Plan, or “living will”, on April 24, 2017.¹⁶⁹⁹ After its initial failure to submit a satisfactory living will in April 2016, Wells Fargo failed a second time on October 2016.¹⁷⁰⁰ Wells Fargo continued to struggle to meet the standards for orderly resolution and liquidation as determined by the FDIC and the Federal Reserve Board under the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).¹⁷⁰¹ Three months later, on December 13, 2016, regulators again rejected Wells Fargo’s living will, leaving Wells Fargo as the last of the largest, U.S. banks without an approved resolution plan.¹⁷⁰²

Living wills are resolution plans required under Dodd-Frank, which Congress implemented after the financial crisis of 2008.¹⁷⁰³ Through these resolution plans, Congress attempted to create a regulatory framework that would prevent U.S. taxpayers from bailing

¹⁶⁹⁹ Letter from Ann E. Misback, Deputy Sec’y of the Bd., Bd. of Governors of the Fed. Reserve Sys., to Timothy Sloan, Chief Exec. Officer & President, Wells Fargo & Co. 1 (Apr. 24, 2017), <https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20170424a1.pdf> [<https://perma.cc/3P-JU-5TMG>] [hereinafter 2017 Letter to Wells Fargo].

¹⁷⁰⁰ See Press Release, Bd. of Governors of the Fed. Reserve Sys. & Fed. Deposit Ins. Corp., Agencies Announce Determinations and Provide Feedback on Resolution Plans of Eight Systemically Important, Domestic Banking Institutions (Apr. 13, 2016), <https://www.fdic.gov/news/news/press/2016/pr16031.html> [<https://perma.cc/CC8W-QWP9>]; Letter from Margaret McCloskey Shanks, Deputy Sec’y of the Bd., Bd. of Governors of the Fed. Reserve Sys., to Timothy Sloan, Chief Exec. Officer & President, Wells Fargo & Co. (Dec. 13, 2016), <https://www.federalreserve.gov/newsevents/press/bcreg/bcreg20161213a5.pdf> [<https://perma.cc/J53E-P84Y>] [hereinafter December 2016 Letter to Wells Fargo].

¹⁷⁰¹ See Bob Bryan, *5 Wall Street banks failed their ‘living will’ tests*, BUS. INSIDER (Apr. 13, 2016), <http://www.businessinsider.com/5-wall-street-banks-fail-living-will-tests-2016-4> [<https://perma.cc/3RJM-VKHY>].

¹⁷⁰² See generally December 2016 Letter to Wells Fargo, *supra* note 2.

¹⁷⁰³ See 12 U.S.C. § 5365 (2010). For an in depth discussion of living wills and their efficacy, see generally David K. Suska, *Reappraising Dodd-Frank’s Living Will Regime*, 36 REV. BANKING & FIN. L. 789 (2017).

out banks considered “too big to fail.”¹⁷⁰⁴ Since 2010, banks and other non-bank, systemically important financial institutions (SIFIs) have overhauled internal operations to meet Dodd-Frank’s requirements.¹⁷⁰⁵ As an example, institutions now regulated by Dodd-Frank have ongoing projects to augment internal capital standards, risk management, and compliance management.¹⁷⁰⁶ Despite the regulators’ feedback, Wells Fargo was unable to adapt to the new regulatory framework as quickly as its peers.¹⁷⁰⁷

This article will explore the details of and debate over Wells Fargo’s resolution plan failures in 2016, with an emphasis on the firm’s bridge bank strategy. Section A provides an overview of the Dodd-Frank regulations, specifically those impacting resolution planning. Section B examines why Wells Fargo failed repeatedly in drafting an adequate living will. Section C explores the different approaches to bridge bank strategies: the single point of entry approach, utilized in the resolution plans of other firms, and the multiple point of entry approach, which Wells Fargo employed in its resolution plans through 2016. Section D concludes with a discussion of Wells Fargo’s adequate resolution plan and how the firm should prepare for the next resolution plan deadline in July of 2017.

¹⁷⁰⁴ See Dan Freed, *Wells Fargo fails ‘living will’ test, faces restrictions: U.S. regulators*, REUTERS (Dec. 13, 2016), <http://www.reuters.com/article/us-usa-banks-wills-idUSKBN1422P7> [<https://perma.cc/MVV4-23XL>].

¹⁷⁰⁵ Reena Agrawal Sahni & Timothy J. Byrne, *Banking Regulation 2016*, GLOBAL LEGAL INSIGHTS (2016), <https://www.globallegalinsights.com/practice-areas/banking-and-finance/global-legal-insights---banking-regulation-3rd-ed./usa> [<https://perma.cc/J3P9-WVVE>].

¹⁷⁰⁶ See ACCENTURE, *COMING TO TERMS WITH DODD-FRANK: BALANCING STRATEGIC CONSIDERATIONS AND TACTICAL IMPLICATIONS* 4 (2013) (reporting that 67 percent of companies are restructuring internal functions to comply with Dodd-Frank, most commonly focusing on compliance management and risk management).

¹⁷⁰⁷ See Press Release, Bd. of Governors of the Fed. Reserve Sys. & Fed. Deposit Ins. Corp., *Agencies Announce Determinations on October Resolution Plan Submissions of Five Systemically Important Domestic Banking Institutions* (Dec. 13, 2016), <https://www.fdic.gov/news/news/press/2016/pr16109.html> [<https://perma.cc/5XHL-7HEW>].

A. The Implementation of the Living Will Test and Its Impact on Banks

Dodd-Frank was passed in the aftermath of the 2008 Financial Crisis to prevent future catastrophes resulting from financial disasters.¹⁷⁰⁸ Its requirements stemmed from the dilemma regulators faced during the 2008 crisis: either bail out failing institutions or allow them to fail, leaving the market susceptible to chaos.¹⁷⁰⁹ Dodd-Frank mitigates systemic risk by limiting financial risks and potential widespread damages caused by failures of financial institutions.¹⁷¹⁰

Banks have a “unique” function in safeguarding the stability of the U.S. financial system.¹⁷¹¹ The larger the depository pools within the banks, the more money there is to circulate and stimulate the economy.¹⁷¹² Systemic failure may result when customers lose faith in the solvency of a bank, either because of general fear that banks are insolvent or due to an inability to pay back existing loans.¹⁷¹³ Systemic failures can cause a “run on the bank” when customers frantically withdraw their deposits all at once.¹⁷¹⁴

As large banks are owned by bank holding companies, Dodd-Frank designates bank holding companies with \$50 billion or more in consolidated assets as SIFIs.¹⁷¹⁵ Dodd-Frank also requires

¹⁷⁰⁸ See Freed, *supra* note 6.

¹⁷⁰⁹ EDWARD D. HERLIHY ET AL., AN ANNUAL REVIEW OF LEADING DEVELOPMENTS 31 (2016).

¹⁷¹⁰ 12 U.S.C. § 5384 (2010) (“It is the purpose of this title to provide the necessary authority to liquidate failing financial companies that pose a significant risk to the financial stability of the United States in a manner that mitigates such risk and minimizes moral hazard.”); see Chadwick Welch, *Dodd-Frank’s Title II Authority: A Disorderly Liquidation of Experience, Logic, and Due Process*, 21 WM. & MARY BILL RTS. J. 989, 992 (2013).

¹⁷¹¹ Julie A. D. Manasfi, *Systemic Risk and Dodd-Frank’s Volcker Rule*, 4 WM. & MARY BUS. L. REV. 181, 189 (2013) (citing JOHN DOWNES & JORDAN E. GOODMAN, *DICTIONARY OF FINANCE AND INVESTMENT TERMS* (8th ed. 2010)).

¹⁷¹² See *id.* (explaining that banks can either keep a portion of the deposit as reserves or use the depositor’s money to make loans or investments).

¹⁷¹³ See Gary Gorton, *Banking Panics and Business Cycles*, 40 OXFORD ECON. PAPERS 751, 751–54 (1988) (describing either a “mass hysteria” or “random events” that can trigger bank runs).

¹⁷¹⁴ See *id.* (suggesting that depositors fear “first-come-first-served” rules apply to withdrawals).

¹⁷¹⁵ See 12 U.S.C. § 5365 (2010) (“In order to prevent or mitigate risks to the financial stability of the United States that could arise from the material

the Financial Stability Oversight Council (FSOC), with advice from the Federal Reserve Board, to consider whether non-bank financial companies with \$50 billion or more in consolidated assets are systemically important.¹⁷¹⁶ Systemically important non-bank financial companies and banks are subject to “prudential standards,” which are more stringent than the standards imposed on companies that do not present systemic risk to the U.S. financial stability and can vary in stringency depending on various risk-based factors.¹⁷¹⁷ Both non-bank financial institutions and banks that Dodd-Frank considers to be systemically important are “covered financial compan[ies]” under the regulation, meaning a “systemic risk determination” has been made to the institution.¹⁷¹⁸

To limit systemic financial risks, Section 165(d) of Dodd-Frank requires SIFIs to prepare plans for “orderly resolution in the event of material financial distress or failure.”¹⁷¹⁹ While Congress gave the FDIC and Federal Reserve Board broad discretion in implementing Section 165(d), Dodd-Frank details specific requirements to be included in the resolution planning process.¹⁷²⁰ The final rule requires each covered company to submit a resolution plan that includes:

financial distress or failure, or ongoing activities, of large, interconnected financial institutions, the Board of Governors shall, on its own or pursuant to recommendations by the Council under section 115, establish prudential standards for nonbank financial companies supervised by the Board of Governors and bank holding companies with total consolidated assets equal to or greater than \$50,000,000,000 . . .”); Resolution Plans Required, 76 Fed. Reg. 67,323 (Nov. 1, 2011) (to be codified at 12 C.F.R. pt. 381).

¹⁷¹⁶ § 5365(a)(1).

¹⁷¹⁷ See §§ 5365 (a), (b) (providing factors that the regulating agencies should consider when determining regulatory standards for each institution).

¹⁷¹⁸ § 5381(a)(8).

¹⁷¹⁹ § 5365(d)(1) (“The Board of Governors shall require each nonbank financial company supervised by the Board of Governors and bank holding companies described in subsection (a) to report periodically to the Board of Governors, the Council, and the Corporation the plan of such company for rapid and orderly resolution in the event of material financial distress or failure”); see also GREGG L. ROZANSKY ET AL., PRACTICAL LAW CO., LIVING WILL REQUIREMENTS FOR FINANCIAL INSTITUTIONS 1 (2012) (proposing that resolution plans “are part of a larger package of measures designed to limit the risk certain financial institutions pose to the US economy and financial system”).

¹⁷²⁰ Sylvia A. Mayer & Heath P. Tarbert, *Test Your Resolution: Living Wills in an Era of Regulatory Uncertainty*, 128 BANKING L.J. 916, 919 (2011).

(A) information regarding the manner and extent to which any insured depository institution affiliated with the company is adequately protected from risks arising from the activities of any nonbank subsidiaries of the company; (B) full descriptions of the ownership structure, assets, liabilities, and contractual obligations of the company; (C) identification of the cross-guarantees tied to different securities, identification of major counterparties, and a process for determining to whom the collateral of the company is pledged; and (D) any other information that the Board of Governors and the Corporation jointly require by rule or order.¹⁷²¹

Section 165(d) also requires covered entities to report the nature and extent of their reciprocal credit exposures to other significant bank holding companies and nonbank financial companies.¹⁷²² The FDIC and Federal Reserve Board then must jointly determine whether an institution's resolution plan would facilitate an orderly resolution of the company under Title 11 of the U.S. Bankruptcy Code or if the institution's plan contains deficiencies.¹⁷²³

Title II of Dodd-Frank introduces a new way for covered companies to resolve themselves without taxpayer money or government support while simultaneously protecting the stability of the U.S. financial economy.¹⁷²⁴ To limit potential systemic damages caused by the failure of an important financial institution, Title II created the Orderly Liquidation Authority (OLA).¹⁷²⁵ The OLA

¹⁷²¹ § 5365(d)(1).

¹⁷²² §§ 5365(d)(2)(A)–(B).

¹⁷²³ § 5365(d)(4) (instructing that after their reviews, *both* regulatory agencies must “jointly determine” that a resolution plan of a non-bank or bank SIFI is not credible or would not facilitate an orderly resolution of the company under Title 11 Bankruptcy in order for that institution to be “deficient”).

¹⁷²⁴ MAYER BROWN, UNDERSTANDING THE NEW FINANCIAL REFORM LEGISLATION: THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT 32 (2010), https://www.mayerbrown.com/public_docs/Final-FSRE-Outline.pdf [<https://perma.cc/XFX4-RAJY>] (explaining the purpose of the processes in Title II is to maintain financial stability in the US).

¹⁷²⁵ § 5384(a) (“It is the purpose of this title to provide the necessary authority to liquidate failing financial companies that pose a significant risk to the financial stability of the United States in a manner that mitigates such risk and

authorizes the FDIC, Federal Reserve Board, and Secretary of the Treasury to place failing financial companies, including bank holding companies, SIFIs, subsidiaries of bank holding companies and SIFIs, and broker dealers into a receivership with the FDIC as the receiver, if neither the Bankruptcy Code nor private sector can provide an adequate remedy for a failing company.¹⁷²⁶ Receiverships intend to neatly resolve failing, complex companies in an efficient and timely manner, while maximizing net returns for creditors and shareholders and fairly resolving outstanding claims.¹⁷²⁷ The OLA seeks to liquidate failed or failing financial institutions with minimal impact on the financial markets.¹⁷²⁸

B. Wells Fargo's Intensifying Impediment in 2016

Wells Fargo first submitted its annual resolution plan in compliance with Section 165(d) of Dodd-Frank on July 1, 2013.¹⁷²⁹ The bank has since submitted resolution plans annually,

minimizes moral hazard.”).

¹⁷²⁶ § 5383(a)(1)(A) (“On their own initiative, or at the request of the Secretary, the [FDIC] and the Board of Governors shall consider whether to make a written recommendation . . . with respect to whether the Secretary should appoint the [FDIC] as receiver for a financial company.”); see AM. BANKERS ASS’N, TITLE II OVERVIEW: ORDERLY LIQUIDATION AUTHORITY I (2010), <http://www.aba.com/aba/documents/RegReform/TitleIISummary.pdf> [<https://perma.cc/WNK8-EDFA>] (explaining that Title II is intended to ensure that Federal authorities will have the ability to address financial distress at companies that could have a significant impact on U.S. financial stability); Mark A. McDermott, *Analysis of the Orderly Liquidation Authority*, SKADDEN COMMENTARY ON DODD-FRANK ACT (Skadden, Arps, Slate, Meagher & Flom LLP, New York, N.Y.), July 9, 2010, at 5–6, https://www.skadden.com/newsletters/FSR_A_Analysis_Orderly_Liquidation_Authority.pdf [<https://perma.cc/GFN3-ZV62>] (explaining that receivership is not an alternative to bankruptcy, but rather it is only available if there are no other plausible ways to resolve a failing company).

¹⁷²⁷ *Receivership Management Program*, FED. DEPOSIT INS. CORP. (May 19, 2015), <https://www.fdic.gov/about/strategic/strategic/receivership.html> [<https://perma.cc/69VU-QWZR>].

¹⁷²⁸ Paul L. Lee, *The Dodd-Frank Act Orderly Liquidation Authority: A Preliminary Analysis and Critique-Part I*, 128 BANKING L.J. 771, 779 (2011).

¹⁷²⁹ See generally WELLS FARGO & CO., RESOLUTION PLAN PUBLIC SUMMARY (2013), <https://www.federalreserve.gov/bankinforeg/resolution-plans/wells-fargo-2g-20130701.pdf> [<https://perma.cc/S7Y7-YTPX>].

with regulators providing a feedback letter in 2014 and clarifying information in 2015.¹⁷³⁰ In April 2016, the FDIC and Federal Reserve Board found resolution plans of five banks, including Wells Fargo, to be deficient.¹⁷³¹ Three other firms passed the living wills test, including Goldman Sachs and Morgan Stanley, and Citigroup.¹⁷³²

The FDIC and Federal Reserve Board issued a joint determination on the insufficiency of Wells Fargo's resolution plan in April of 2016, in response to the company's 2015 resolution plan.¹⁷³³ The joint determination cited deficiencies with internal governance, operations, and legal entity rationalization, and required Wells Fargo address the material errors within six months.¹⁷³⁴ Wells Fargo needed to strengthen its internal governance by demonstrating a process that would ensure quality control and accuracy of its resolution plan and the consistency of financial and other information reported for material legal entities.¹⁷³⁵ The agencies further required that Wells Fargo fortify operations around its proposed divestiture plan, by identifying the operational capabilities, services, and contingency arrangements required to execute its divestiture plan, and how these support the company's core and subordinate businesses.¹⁷³⁶ Lastly, the agencies required that Wells Fargo establish clear, actionable criteria to best align its legal entities to improve resolvability and demonstrate better

¹⁷³⁰ See WELLS FARGO & CO., RESOLUTION PLAN PUBLIC SUMMARY (2015), <https://www.federalreserve.gov/bankinforeg/resolution-plans/wells-fargo-2g-20150701.pdf> [<https://perma.cc/6KQQ-83HM>]; WELLS FARGO & CO., RESOLUTION PLAN PUBLIC SUMMARY (2014), <https://www.federalreserve.gov/bankinforeg/resolution-plans/wells-fargo-2g-20140701.pdf> [<https://perma.cc/Z4QF-77NA>].

¹⁷³¹ See generally BD. OF GOVERNORS OF THE FED. RESERVE SYS. & FED. DEPOSIT INS. CORP., RESOLUTION PLAN ASSESSMENT FRAMEWORK AND FIRM DETERMINATIONS (2016) [hereinafter AGENCIES' 2016 DETERMINATIONS], <https://www.federalreserve.gov/newsevents/press/bcreg/bcreg20160413a2.pdf> [<https://perma.cc/HEM4-NWA3>].

¹⁷³² See *id.*

¹⁷³³ See Letter from Robert deV. Frierson, Sec'y of the Bd., Bd. of Governors of the Fed. Reserve Sys., to John G. Stumpf, Chairman & Chief Exec. Officer, Wells Fargo & Co. (Apr. 12, 2016), <https://www.federalreserve.gov/newsevents/press/bcreg/wells-fargo-letter-20160413.pdf> [<https://perma.cc/R5PP-HSSL>].

¹⁷³⁴ See *id.*

¹⁷³⁵ *Id.*

¹⁷³⁶ *Id.*

control the firm's corporate structure to facilitate resolvability as the firm changes over time.¹⁷³⁷ The agencies required Wells Fargo, as well as Bank of America, Bank of New York Mellon, JPMorgan Chase, and State Street, to present targeted submissions of remediation for their respective deficiencies by October 1, 2016.¹⁷³⁸ Relative to the other failed plans, Wells Fargo seemed to be well positioned to submit an adequate plan in 2016.¹⁷³⁹

In December of 2016, the FDIC and Federal Reserve Board found all targeted submissions sufficient except for that of Wells Fargo.¹⁷⁴⁰ The agencies determined that Wells Fargo failed to fix two of the three deficiencies identified in its 2015 submission: "simplifying its legal entity structure so that the bank is more easily taken apart and identifying shared services among its units and the risks therein" ¹⁷⁴¹ Large banks often operate similar services across many affiliates within the same bank holding company, also known as "legal entities"; a single transaction routinely could involve several subsidiaries of the same bank holding company.¹⁷⁴² Multiple entities within a bank holding company complicate a bankruptcy proceeding, since one transaction may implicate many different affiliates.¹⁷⁴³ The FDIC and

¹⁷³⁷ *Id.*

¹⁷³⁸ See AGENCIES' 2016 DETERMINATIONS, *supra* note 34.

¹⁷³⁹ See Jesse Hamilton et al., *Wells Fargo Living Will Gets Initial Approval by Regulators*, BLOOMBERG (Nov. 25, 2014), <https://www.bloomberg.com/news/articles/2014-11-25/fed-says-wells-fargo-resolution-plan-acceptable-with-revisions> [<https://perma.cc/LHA6-77BT>]; AGENCIES' 2016 DETERMINATIONS, *supra* note 34.

¹⁷⁴⁰ See generally December 2016 Letter to Wells Fargo, *supra* note 2.

¹⁷⁴¹ December 2016 Letter to Wells Fargo, *supra* note 2; see also Evan Weinberger, *Feds Say Wells Fargo Failed To Address 'Living Will' Problems*, LAW360 (Dec. 13, 2016, 4:29 PM), <https://www.law360.com/articles/872305/feds-say-wells-fargo-failed-to-address-living-will-problems> [<https://perma.cc/NW7E-8WUA>] (stating that Wells Fargo "did not provide enough examples of how it would align its large number of legal entities with its business lines in order to make it easier to resolve through bankruptcy").

¹⁷⁴² See Cyrus Amir-Mokri et al., *A Continued Focus On Strategies For Resolving SIFIs*, LAW360 (Feb. 20, 2015, 12:45 PM), <https://www.law360.com/articles/620100/a-continued-focus-on-strategies-for-resolving-sifis> [<https://perma.cc/C2G2-96RR>] (highlighting the legal entity alignment as being one of the most prominent issues banks faced during the resolution planning process).

¹⁷⁴³ See *id.*

Federal Reserve Board seek to ensure that the business rationale of multiple legal entities within a large, global financial institution is not outweighed by “the incremental complexity it might create for orderly resolution.”¹⁷⁴⁴

Wells Fargo’s 2016 submission also avoided resolvability risks related to the firm’s bridge bank strategy and called for “additional research and further assessments” when applying the proposed criteria to the firm’s existing structure.¹⁷⁴⁵ Resolvability risks are anticipated damages to the financial system and the U.S. economy as a whole that result from the failure of a SIFI.¹⁷⁴⁶ Bridge banks are FDIC-created entities that establish a bridge into a failing bank through which all assets of the failing institution are transferred.¹⁷⁴⁷ A bridge bank provides the FDIC with “flexibility and time to evaluate a bank’s situation, stabilize the institution, determine the appropriate type of resolution to offer, and market the franchise.”¹⁷⁴⁸ The OLA reduces resolvability risks by appointing the FDIC as the receiver of the failing SIFI¹⁷⁴⁹ and expanding the FDIC’s bridge bank authority to include failing SIFIs.¹⁷⁵⁰ Wells Fargo’s resolution plan included a regional

¹⁷⁴⁴ *Id.*

¹⁷⁴⁵ See December 2016 Letter to Wells Fargo, *supra* note 2, at 6–8.

¹⁷⁴⁶ *Dodd-Frank Act: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 113th Cong. 8–9 (2013) (statement of Daniel K. Tarullo, Governor, Board of Governors of the Federal Reserve System), <https://www.federalreserve.gov/newsevents/testimony/tarullo20130214a.htm> [<https://perma.cc/AT53-QA5J>].

¹⁷⁴⁷ FED. DEPOSIT INS. CORP., RESOLUTIONS HANDBOOK 18–19 (2014), https://www.fdic.gov/about/freedom/drr_handbook.pdf [<https://perma.cc/2C-GN-BJN5>].

¹⁷⁴⁸ FED. DEPOSIT INS. CORP., BRIDGE BANK MANUAL 9 (2011) (explaining that the FDIC “may establish a bridge bank when any insured institution fails and there is inadequate time to market the franchise or for other circumstances”).

¹⁷⁴⁹ See 12 U.S.C. §§ 5384(b), 5386 (2010) (appointing the FDIC as the receiver of failing financial institutions and mandating certain terms and conditions); McDermott, *supra* note 28, at 3 (providing that once a financial company is put into receivership, the FDIC “assumes virtually complete control over the liquidation process . . . [and] the role of the courts in the core receivership process ends”).

¹⁷⁵⁰ See § 5390 (a)(1)(G) (“The Corporation, as receiver for one or more covered financial companies or in anticipation of being appointed receiver for one or more covered financial companies, may organize one or more bridge financial companies in accordance with this subsection.”); FED. DEPOSIT INS. CORP., BRIDGE BANK MANUAL (2011) (providing a history of the FDIC’s au-

bridge bank strategy, whereby the bank planned to resolve itself regionally through multiple bridge banks.¹⁷⁵¹ The agencies determined that Wells Fargo did not present adequate details to demonstrate feasibility of dividing the bridge bank into regional units in the event of financial distress and receivership.¹⁷⁵²

Wells Fargo did remedy the governance deficiency from its 2015 Resolution Plan.¹⁷⁵³ The agencies agreed that Wells Fargo's newly implemented process for resolution plan preparation, including "mechanisms for independently verifying internal coordination and review and active oversight by management" were sufficient.¹⁷⁵⁴ The agencies jointly determined that Wells Fargo and its subsidiaries would be subject to restrictions on activity, growth, and operations until a revised submission adequately remedied the remaining two deficiencies.¹⁷⁵⁵ If Wells Fargo fails to submit a revised submission by March 31, 2017 that adequately remedies the remaining deficiencies, Wells Fargo's nonbank entity total assets and broker-dealer entity total assets will be capped at the level reported as of September 30, 2016.¹⁷⁵⁶ Should Wells Fargo be unable to remedy its deficiencies by December 13, 2018, the FDIC, Federal Reserve Board, and the Financial Stability Oversight Council may compel Wells Fargo to

thority to establish bridge banks to savings institutions as well as banks).

¹⁷⁵¹ WELLS FARGO & CO., RESOLUTION PLAN PUBLIC SUMMARY (2016), <https://www.federalreserve.gov/bankinforeg/resolution-plans/wells-fargo-2g-20161001.pdf> [<https://perma.cc/8YN6-GRXK>] [hereinafter WELLS FARGO RESOLUTION PLAN 2016].

¹⁷⁵² December 2016 Letter to Wells Fargo, *supra* note 2, at 3 (stating that "descriptions do not address the specific resolvability risks related to the firm's bridge bank strategy"); *see also* CLEARY GOTTlieb, JUDGMENT ON 2015 DOMESTIC FIRST WAVE RESOLUTION PLANS: FIVE DEEMED "NOT CREDIBLE" (2016) (suggesting that the agencies were concerned with Wells Fargo's regional strategy in April of 2016 since "branch break up strategies have been recognized by the FDIC as posing difficult operational challenges").

¹⁷⁵³ *See* December 2016 Letter to Wells Fargo, *supra* note 2, at 8.

¹⁷⁵⁴ *Id.*

¹⁷⁵⁵ *See id.* at 9 (concluding that effective December 13, 2016, Wells Fargo and its subsidiaries may not establish a foreign bank or foreign branch, nor acquire any nonbank subsidiary).

¹⁷⁵⁶ *Id.* at 9–10; *see also* Antoine Gara, *From First To Worst: Wells Fargo Fails Its 'Living Will' Exam... Again*, FORBES (Dec. 14, 2106), <https://www.forbes.com/sites/antoinegara/2016/12/14/from-first-to-worst-wells-fargo-fails-its-living-will-exam-again/#334d81c742c5> [<https://perma.cc/RUD2-NQM3>].

divest some of its assets or operations so that an orderly resolution would be more attainable Wells Fargo faced bankruptcy.¹⁷⁵⁷

C. Wells Fargo: Just Not Like the Others

As Wells Fargo prepared for its March 2017 submission, the bank stated that it was “committed to strengthening and enhancing its resolution planning processes” as evidenced by its progress throughout 2016, and that it would strive to fully comprehend the agencies’ concerns and meet regulatory standards.¹⁷⁵⁸ Some scholars, however, argue that Wells Fargo’s failure to adopt the agencies’ preferred resolution strategy of single-point-of-entry (SPOE) as opposed to Wells Fargo’s multiple-point-of-entry (MPOE) approach, was a factor in the delayed approval of its resolution plan.¹⁷⁵⁹ Of the eight banks that submitted resolution plans in 2016, Wells Fargo was the only one to use an MPOE approach.¹⁷⁶⁰

1. The Undesirable: MPOE Approach

As noted, Wells Fargo proposed regional bridge bank strategies as its resolution plan in the event of financial distress in its October submission.¹⁷⁶¹ This plan relied on an MPOE approach to resolution, “whereby resolution actions are taken by multiple authorities along national, regional or functional lines” and the institution is broken into

¹⁷⁵⁷ December 2016 Letter to Wells Fargo, *supra* note 2, at 10.

¹⁷⁵⁸ Press Release, Wells Fargo & Co., Wells Fargo Issues Statement Regarding Federal Reserve, FDIC 2016 Resolution Plan Submission Determination (Dec. 13, 2016), https://www.wellsfargo.com/about/press/2016/resolution-plan_1213/ [<https://perma.cc/MB56-Y6PU>].

¹⁷⁵⁹ See Paul L. Lee, *A Paradigm’s Progress: The Single Point of Entry in Bank Resolution Planning*, CLS BLUE SKY BLOG (Jan. 18, 2017), http://clsbluesky.law.columbia.edu/2017/01/18/a-paradigms-progress-the-single-point-of-entry-in-bank-resolution-planning/#_edn3 [<https://perma.cc/75EG-PQEC>] (“One prominent point of speculation was that Wells Fargo had failed to pick up on the assumed preference of the regulators for a single-point-of-entry (“SPOE”) resolution strategy.”); Resolution of Systemically Important Financial Institutions: The Single Point of Entry Strategy, 78 Fed. Reg. 76,614 (Dec. 18, 2013) (outlining the SPOE approach as its anticipated approach to resolution).

¹⁷⁶⁰ Lee, *supra* note 61.

¹⁷⁶¹ See WELLS FARGO RESOLUTION PLAN 2016, *supra* note 53 (explaining the bank’s plans to resolve the company in regional units).

multiple parts.¹⁷⁶² MPOE approaches generally are favored by “banks that have developed their businesses through a network of locally incorporated banks,” which were likely acquired to expand the holding company’s footprint.¹⁷⁶³ Supporters argue that this approach allows for better alignment between the institution and local regulators, and regionally limits financial exposure to avoid pushing losses to the holding company.¹⁷⁶⁴ Nevertheless, the FDIC has recognized branch break-up strategies at the regional level to present “difficult operational challenges,” despite the FDIC having employed regional strategies in the past.¹⁷⁶⁵

2. Preferred Resolution Method: SPOE Approach

An SPOE approach to resolution requires a resolution of the entire institution at the bank holding company level, placing only the bank holding company into receivership.¹⁷⁶⁶ All subsidiaries and operating companies “remain outside the receivership with the idea that they would continue to conduct business as normal”¹⁷⁶⁷ Simultaneously, the FDIC charters a bridge financial company to run the subsidiaries and operating companies and transfers all of the holding company’s assets to the bridge company.¹⁷⁶⁸ The FDIC and some academics theorize that the failed holding company’s

¹⁷⁶² See FIN. STABILITY BD., RECOVERY AND RESOLUTION PLANNING: MAKING THE KEY ATTRIBUTES REQUIREMENTS OPERATIONAL 4, 15 (2012).

¹⁷⁶³ James Chew, *Multiple Point of Entry: The Forgotten Alternative*, CLEARING HOUSE (2014), <https://www.theclearinghouse.org/research/banking-perspectives/2014/2014-q1-banking-perspectives/multiple-point-of-entry#footnote-73196-1> [<https://perma.cc/4ULM-BZTH>].

¹⁷⁶⁴ See *id.*

¹⁷⁶⁵ CLEARY GOTTlieb, *supra* note 54, at 10; see also FED. DEPOSIT INS. CORP. & Bd. OF GOVERNORS OF THE FED. RESERVE SYS., GUIDANCE FOR 2017 §165(D) ANNUAL RESOLUTION PLAN SUBMISSIONS 15–17 (2016), <https://www.fdic.gov/news/news/press/2016/pr16031b.pdf> [<https://perma.cc/4QC7-VNDX>] (imposing more rigid standards that seem to require an implementation of an SPOE strategy).

¹⁷⁶⁶ Arthur Wilmarth, ‘Single Point of Entry’ Plan Ensures More Megabank Bailouts, AM. BANKER (July 16, 2015), <https://www.americanbanker.com/opinion/single-point-of-entry-plan-ensures-more-megabank-bailouts-tab-tab> [<https://perma.cc/S3LE-XYKT>].

¹⁷⁶⁷ HERLIHY, *supra* note 11, at 32–33.

¹⁷⁶⁸ *Id.* (explaining the FDIC’s role in the bridge bank strategy).

subsidiaries' operations continue as usual within the bridge company; as long as the bridge company is well capitalized with only assets and no liabilities on its balance sheet, the new company, made up of the FDIC's bridge company and failed holding company's subsidiaries, can could support itself.¹⁷⁶⁹

Arguments cutting against the merits of the SPOE approach suggest that the FDIC has been too idealistic in the reality and applicability of and SPOE resolution.¹⁷⁷⁰ Many suggest that not only does the SPOE approach not solve too big to fail, it also does not resolve the entity, like bankruptcy.¹⁷⁷¹ Moreover, some academics disagree altogether that resolution plans will help identify systemic risks and resolve failing financial firms without escalating those risks.¹⁷⁷² The SPOE model relies on Title II's Orderly Liquidation Fund (OLF) to provide liquidity to the bridge company during resolution, if private sector funding is not available.¹⁷⁷³ The SPOE's funding model first relies in part on the bank holding company's ability borrow from "customary sources of liquidity in the private markets."¹⁷⁷⁴ If the

¹⁷⁶⁹ *Id.*; see also Jerome H. Powell, Member, Bd. of Governors of the Fed. Reserve Sys., Remarks at the Institute of International Bankers 2013 Washington Conference: Ending "Too Big to Fail" (Mar. 4, 2013), https://fraser.stlouisfed.org/files/docs/historical/federal%20reserve%20history/bog_members_statements/powell_20130304.pdf [<https://perma.cc/D46W-KBZ2>] (explaining that SPOE solves the problem of bank runs by focusing losses on the shareholders and long-term debt holders of the failed parent and producing a well-capitalized, fully operational bridge holding company in place of the failed parent).

¹⁷⁷⁰ See, e.g., David A. Skeel, *Single Point of Entry and the Bankruptcy Alternative*, in *ACROSS THE GREAT DIVIDE* 311, 313 (Martin Neil Bailly & John B. Taylor eds., 2014) (arguing that SPOE reinforces problematic incentives for financial institutions to rely on short-term financing).

¹⁷⁷¹ See, e.g., Paul H. Kupiec & Peter J. Wallison, *Can the "single point of entry" strategy be used to recapitalize a failing bank?* (Am. Enter. Inst., Working Paper No. 2014-08, 2014), <https://www.aei.org/wp-content/uploads/2014/11/SPOE-Working-paper-Nov-5.pdf> [<https://perma.cc/C4A3-U252>] (suggesting instead that the approach merely recapitalizes the failed institution).

¹⁷⁷² See, e.g., Adam Levitin, *In Defense of Bailouts*, 99 GEO. L.J. 435, 468–69 (2011) (arguing that living will proposals are "disconnected from institutional realities" and "are unlikely to prevent the failure of too big to fail institutions, or to assist in their resolution").

¹⁷⁷³ See 12 U.S.C. § 5390 (2010).

¹⁷⁷⁴ H. Rodgin Cohen, "SPOE" Resolution Strategy for SIFIs under Dodd-Frank, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Jan. 17, 2014),

failing company cannot source enough funds to support its operating subsidiaries, the FDIC would borrow the difference from the Treasury Department through the OLF.¹⁷⁷⁵ SPOE opponents argue that because the OLF's funds are limited, taxpayers would ultimately subsidize the OLF loans.¹⁷⁷⁶

D. Conclusion

On April 24, 2017, the Federal Reserve Board and the FDIC issued a joint resolution determining that Wells Fargo's revised resolution plan submission in March 2017 had adequately remedied the living will's remaining deficiencies.¹⁷⁷⁷ The agencies reported that Wells Fargo resolved its operations deficiency related to shared services by integrating "the mapping of critical services into its legal entity rationalization criteria and implementation efforts."¹⁷⁷⁸ Wells Fargo also remedied its legal entity rationalization deficiency by demonstrating "that its legal entity rationalization criteria are clear, actionable, and promote the best alignment of legal entities and business lines to improve the firm's resolvability given the firm's bridge bank strategy."¹⁷⁷⁹ While the agencies did not specify whether Wells Fargo adopted an SPOE bridge bank strategy,¹⁷⁸⁰ Wells Fargo's first quarterly report of 2017 outlines a "support agreement" with

<https://corpgov.law.harvard.edu/2014/01/17/spoe-resolution-strategy-for-si-fis-under-dodd-frank/#2b> [<https://perma.cc/6TAL-5N73>]; *see also* Wilmarth, *supra* note 68 (suggesting that the reality would be institutions issuing their own "bail in" bonds to mutual funds and pension funds, investment vehicles for ordinary investors).

¹⁷⁷⁵ Wilmarth, *supra* note 68.

¹⁷⁷⁶ *See id.* (stating the SPOE method ensures "protection for short-term creditors of the failed bank's holding company and all creditors of the operating subsidiaries"). *But see* Cohen, *supra* note 76 (suggesting that "the use of OLF funds would be significantly limited" to liquidity, not capital, and that all OLF borrowings would be repaid from the operations and assets of the bridge financial company, its subsidiaries, and the receivership, "without any loss to the taxpayer").

¹⁷⁷⁷ 2017 Letter to Wells Fargo, *supra* note 1.

¹⁷⁷⁸ *Id.*

¹⁷⁷⁹ *Id.*

¹⁷⁸⁰ As of May 14, 2017, the Federal Reserve Board had refused to clarify Wells Fargo's existing bridge bank strategy, and the FDIC had not responded to requests for comment.

a bridge company that mimics the SPOE approach.¹⁷⁸¹ However, the report clarifies that the MPOE approach remains Wells Fargo's preferred resolution strategy and does not indicate that this support agreement would require Wells Fargo to carry out an OLA resolution using a single point of entry.¹⁷⁸² Without additional detail concerning Wells Fargo's revised submission, it remains unclear if this "support agreement" convinced the FDIC and Federal Reserve Board that Wells Fargo's resolution plan was adequate, or if Wells Fargo accomplished other improvements between December of 2016 and March of 2017.

Although Wells Fargo activities, growth, and operations are no longer restricted, the adequacy determination of its revised resolution plan does not exempt the bank from the 2017 plan submissions.¹⁷⁸³ Despite the potential shortcomings of the SPOE approach, and without knowing the details of the bridge bank strategy used in Wells Fargo's March 2017 revised submission, it seems to be in Wells Fargo's best interest to adopt an SPOE approach for resolution as opposed to its current MPOE approach. The adoption of an SPOE approach would require Wells Fargo's executive management to have clearer understanding of the regional operations of the organization. Since Wells Fargo originally was found to be deficient in its governance, and in light of the bank's ongoing publicity regarding its fake account scandal,¹⁷⁸⁴ the implementation of an SPOE approach may be a difficult.

¹⁷⁸¹ Wells Fargo & Co., Quarterly Report (Form 10-Q) 61 (Mar. 31, 2017), <https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/sec-filings/2017/first-quarter-10q.pdf> [<https://perma.cc/JER2-CJJ6>] (stating that the Wells Fargo's holding company would enter into a support agreement with an intermediate holding company, authorizing the holding company to "transfer a substantial portion of its assets to the [intermediate holding company] upon entering into the Support Agreement and would contribute certain additional assets to the [intermediate holding company] from time to time").

¹⁷⁸² See *id.* (confirming that the plan is an authorization by Wells Fargo's Board of Directors "[i]n response to the regulators' guidance and to facilitate the implementation of the Company's preferred "multiple point of entry" resolution strategy").

¹⁷⁸³ 2017 Letter to Wells Fargo, *supra* note 1 (clarifying that "findings described in this letter relate only to the Agencies' review of the Remaining Deficiencies" and that the agencies will review 2017 resolution plans separately).

¹⁷⁸⁴ Dorothy Atkins, *Wells Fargo To Pay \$110M To End Phony Accounts Suits*, LAW360 (Mar. 28, 2017, 7:31 PM), <https://www.law360.com/arti>

Nevertheless, such a change may help to prevent future infractions and illuminate ongoing violations to management and regulators.¹⁷⁸⁵

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cles/907284/wells-fargo-to-pay-110m-to-end-phony-accounts-suits [https://perma.cc/3V8L-TMAT] (“Wells Fargo & Co. has agreed to pay \$110 million to resolve 12 putative class actions that allege bank workers opened unauthorized accounts in customers’ names or enrolled them in the bank’s services without their consent”). See generally Merric Kaufman, Dev. Art., “*Lions Hunting Zebras*”: *The Wells Fargo Fake Accounts Scandal and its Aftermath*, 36 REV. BANKING & FIN. L. 436 (2017).

¹⁷⁸⁵ See Press Release, Wells Fargo & Co., Wells Fargo Chairman and CEO John Stumpf Provides an Update on Actions to Address Wrongful Sales Practices in the Company’s Retail Bank (Sept. 29, 2016), https://www.wellsfargo.com/about/press/2016/chairman-ceo-update-on-wrongful-sales-practices_0929.content [https://perma.cc/Q4KF-KDWG].

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