REAPPRAISING DODD-FRANK'S LIVING WILL REGIME

DAVID K. SUSKA*

Abstract

In the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Congress required certain financial institutions to draft "orderly resolution" plans—colloquially termed "living wills"—that explain how each institution could be unwound in case of insolvency. This living will regime is now more than five years old. Yet as consequential as it has been and still may be, scholars have largely overlooked it, except to opine that it does not solve the problem of "too big to fail." This article fills that gap in the literature. It explains the origins of the living will regime, defends it as a pragmatic feature of post-crisis regulatory reform, and proposes amendments to bolster its legitimacy and legality.

---

* Law Clerk to the Honorable Frank H. Easterbrook of the U.S. Court of Appeals for the Seventh Circuit. Thanks to Professor Eric Posner for incisive comments on earlier drafts. Thanks to the organizers and participants of the Liberty Fund and Federalist Society Faculty Division colloquium on "Banking and the Free Society," held in January 2016—several ideas here stem from thoughtful discussions there. And thanks to the staff of the Review of Banking & Financial Law for careful efforts and good advice. Of course, all errors are mine.

Table of Contents

I. Introduction . . . 781
II. Dodd-Frank's Living Will Regime . . . 783
A. Origins . . . 784
1. Lehman's Bankruptcy, AIG's Bailout, and TARP . . . 784
2. "A Sweeping Overhaul" . . . 789
B. Enactment . . . 794
1. Section 165(d) . . . 792
2. Regulation QQ . . . 793
C. Returns . . . 795
III. Why Require Living Wills? . . . 798
A. Standard Theory . . . 798
1. Correcting a Market Failure . . . 798
2. Mitigating TBTF . . . 801
B. Other Plausible Benefits . . . 803
1. Enhancing Disclosure and Communication . . . 803
2. Regulating with Big Data . . . 804
3. Improving Visibility and Accountability . . . 805
4. Nudging Corporate Executives . . . 807
IV. Some Suggested Reforms . . . 808
A. Impetus for Reform: *MetLife v. FSOC* . . . 809
B. Specific Proposals . . . 812
1. Undertake Cost-Benefit Analysis . . . 813
2. Define "Not Credible" . . . 814
V. Conclusion . . . 815

I. Introduction

Preparing a will is surely a difficult exercise. To contemplate your demise while still in good form is emotionally and cognitively stressful. Questions must be posed for the first time and directives issued according to speculation far into the future. You cannot help but second-guess your judgment—the only certainty is that circumstances will change in the interim. Now suppose you must sort through assets and liabilities of more than $2 trillion and account for opaque risks to counterparties across the world. In other words, you are JPMorgan Chase,[1] or perhaps Bank of America.[2] The problem of planning begins to seem insoluble.[3] Yet planning is what Congress demanded of these and similar financial institutions in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank).[4]

Dodd-Frank requires large and systemically important financial institutions to submit to regulators "orderly resolution"[5] plans—colloquially termed "living wills"[6]—that explain how each institution could be unwound if it became insolvent.[7] The complete, confidential versions of these documents are said to "run tens of thousands of pages."[8] The public sections are shorter yet still abstruse.[9]

---

[1] As of December 31, 2015, JPMorgan had about $2.35 trillion in assets and $2.1 trillion in liabilities. *JPMorgan Chase & Co.*, YAHOO! FIN., https://finance.yahoo.com/q/bs?s=JPM+Balance+Sheet&annual [http://perma.cc/CQ9Q-ECW7].

[2] As of December 31, 2015, Bank of America had about $2.1 trillion in assets and $1.9 trillion in liabilities. *Bank of America Corporation*, YAHOO! FIN., https://finance.yahoo.com/q/bs?s=BAC+Balance+Sheet&annual [http://perma.cc/AE6F-B7PF].

[3] *See generally* P.B. MEDAWAR, THE ART OF THE SOLUBLE (1967) (discussing the problem scientists face of knowing what to study and when).

[4] P.L. 111-203, 124 Stat. 1376 (2010) (codified in various sections of the U.S.C.).

[5] 12 U.S.C. § 5365(d) (2012).

[6] *See* Ryan Tracy & Leslie Scism, *AIG, Prudential Make Pitch to Regulators on 'Living Wills,'* WALL ST. J. (Jan. 15, 2016), https://www.wsj.com/articles/aig-prudential-make-pitch-to-regulators-on-living-wills-1452887953 [https://perma.cc/7VFJ-FJVL].

[7] *Id.*

[8] *Id.*

[9] *See Resolution Plans*, BOARD GOVERNORS FED. RES. SYS., http://www.federalreserve.gov/bankinforeg/resolution-plans.htm [http://perma.cc/H2DY-UAFV].

They describe corporate structure and risk exposures, as well as last-resort pathways to an orderly liquidation or reorganization under the Bankruptcy Code.[10] The stated aim of the living will regime is to render "too big to fail" (TBTF) an anomaly of past financial crises.[11] If the private sector and regulators are just better prepared for failure, the thinking goes, failure is tolerable.[12]

But there is a problem: regulators have largely rejected the living wills submitted so far as "unrealistic," "inadequately supported," and "deficient."[13] And this should not come as a surprise. As the thought experiment at the start of this article suggested, and as many have observed, it is implausible to expect the most complex firms in the world to develop pre-packaged bankruptcies clairvoyant enough to be pulled off the shelf and executed during a crisis.[14] One prominent advocate of regulatory reform has thus derided the living will regime as nothing more than a "sham, meaningless boilerplate, and box checking."[15] Yet regulators continue to demand living wills, so financial institutions continue to produce them. JPMorgan alone

---

[10] *See id.*

[11] *See* Preamble to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, P.L. 111-203, 124 Stat. 1376 (2010) ("An Act [t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end "too big to fail", to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.").

[12] *See Regulators are Trying to Make Banks Better Equipped Against Catastrophe,* THE ECONOMIST (Jan. 21, 2010), http://www.economist.com/node/15328883 [https://perma.cc/2ZHN-42BP].

[13] *See, e.g.*, Danielle Douglas, *Regulators Reject Bankruptcy Plans of 11 Big Banks*, WASH. POST (Aug. 5, 2014), https://www.washingtonpost.com/business/economy/us-regulators-reject-bankruptcy-plans-of-11-big-banks/2014/08/05/aec219b2-1ce3-11e4-ab7b-696c295ddfd1_story.html [https://perma.cc/WJ8N-ZCU3].

[14] *See, e.g.*, Simon Johnson, *The Myth of a Perfect Orderly Liquidation*, N.Y. TIMES: ECONOMIX (May 16, 2013, 12:01 AM), http://economix.blogs.nytimes.com/2013/05/16/the-myth-of-a-perfect-orderly-liquidation-authority-for-big-banks/?_r=0 [https://perma.cc/U862-KKXH].

[15] Brad Miller, *Regulators, Demand Credible Living Wills Now Not 'Ultimately'*, AM. BANKER (Dec. 26, 2013), http://www.americanbanker.com/bankthink/regulators-must-demand-credible-living-wills-now-not-ultimately-1055434-1.html#comments [https://perma.cc/F234-9FD4] (quoting Simon Johnson, Professor of Economics at MIT's Sloan School of Management and former Chief Economist at the International Monetary Fund).

claims to allocate more than one thousand employees to the task.[16] Is this socially valuable? Should we embrace financial regulation by hypothetical?[17] Is financial regulation by hypothetical consistent with the rule of law, grounded as it is in concerns about too little notice and too much discretion?[18]

This article defends the living will regime as a pragmatic feature of post-crisis regulatory reform while also suggesting tweaks to bolster its legitimacy and legality. In a departure from the prevailing commentary that focuses on why living wills do not solve TBTF,[19] this article concedes that impossibility and considers more modest benefits that living wills might yield. This article also proposes two reforms that may be necessary to defend the regime in future litigation and from legislative repeal. A fairly recent decision of the U.S. District Court for the District of Columbia informs these proposals.[20]

II. Dodd-Frank's Living Will Regime

This part begins with a brief overview of the failure of Lehman Brothers Holding Inc. (Lehman) and near-failure of American International Group (AIG) in September 2008, events that exposed the inadequacy of bankruptcy law and dependency of large financial institutions on government rescues. It is the chaos of Lehman's bankruptcy, as well as the unpopularity of AIG's bailout and others following it, that prompted Congress to overhaul financial regulation with Dodd-Frank. One of Dodd-Frank's novel reforms is its living will regime, which requires certain financial institutions to

---

[16] *See* JPMORGAN CHASE & CO. RESOLUTION PLAN PUBLIC FILING 4 (2015), http://www.federalreserve.gov/bankinforeg/resolution-plans/jpmorgan-chase-1g-20150701.pdf [https://perma.cc/N839-YBTN].

[17] *See generally* Mehrsa Baradaran, *Regulation by Hypothetical*, 67 VAND. L. REV. 1247 (2014).

[18] *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

[19] Most commentary on the living will regime is critical for this reason. *See, e.g.*, Miller, *supra* note 15. Academic literature on point is also critical. *See, e.g.*, Nizan Pakin, *The Case Against Dodd-Frank Act's Living Wills: Contingency Planning Following the Financial Crisis*, 9 BERKELEY BUS. L.J. 29 (2012) (examining the implementation and operation of living wills for systemically important financial institutions and discussing the problematic aspects of living wills).

[20] MetLife, Inc. v. Fin. Stability Oversight Council, 177 F. Supp. 3d 219 (D.D.C. 2016).

plan for an orderly resolution or liquidation in case of insolvency.[21] This part concludes with a survey of the legislation and rulemakings that comprise the regime.

A. Origins

1. Lehman's Bankruptcy, AIG's Bailout, and TARP

Lehman was among the largest and most interconnected financial institutions in the world when it filed for bankruptcy on September 15, 2008.[22] At the time, Lehman controlled $700 billion in assets and sat atop more than 7,000 distinct legal entities, of which 200 were registered subsidiaries.[23] Lehman was party to more than 900,000 derivatives positions executed under 6,000 contracts with a notional value of $35 trillion.[24] It had divisions in equity and fixed income sales, trading and research, investment banking, asset management, and private equity.[25] Unsurprisingly, then, when Lehman officials realized the inevitability of failure and started to plan for an unwinding, they estimated that dissolution might take six months with the benefit of support from the Federal Reserve Bank of New York.[26]

---

[21] 12 U.S.C. § 5365(d) (2012).

[22] *See* Michael Fleming & Asani Sarkar, *The Failure Resolution of Lehman Brothers*, 20 FRBNY ECON. POL'Y REV. 175 (2014), https://www.newyorkfed.org/medialibrary/media/research/epr/2014/1412flem.pdf [https://perma.cc/52K2-UNVL].

[23] *See Why Two Big Banks Failed*, THE ECONOMIST (Nov. 28, 2015), http://www.economist.com/news/finance-and-economics/21679228-why-two-big-banks-failed-not-so-smart [https://perma.cc/5MEJ-PNLR].

[24] ROSALIND Z. WIGGINS & ANDREW METRICK, *The Lehman Brothers Bankruptcy G: The Special Case of Derivatives*, YALE PROGRAM ON FINANCIAL STABILITY CASE STUDY (Yale Sch. Mgmt., New Haven, Conn.), Oct. 1, 2014, at 2, http://som.yale.edu/sites/default/files/files/001-2014-3G-V1-LehmanBrothers-G-REVA.pdf [https://perma.cc/R5CT-SGED]. Lehman's derivatives book was primarily comprised of "over-the-counter" products executed under International Swaps and Derivatives Association Master Agreements. Each Master Agreement set terms for all transactions between the parties, which is how more than 900,000 positions stem from about 6,000 contracts. *See id*. at 6.

[25] *See* Lehman Bros. Holding Inc., Annual Report (Form 10-K) (2007), http://www.sec.gov/Archives/edgar/data/806085/000110465908005476/a08-3530_110k.htm [https://perma.cc/J7ME-A4GN].

[26] *See Orderly Liquidation of Lehman Brothers Holdings Inc. under the*

When, on September 14, Lehman was informed that no support would be forthcoming,[27] the prospect of an orderly unwinding over six months vanished. Lehman filed for bankruptcy in the early hours of the morning on September 15.[28]

The consequences of Lehman's bankruptcy were immediately apparent, as turmoil in financial markets spread like wildfire and disrupted the real economy. On September 15, the Dow Jones Industrial Average dropped 504 points, or 4.4 percent of its value at the start of the day, marking it as the single worst trading session since September 11, 2001.[29] More troubling, the Reserve Primary Fund—a $62 billion money market mutual fund with substantial exposure to Lehman-issued commercial paper—suffered a classic run.[30] Forced to liquidate assets to keep up with redemptions, the Fund announced on September 16 that it would "break the buck," meaning its investors would face losses.[31] This was the first time in fourteen years that investors in the money market had come out behind,[32] and it prompted withdrawals of more than $300 billion from similar funds during the rest of the week,[33] depriving the modern economy of its lifeblood in the form of short-term credit. As others have written, "If the precipitating event of the Great Depression was the 1929 stock

Dodd-Frank Act, 5 FDIC Q. 3 (2011), https://www.fdic.gov/bank/analytical/quarterly/2011_vol5_2/lehman.pdf [https://perma.cc/M34S-76WR].

[27] *Id*. ("On September 14, 2008 . . . the Federal Reserve Bank of New York told LBHI that . . . it would not fund Lehman."). Whether the Federal Reserve had authority to fund Lehman is disputed. *See* Eric A. Posner, *What Legal Authority Does the Fed Need During a Financial Crisis?* 16–17 (U. of Chi. Coase-Sandor Inst. for L. & Econ. Res. Paper No. 741; U. of Chi., Pub. L. Working Paper No. 560, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2723524 [https://perma.cc/JT6D-HVLQ].

[28] Report of Anton R. Valukas, Examiner at 726, *In re* Lehman Brothers Holdings Inc., No. 08-13555 (Bankr. S.D.N.Y. Mar. 11, 2010), ECF No. 7531.

[29] *See Lehman Brothers Collapse Stuns Global Markets,* CNN (Sep. 15, 2008), http://edition.cnn.com/2008/BUSINESS/09/15/lehman.merrill.stocks.turmoil/index.html [https://perma.cc/74KD-9U8S].

[30] *See* Fed. Deposit Ins. Corp., *supra* note 26; Diya Gullapalli et al., *Money Fund, Hurt by Debt Tied to Lehman, Breaks the Buck*, WALL ST. J. (Sept. 17, 2008), http://www.wsj.com/articles/SB122160102128644897 [https://perma.cc/H43M-USQM].

[31] *See* Gullapalli et al., *supra* note 30.

[32] *See id*.

[33] *See* Fed. Deposit Ins. Corp., *supra* note 26, at 3.

market crash, the September 15, 2008 filing of Lehman . . . was the analogous triggering event for the Great Recession."[34]

Lehman's bankruptcy also caused unprecedented chaos in the derivatives market.[35] When a corporation files for bankruptcy protection, an automatic stay ordinarily applies to prevent creditors from terminating contracts and seizing and selling the corporation's assets.[36] On the eve of Lehman's filing, however, its derivatives counterparties enjoyed a statutory exemption from the automatic stay.[37] In other words, when Lehman filed for bankruptcy, its counterparties to the more than 6,000 contracts that underlay its more than 900,000 derivatives positions could suddenly force termination.[38] Most counterparties rushed to do so, but termination proved very difficult in practice.[39]

Because there are no published prices for the "over-the-counter" derivatives that comprised most of Lehman's book, reference had to be made to the terms of each contract to determine who owed whom and how much.[40] Like any contract allocating a large sum of money, terms were fiercely disputed.[41] In one instance, Lehman claimed that its counterparty owed $484 million, while the counterparty claimed that Lehman owed $217 million.[42] This $700 million difference in opinion spawned costly litigation that is still pending.[43] More trouble

[34] Thomas W. Merrill & Margaret L. Merrill, *Dodd-Frank Orderly Liquidation Authority: Too Big for the Constitution?*, 163 U. PA. L. REV. 165, 167 (2014).
[35] *See* WIGGINS & METRICK, *supra* note 24, at 15.
[36] 11 U.S.C. § 362(a) (2012).
[37] *See* David A. Skeel, Jr. & Thomas H. Jackson, *Transaction Consistency and the New Finance in Bankruptcy*, 112 COLUM. L. REV. 152, 158–62 (2012).
[38] LBHI's filing under Chapter 11 constituted a default "under most, if not all," of its subsidiaries' derivative contracts. *See* WIGGINS & METRICK, *supra* note 24, at 6.
[39] Most counterparties first sought to novate their derivatives contracts with Lehman so as to leave their risk exposures unchanged. Where this was not possible, counterparties terminated the contracts. *See* WIGGINS & METRICK, *supra* note 24, at 2.
[40] *See* WIGGINS & METRICK, *supra* note 24, at 6–12.
[41] *See id.* at 9–11.
[42] *See id.* at 10.
[43] *See* John Thompson & Alex Lurie, *Lehman-JPMorgan Settlement Still Leaves Much Unresolved*, LEXOLOGY (Jan. 29, 2016), http://www.lexology.com/library/detail.aspx?g=792f506b-1806-4e5e-81c8-613be62d4434

stemmed from the practical difficulties of getting collateral returned.[44] Common practice at the time of Lehman's bankruptcy was for a holder of collateral to re-pledge the collateral in different transactions with different counterparties.[45] Termed "rehypothecation" in the argot of finance, this practice is generally efficient when markets are functioning normally.[46] In crisis mode, however, counterparties were demanding assets that were missing or located in accounts now frozen because of Lehman's bankruptcy filing.[47]

Witnessing the systemic fallout from its decision to deny Lehman funding,[48] the Federal Reserve changed course overnight and decided to rescue the faltering AIG on September 16.[49] Just one day earlier, amid the panic from Lehman, Standard & Poor's had downgraded AIG's credit rating.[50] This triggered a requirement that AIG post an additional $8.6 billion in collateral with various counterparties, an amount it did not have and apparently could not raise.[51] With the insurer nearing collapse, the Federal Reserve Bank

---

[https://perma.cc/XMS7-HB7T].

[44] *See* WIGGINS & METRICK, *supra* note 24, at 9 ("Efforts to agree to termination values were complicated by duplicate and inflated claims and the corporate complexity of the Lehman organization, which made identifying trades, locating collateral held by Lehman, and verifying customer records a challenge.").

[45] *See* Manmohan Singh & James Aitken, *Deleveraging After Lehman—Evidence from Reduced Rehypothecation* 3 (Int'l Monetary Fund, Working Paper 09/42, 2009), https://www.imf.org/external/pubs/ft/wp/2009/wp0942.pdf [https://perma.cc/W9HE-A3X8].

[46] *See id.*

[47] *See id*.

[48] Senior U.S. officials contend they did not deny Lehman assistance in their discretion, but rather that they lacked the necessary authority. *See* Posner, *supra* note 27, at 16–17.

[49] *See* Matthew Karnitschnig et al., *U.S. to Take Over AIG in $85 Billion Bailout; Central Banks Inject Cash as Credit Dries Up*, WALL ST. J. (Sep. 16, 2008), http://www.wsj.com/articles/SB122156561931242905 [https://perma.cc/T4R5-UGR7].

[50] *S&P Downgrades AIG Citing 'Reduced Flexibility'*, WALL ST. J.: CRISIS ON WALL ST. (Sep. 15, 2008, 9:35 PM), http://blogs.wsj.com/wallstreetcrisis/2008/09/15/sp-downgrades-aig-citing-reduced-flexibility/ [https://perma.cc/QX6Q-2TDP].

[51] *See* Robert McDonald & Anna Paulson, *AIG in Hindsight* 22 (Fed. Reserve Bank of Chi., Working Paper 2014-07, 2014), https://www.chicagofed.org/publications/working-papers/2014/wp-07 [https://perma.cc/783D-MQLU].

of New York and Treasury Department structured an $85 billion loan to AIG in exchange for a 79.9 percent equity stake in the company and an interest rate of LIBOR plus 8.5 percent.[52] This was regarded at the time as sensible policy that would prevent further deterioration in the financial markets and the economy.[53] Yet the loan was legally suspect.[54] The Federal Reserve did not clearly possess authority to purchase assets (except for purchases in connection with open-market operations) or take an equity interest in exchange for a loan.[55] Government officials evaded these limitations by channeling funds through Special Purpose Vehicles, which received nonrecourse loans to purchase AIG's assets, and placing the equity stake in a trust for benefit of the Treasury Department.[56] This elevation of form over substance was largely overlooked at the time, but the Court of Federal Claims would later hold it illegal.[57]

Federal Reserve Board (FRB) Chairman Ben Bernanke and Treasury Secretary Hank Paulson approached Congress shortly after the AIG rescue to ask for additional authorities and funding, anticipating that more public support for faltering institutions would be needed.[58] Congress responded on October 3, 2008 by passing the Emergency Economic Stabilization Act (EESA), which President George W. Bush signed into law the same day.[59] The core of EESA was the Troubled Asset Relief Program (TARP), through which Congress authorized the Secretary to spend up to $700 billion to "purchase . . . troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary, and in accordance with this Act and the policies and procedures developed and published by

---

[52] LIBOR is the London Interbank Offered Rate, a benchmark rate for short-term loans around the world. *See Actions Related to AIG*, FED. RES. BANK N.Y., https://www.newyorkfed.org/aboutthefed/aig [https://perma.cc/4FVL-N5V9].

[53] *See id.*

[54] *See* Posner, *supra* note 27, at 10–18.

[55] *Id.*

[56] *See id.*

[57] *See* Starr Int'l Co. v. United States, 121 Fed. Cl. 428, 466 (2015).

[58] *See Bernanke, Paulson: Congress Must Act Now*, NBC NEWS (Sep. 23, 2008), http://www.nbcnews.com/id/26850571/ns/business-stocks_and_economy/t/bernanke-paulson-congress-must-act-now/ [https://perma.cc/WB38-2JUX].

[59] Emergency Economic Stabilization Act, Pub. L. No. 110-343, 122 Stat. 3765 (2008).

the Secretary."[60] That a Congress firmly under Democratic control would confer upon the Bush Administration virtually unfettered discretion to spend $700 billion attests to the widespread belief at the time that bankruptcy would be a disastrous way to manage another Lehman-like failure.[61] Yet it was equally apparent that bailouts were not a sustainable alternative—at least not politically.[62] The thought of Congress resuscitating financial institutions with taxpayer money while taxpayers themselves lost jobs and retirement savings provoked a backlash across the political spectrum.[63] Reform after the November 2008 election was inevitable.

2. "A Sweeping Overhaul"

President Barack Obama first sketched a blueprint for financial regulatory reform in a June 2009 speech at the White House and accompanying whitepaper.[64] Perhaps the central theme of the speech was that the federal government had failed to adequately oversee risk-taking in the financial sector for too long, and as risk-taking scaled to unprecedented levels, one firm's failure came to undermine the entire economy.[65] Accordingly, the Obama Administration was proposing "a sweeping overhaul of the financial regulatory system, a transformation on a scale not seen since the reforms that followed the Great Depression."[66] The most prominent features of the proposal included the consolidation of regulatory agencies to promote more centralized

---

[60] *Id*. at 3767.

[61] *See, e.g.*, David M. Herszenhorn, *Bailout Plan Wins Approval; Democrats Vow Tighter Rules*, N.Y. TIMES (Oct. 3, 2008), http://www.nytimes.com/2008/10/04/business/economy/04bailout.html [https://perma.cc/8JFX-79Z7].

[62] *See* Jonathan Yip, *The Bank Bailout in Perspective*, HARV. POL. REV. (Oct. 24, 2011), http://harvardpolitics.com/arusa/the-bank-bailout-in-perspective/ [https://perma.cc/ZUT4-ASRT].

[63] *See id*.

[64] *See* President Barack Obama, Address on Financial Regulatory Reform (June 17, 2009), https://obamawhitehouse.archives.gov/the-press-office/remarks-president-wall-street-reform-1 [https://perma.cc/JT85-J4TL]; U.S. TREASURY DEP'T, A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION (2009), http://online.wsj.com/public/resources/documents/finregfinal06172009.pdf [https://perma.cc/LL8S-42CL].

[65] *See* Obama, *supra* note 63 ("An absence of oversight engendered systematic, and systemic, abuse.").

[66] *Id*.

oversight, and the establishment of a new resolution authority that would permit the federal government to unwind nonbank financial institutions whose failure posed a threat to economic stability.[67] A lesser-noticed feature, and a novel one, was to require large and systemically important financial institutions to submit "Rapid Resolution Plans."[68] The whitepaper offered little guidance about what these might entail but suggested that they "would create incentives for the firm to better monitor and simplify its organizational structure and would better prepare the government, as well as the firm's investors, creditors, and counterparties, in the event that the firm collapsed."[69]

Congress largely endorsed the Obama Administration's vision for reform in passing Dodd-Frank in July 2010.[70] According to its preamble, Dodd-Frank aims "[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail', [and] to protect the American taxpayer by ending bailouts . . . ."[71] A comprehensive overview of Dodd-Frank is beyond the scope of this article, but it is worth surveying some of its major provisions, found primarily in Title I and Title II.

Title I creates the Financial Stability Oversight Council (FSOC), a regulatory body comprised of senior officials from various agencies.[72] The FSOC is charged with

> identify[ing] risks to the financial stability of the United States that could arise from the material financial distress or failure, or ongoing activities, of large, in-

[67] *See* U.S. TREASURY DEP'T, *supra* note 64, at 10.
[68] *See id.* at 25. "Rapid Resolution Plans" were not mentioned in media summaries of the whitepaper's proposed reforms. *See, e.g.*, *Obama's Financial Reform Plan: The Condensed Version*, WALL ST. J.: WASH. WIRE (June 17, 2009), http://blogs.wsj.com/washwire/2009/06/17/obamas-financial-reform-plan-the-condensed-version/ [https://perma.cc/M4DQ-FGAM].
[69] U.S. TREASURY DEP'T, *supra* note 64, at 25.
[70] Dodd-Frank Wall Street Reform and Consumer Protection Act, P.L. 111-203, 124 Stat. 1376 (2010). President Obama remarked that Dodd-Frank included "90 percent of what I proposed when I took up this fight." President Barack Obama, Remarks on Wall Street Reform (June 25, 2010), https://obamawhitehouse.archives.gov/the-press-office/remarks-president-wall-street-reform-1 [http://perma.cc/8C98-T9CW].
[71] Preamble to the Dodd-Frank Wall Street Reform and Consumer Protection Act, P.L. 111-203, 124 Stat. 1376 (2010).
[72] 12 U.S.C. § 5321(a)–(b) (2012).

> terconnected [financial institutions] . . . , promot[ing] market discipline, by eliminating expectations on the part of shareholders, creditors, and counterparties of such companies that the Government will shield them from losses in the event of failure . . . , and respond[ing] to emerging threats to the stability of the United States financial system.[73]

Title I also imposes more stringent prudential regulations on large bank holding companies and nonbank financial institutions designated systemically important by a two-thirds vote of FSOC members.[74] In deciding to designate a nonbank financial institution systemically important, the FSOC is instructed to consider eleven factors, spanning from "the extent and nature of the off-balance-sheet exposures of the company" to "the importance of the company as a source of credit for low-income, minority, or underserved communities," as well as "any other risk-related factors that the Council deems appropriate."[75]

Title II recognizes that insolvency is inevitable for some firms despite more stringent regulations, and therefore it aims to mitigate the fallout from insolvency while avoiding bailouts.[76] To that end, Title II vests the Federal Deposit Insurance Corporation (FDIC) with new powers to resolve a bank or nonbank financial institution if its failure poses "a significant risk to the financial stability of the United States."[77] This insolvency regime, termed the Orderly Liquidation Authority (OLA),[78] is plainly intended to avoid another Lehman-like bankruptcy: soon after Title II took effect, the FDIC released a report documenting how it would have used OLA to resolve Lehman had OLA existed in September 2008.[79] Under OLA, the FDIC assumes control of a failing institution after an abbreviated administrative proceeding and then acts as receiver to liquidate the institution within five years.[80] Public funds are available to pay creditors of the

---

[73] § 5322(a)(1).

[74] § 5322(a).

[75] § 5323(a)(2). The breadth of these factors led to the litigation discussed *infra* Part IV.A.

[76] §§ 5384–85.

[77] § 5384.

[78] § 5381.

[79] *See* Fed. Deposit Ins. Corp., *supra* note 26.

[80] *See* §§ 5383–85; § 5390 (h)(12). For an argument that the administrative

liquidated firm in the FDIC's discretion, but the ultimate cost is to be covered through asset sales and, if necessary, risk-based assessments on surviving financial institutions.[81] Title II insists that "creditors and shareholders will bear the losses of the financial company,"[82] and the FDIC is directed to exercise OLA authorities "in a manner that . . . minimizes moral hazard."[83]

Central to the effectiveness of the reforms in Title I and Title II is Section 165(d), the living will regime. The statutory text and associated rulemaking that comprise the living will regime are discussed in the following section.

B. Enactment

1. Section 165(d)

Section 165(d) of Dodd-Frank mandates that bank holding companies with more than $50 billion in assets and systemically important nonbank financial institutions submit living wills to the FRB, FSOC, and FDIC explaining how they could be resolved in an orderly fashion "in the event of material financial distress or failure."[84] The statute requires that living wills include detailed information about a firm's insured depository affiliates, corporate structure, financial statements, major counterparties, collateral obligations, as well as any other information jointly requested by the FRB and FDIC by rule or order.[85]

Section 165(d) specifies that the FRB and FDIC are to review each firm's living will periodically and vests the agencies with significant enforcement authority.[86] If the FRB and FDIC jointly determine that a living will is "not credible," they must alert the firm of any deficiencies, and the firm must resubmit its living will within a specified time showing that the deficiencies have been addressed.[87] If the firm fails to resubmit a credible plan, then the FRB and FDIC

---

proceeding leading to OLA receivership is unconstitutional, see Merrill & Merrill, *supra* note 34.

[81] § 5384(d).

[82] § 5384(a)(1).

[83] § 5384(a).

[84] § 5365(d)(1).

[85] § 5365(d)(1)(A)–(D).

[86] § 5365(d)(3).

[87] § 5365(d)(4).

"may jointly impose more stringent capital, leverage, or liquidity requirements, or restrictions on the growth, activities, or operations of the company, or any subsidiary thereof, until such time as the company resubmits a plan that remedies the deficiencies."[88] If a firm fails to file a credible plan within two years of facing more stringent requirements or operational restrictions, then the FRB and FDIC may jointly require it "to divest certain assets or operations . . . to facilitate an orderly resolution . . . in the event of the failure."[89] In light of the far-reaching sanctions for non-compliance, it is noteworthy that "credible" goes undefined in the statute.[90]

Section 165(d) makes clear that living wills "shall not be binding on a bankruptcy court, a receiver appointed under [OLA], or any other authority that is authorized or required to resolve" a failing company.[91] And it concludes with a directive that the FRB and FDIC issue final rules to implement and administer the living will regime.[92]

2. Regulation QQ

Pursuant to Section 165(d)'s rulemaking directive, the FRB and FDIC jointly proposed Regulation QQ on April 22, 2011.[93] The agencies received twenty-two comment letters from individuals and trade groups in response.[94] Many commenters sought clarification about the criteria for determining if a living will is "credible."[95] Others expressed concern that Regulation QQ requires onerous and ultimately impractical scenarios planning.[96] After making "appropriate revisions,"[97] but without defining "credible" or conducting cost-benefit analysis,[98] the agencies jointly promulgated the final version of Regulation QQ on November 1, 2011.[99]

---

[88] § 5365(d)(5)(A).
[89] *Id.*
[90] *See id.*
[91] § 5365(d)(6).
[92] § 5365(d)(8).
[93] 12 C.F.R. §§ 243.1, 381.1 (2011).
[94] *See* Resolution Plans Required, 76 Fed. Reg. 67,323, 67,324 (Nov. 11, 2011) (to be codified at 12 C.F.R. § 381).
[95] *Id*. at 67,325.
[96] *See id*. at 67,325.
[97] *Id*. at 67,326.
[98] *See id.* at 67,325.
[99] *Id.* at 67,323.

In its final form, Regulation QQ requires that living wills detail how a "covered company" could be reorganized or liquidated within a "reasonable period of time and 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."[100] Each living will must include an executive summary, a strategic analysis of the plan for reorganization or liquidation, a description of the covered company's corporate governance structure for resolution planning, information regarding management information systems, a description of interconnections and interdependencies among the covered company and its material entities, and supervisory and regulatory information.[101] If this seems incomprehensibly comprehensive, it should. The complete, confidential versions of living wills are said to run tens of thousands of pages,[102] forcing regulators to comb through them with a word-search function.[103] The public versions are shorter—typically fifteen to thirty pages—but abstract and abstruse.[104]

To elude the temptation to plan with rosy assumptions, Regulation QQ requires that living wills incorporate "baseline, adverse and severely adverse economic conditions" that the FRB has postulated for conducting stress tests of financial institutions pursuant to Section 165(i) of Dodd-Frank.[105] In other words, living wills must be drafted to work credibly in three different scenarios, with each scenario presenting hypothetical measures of about thirty economic and financial variables on a quarterly basis stretching three years into to the future.[106] The one constant in all of this scenarios planning is

---

[100] 12 C.F.R. § 243.2(o) (2011).

[101] § 243.4.

[102] *See* Tracy & Scism, *supra* note 6.

[103] *See* Ryan Tracy & Victoria McGrane, *Big U.S. Banks Refile Living Wills After Regulatory Rebuke*, WALL ST. J. (July 6, 2015), https://www.wsj.com/articles/big-u-s-banks-refile-living-wills-after-regulatory-rebuke-1436212747 [http://perma.cc/M5UL-3FBT].

[104] *See Resolution Plans*, BOARD GOVERNORS FED. RES. SYS., http://www.federalreserve.gov/bankinforeg/resolution-plans.htm [http://perma.cc/H2DY-UAFV].

[105] § 243.4(a)(4)(i); 12 U.S.C. § 5365(i)(1)(B) (2012).

[106] Each scenario also has a narrative component. *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., SUPERVISORY SCENARIOS FOR ANNUAL STRESS TESTS REQUIRED UNDER THE DODD-FRANK ACT STRESS TESTING RULES AND THE CAPITAL PLAN RULE 3–21 (2016), https://www.federalreserve.gov/newsevents/press/bcreg/bcreg20160128a2.pdf [https://perma.cc/GX84-W69D].

that companies may not assume "provision of extraordinary support" from any government.[107]

Regulation QQ demands that covered companies file living wills with the FRB and FDIC annually.[108] Filings occur in waves, with the largest and systemically important companies required to submit first.[109] Regulation QQ also establishes timelines for agency review of living wills,[110] and it reiterates the graduated schedule of sanctions in Section 165(d).[111] In short, if the FRB and FDIC jointly determine that a company's living will is "not credible," or if the company fails to submit timely fixes, the agencies may impose heightened capital, liquidity, or leverage requirements.[112] Should the company still fail to submit a credible plan within two years, the agencies may order it to divest assets or cease operations as "necessary to facilitate an orderly resolution."[113]

C. Returns

Covered companies have now completed several rounds of annual filings, and public comments from regulators paint a negative picture of the returns so far.[114] The first indication that regulators were unsatisfied came in November 2012 when Federal Reserve Bank of New York President William Dudley said that the initial submissions "confirmed that we are a long way from the desired situation in which large complex firms could be allowed to go bankrupt without major disruptions to the financial system and large costs to society."[115] Dudley conceded that living wills offered regulators "a better understanding of the impediments to an orderly bankruptcy," and he assured that

---

[107] 12 C.F.R. § 243.4(a)(4)(ii).
[108] § 243.3(a)(3).
[109] *See* § 243.3(a)(1).
[110] § 243.5.
[111] § 243.6.
[112] § 243.6(a).
[113] § 243.6(c).
[114] *See Resolution Plans*, BOARD GOVERNORS FED. RES. SYS., http://www.federalreserve.gov/bankinforeg/resolution-plans.htm [http://perma.cc/H2DY-UAFV].
[115] William C. Dudley, President, Fed. Reserve Bank of N.Y., Remarks at the Clearing House's Second Annual Business Meeting and Conference (Nov. 15, 2012), https://www.newyorkfed.org/newsevents/speeches/2012/dud121115 [https://perma.cc/N2PH-SH8F]).

agency officials were "drafting feedback for firms to incorporate in their next submissions" due in July 2013.[116]

In August 2014, the FDIC announced that it had finished reviewing the July 2013 filings and decided to reject the living wills of eleven companies as "not credible."[117] The FDIC identified two deficiencies common to these living wills. First, the strategies for an orderly resolution or liquidation depended on "assumptions that [were] unrealistic or inadequately supported, such as assumptions about the likely behavior of customers, counterparties, investors, central clearing facilities, and regulators[.]"[118] Second, each living will failed "to make, or even to identify, the kinds of changes in firm structure and practices that would be necessary to enhance the prospects for orderly resolution."[119] The FDIC did not further explain these deficiencies or clarify its criteria for determining credibility, but it did note that the eleven firms would receive more detailed guidance in private correspondence.[120] The FRB announced in the same press release that it would refrain from rejecting any of the July 2013 living wills as "not credible," a crucial decision given that Regulation QQ requires a joint determination to take enforcement actions.[121] Still, the FRB announced it was expecting substantial improvements in the filings due July 2015, and it warned that any deficiencies at that point would likely trigger a "not credible" determination.[122]

In 2016, the other shoe dropped. First, in April, both the FRB and FDIC announced that they had determined the July 2015 filings of five companies were "not credible."[123] The companies—JPMorgan, Bank of America, Wells Fargo, State Street, and Bank of New York Mellon—were asked to file revised living wills by October that

---

[116] *See id.*

[117] Press Release, Fed. Deposit Ins. Corp., Agencies Provide Feedback on Second Round Resolution Plans of "First-Wave" Filers (Aug. 5, 2014), https://www.fdic.gov/news/news/press/2014/pr14067.html [https://perma.cc/E5X6-3X47].

[118] *Id*.

[119] *Id*.

[120] *See id.*

[121] *See id*.

[122] *See id.*

[123] Ryan Tracy, *Regulators Reject "Living Wills" of Five Big U.S. Banks*, WALL ST. J. (Apr. 13, 2016), http://www.wsj.com/articles/regulators-reject-living-wills-of-five-huge-u-s-banks-1460548801 [https://perma.cc/G47U-3JKC].

address the deficiencies or else face sanctions.[124] Two other companies received a split decision—the FDIC determined that Goldman Sachs Group's plan was "not credible," while the FRB determined the same with respect to Morgan Stanley.[125] These two companies were asked to make revisions by July 2017.[126] Only one company—Citigroup—escaped a "not credible" determination from both the FRB and FDIC.[127] Then, in December, both the FRB and FDIC announced that Wells Fargo's revised living will remained inadequate.[128] The agencies barred the bank from creating new international units or acquiring nonbank subsidiaries and demanded an improved plan by March 2017.[129]

Perhaps more important than the message the agencies delivered in 2016, though, was how they delivered that message. Rather than summarizing problems common to living wills, as they had done in prior years, the agencies publicly released the letters with detailed feedback that they had sent to each company.[130] Although redacted in parts, these letters deliver unprecedented insight into the content of living wills and illustrate the granular level at which regulators are reviewing them. For example, in their April 2016 letter to JPMorgan, the agencies criticized the company's model for estimating liquidity needs after a hypothetical bankruptcy filing because it only projected forward seven days and disregarded the possibility of foreign governments freezing funds held by subsidiaries.[131] The agencies also criticized JPMorgan for not analyzing how to unwind trading positions if major counterparties unexpectedly shunned the firm.[132] To drive home the point, what is most important about all of

---

[124] *See id*.

[125] *See id*.

[126] *See id*.

[127] *See id*.

[128] Ryan Tracy, *Wells Fargo Sanctioned by U.S. Regulators for "Living Will" Deficiencies,* WALL ST. J. (Dec. 13, 2016), http://www.wsj.com/articles/u-s-regulators-sanction-wells-fargo-declaring-living-will-deficiencies-1481664744 [https://perma.cc/2Y4L-3CD8].

[129] *See id*.

[130] *See, e.g.*, Letter from Board of Governors of the Fed. Res. and Fed. Deposit Ins. Corp. to James Dimon, Chairman, JPMorgan Chase & Co. (Apr. 12, 2016), http://www.federalreserve.gov/newsevents/press/bcreg/jpmorgan-chase-letter-20160413.pdf [https://perma.cc/YG3C-WNLP].

[131] *Id.* at 6–9.

[132] *Id.* at 14.

this information specific to JPMorgan's living will is that the agencies told us it is specific to JPMorgan's living will. For a regulatory scheme designed to be opaque, the public release of feedback letters marks a major step toward transparency.

III. Why Require Living Wills?

Part II examined how Lehman's bankruptcy and AIG's bailout served as aversive precedents that shaped post-crisis regulatory reform, including Dodd-Frank and its living will regime. But what exactly is the nexus between these aversive precedents and living wills? Part III addresses this question. The discussion first presents the standard theory for requiring living wills. Finding the standard justification for living wills somewhat lacking, however, the discussion pivots to consider other benefits that living wills plausibly yield. These benefits have been overlooked in the extant scholarly literature but undergird a pragmatic defense of living wills.

A. Standard Theory

It is somewhat misleading to speak of the standard theory for requiring living wills because there is no textbook rationale. Yet two intuitions do seem to underlie nearly every defense of the living will requirement. First is that it is necessary to correct a market failure.[133] Second is that it is about mitigating the TBTF problem.[134] This section examines each rationale in turn.

1. Correcting a Market Failure

The standard theory for requiring living starts with an assumption—the market systematically fails to generate an efficient supply of living wills or anything closely resembling living wills. To understand why this assumption might be true, consider that a living will is itself a commodity. Like any commodity, supply primarily depends on cost of production and market demand.[135] We have seen

---

[133] Of course, one might argue that this intuition underlies every regulation.

[134] *See, e.g.*, ARANTXA JARQUE & DAVID PRICE, FED. RESERVE BANK OF RICHMOND, LIVING WILLS: A TOOL FOR CURBING "TOO BIG TO FAIL" 11 (2014), https://www.richmondfed.org/-/media/richmondfedorg/publications/research/annual_report/2014/pdf/article.pdf [https://perma.cc/29RH-MG9Z].

[135] *Cf.* BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 6 (7th ed. 2011) ("Of course, information is itself a commodity, whose supply reflects

that living wills are costly to produce—they run tens of thousands of pages,[136] and firms like JPMorgan claim to allocate more than one thousand employees to the effort.[137] But we might expect demand for living wills to be strong. Creditors routinely pay for information about borrowers; that is the foundation of the credit rating industry.[138] And borrowers often disclose sensitive information voluntarily; doing so begets a lower cost of funding.[139] So why does the market not get things right when it comes to living wills?

One explanation is that the market fails to translate demand for living wills into a reduced cost of funding for firms that would supply living wills because many on the demand side are content to rely on explicit and implicit government guarantees.[140] Creditors who believe themselves effectively secured through deposit insurance or the prospect of TARP-like bailouts need not waste time sorting borrowers into high- and low-risk categories according to disclosures contained in living wills.[141] The difference between lending to a high- and low-risk borrower is diminished with these backstops in place.[142] Risk premiums consequently shrink, and without risk premiums, borrowers choose not to disclose more than what regulators demand because there is no reward.[143]

A second and related explanation for the market's failure to supply living wills is that it is lucrative for financial companies to acquire and preserve an aura of TBTF.[144] That aura is what informs the expectations of creditors and thus reduces the cost of funding.[145] Any company that publishes a sound living will potentially undermines its best argument for a bailout should its balance sheet deteriorate. Perhaps it is better to keep everyone believing one's demise will bring down

---

cost and demand.").

[136] *See* Tracy & Scism, *supra* note 6.

[137] *See* JPMORGAN CHASE & CO., *supra* note 16, at 4.

[138] *See, e.g.*, *The Credit Rating Controversy*, COUNCIL ON FOREIGN REL. (Feb. 19, 2015), http://www.cfr.org/financial-crises/credit-rating-controversy/p22328 [https://perma.cc/CG6N-NZLF].

[139] *See* Elena Petrova et al., *The Relationship Between Cost of Capital and Voluntary Disclosure*, 4 INT'L J. ECON. & FIN. 83, 84–86 (2012).

[140] *See* JARQUE & PRICE, *supra* note 134, at 11.

[141] *See id.* at 5.

[142] *See id.*

[143] *See id.*

[144] *See* Dudley, *supra* note 115.

[145] *See id.*

the economy, for that is what convinces regulators and legislators to endure the political costs of structuring a bailout.[146] Of course, this perverse incentive does not go away just because the government mandates living wills into existence. A cynical explanation of the "not credible" living will that Wells Fargo filed in December 2016 is that "not credible" is optimal from the company's perspective, as long regulators also forbear from onerous sanctions.[147]

A third explanation for the market failure's to generate living wills does not depend on moral hazard. Rather, it is a straightforward argument about negative externalities: the social cost of a financial company's insolvency is often greater than the private cost to the insolvent company and its stakeholders.[148] This is due to the integration of financial companies, financial markets, and the economy, which gives rise to so-called "financial contagion."[149] The effect of Lehman's failure on the money and derivatives markets best illustrates the concept of financial contagion and the social costs of insolvency.[150] The problem is that there is too weak an incentive for a company like Lehman to plan for how the rest of the world might deal with its demise.[151] From the company's perspective, once it is insolvent, it does not matter much what happens.[152] Regulation is therefore essential to get an efficient level of resolution planning.[153]

Finally, the market might fail to supply living wills without regulation because a credible living will embodies sensitive information that a company presumably does not want competitors to obtain.[154] This explanation could be recast as a collective-action problem. Perhaps companies would produce living wills to submit to regulators or sell to creditors if all parties could commit to confidentiality, and if it were relatively easy to detect the source of any leaks. But the transaction costs of such an arrangement are perhaps impossibly high,

---

[146] *See* JARQUE & PRICE, *supra* note 134, at 8.
[147] *See* Tracy, *supra* note 123.
[148] *See* Dudley, *supra* note 115.
[149] *See, e.g.*, *Financial Contagion in the Era of Globalized Banking*, ECON. DEP'T POL. NOTE NO. 14 3 (OECD, Paris, Fr.), June 2012, https://www.oecd.org/eco/monetary/50556019.pdf [https://perma.cc/WLT3-KARR].
[150] *See* Dudley, *supra* note 115.
[151] *See id*.
[152] *See id*.
[153] *Cf.* JARQUE & PRICE, *supra* note 134, at 11.
[154] *See* 12 U.S.C. §§ 5383–85 (2010).

and so we are stuck at a suboptimal equilibrium without living wills. One way off of that equilibrium is through regulation that compels living wills into existence and assures confidentiality. In effect, the regulation substitutes for cooperation.

2. Mitigating TBTF

If the first part of the standard theory focuses on why it might be wise to *require* living wills, this second part focuses on why it might be wise to require *living wills*. Put differently, this second part focuses on what it is that living wills uniquely offer from a standpoint of prudential regulation. There are two points to make here, though they could be summarized as the singular claim that a living will requirement mitigates TBTF.

The first reason a living will requirement is thought to mitigate TBTF is that, after several rounds of filings and feedback, regulators could have on their shelves a set of actionable plans for resolving a failed financial institution in an orderly fashion. The preamble to Dodd-Frank,[155] as well as the text of Section 165(d) and Regulation QQ,[156] anticipates this outcome. Yet this outcome seems utterly implausible, not least because it is contrary to the returns of the living will regime thus far. And irrespective of plausibility, it is just too facile to merit further discussion.

The second, more interesting reason a living will requirement is thought to mitigate TBTF focuses on how living wills might help regulators credibly commit not to rescue failing firms. Convincing the market that there will be no bailouts is itself a worthy objective insofar as it would reduce the moral hazard discussed in the previous subsection. Economists call the problem of believability that regulators have in this respect a "dynamic inconsistency" problem.[157] The idea

---

[155] *See* Preamble to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, P.L. 111-203, 124 Stat. 1376 (2010) (stating that the Act is intended "[t]o promote financial stability . . . end 'too big to fail' . . . [and] protect the American taxpayer by ending bailouts.").

[156] *See supra* Part II.B.2.

[157] A canonical exposition is found in Finn E. Kydland & Edward C. Prescott, *Rules Rather than Discretion: The Inconsistency of Optimal Plans*, 85 J. POL. ECON. 473 (1977). For an explanation of the problem as it manifests in the context of bailouts, see JARQUE & PRICE, *supra* note 134, at 6–7 ("What makes living wills an especially powerful tool is that they can assist policymakers in establishing credibility—in particular, a credible commitment not to res-

is simple: preferences of regulators, like those of any individual, can change between T_o and T_1.[158] This is not always problematic, of course. Sometimes regulators err in their forecast of conditions at T_1, so an updating of preferences makes sense. But for regulators trying to shape behavior at T_o where that behavior depends on expectations of policy at T_1, the risk is that a promise of "no bailouts" rings hollow.[159] What regulators need, therefore, is some device that bolsters the credibility of the promise, so that the promise becomes the market's best forecast of actual policy at T_1.[160] Living wills conceivably work as such a device. The very act of demanding plans for an orderly resolution under the bankruptcy laws might credibly signal to companies that regulators will not spare them from a bankruptcy filing.[161]

The fundamental problem with this idea—and more broadly, with the standard theory of living wills mitigating TBTF—is that the law continues to provide legal authority for regulators to save struggling firms. For example, the Federal Reserve continues to possess broad authority to make emergency loans under Section 13(3) of the Federal Reserve Act.[162] The FDIC has newfound authority under Dodd-Frank's OLA to seize a failing company and borrow from the Treasury to pay off the company's creditors.[163] And Congress can always enact another TARP-like program. It is a stretch to think a living will requirement somehow cabins this lawful discretion that regulators and legislators continue to possess. In fact, there is empirical support for the proposition that living wills have had little effect on expectations of governmental assistance.[164] According to one study of credit spreads of the largest and most systemically important financial

---

cue.").

[158] *See* Kydland & Prescott, *supra* note 157, at 475–76.

[159] *See id.*

[160] *See* JARQUE & PRICE, *supra* note 134, at 6 (stating that "policymakers can sometimes best serve financial stability by tying themselves to the mast," in reference to Odysseus).

[161] *See id.*

[162] *See* 12 U.S.C. § 343 (2012).

[163] §§ 5384–85.

[164] *See, e.g.,* Viral V. Acharya et al., The End of Market Discipline? Investor Expectations of Implicit Government Guarantees 26–30 (May 1, 2015) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1961656 [https://perma.cc/3Z9L-2TW3].

institutions, there is virtually no difference in the market's expectations of a government backstop before and after Dodd-Frank.[165]

B. Other Plausible Benefits

If the living will requirement does not mitigate the TBTF problem, what good does it do? That is the focus of this section. Four plausible benefits are identified. Together they offer a defense of Dodd-Frank's living will regime as a pragmatic feature of post-crisis regulatory reform.

1. Enhancing Disclosure and Communication

Perhaps the essential benefit of the living will regime, at least from a regulatory perspective, is its information-forcing quality.[166] Officials at the FRB and FDIC probably possess more detailed information about the operations and vulnerabilities of complex financial institutions than ever before. Moreover, officials are probably better armed to demand additional information from these institutions related to nearly any issue of regulatory interest than ever before. Indeed, one might perceive the FDIC's determination that many July 2014 plans were not credible in concert with the FRB's more patient disposition as a kind of "good cop, bad cop" routine intended to capitalize on their authority to compel further disclosures.[167] In an ideal world, demands for additional information would be met and transparency into some of the economy's most critical firms enhanced. Perhaps more realistically, such demands result in give-and-take between regulators and institutions that leaves each more aware of the other's interests and concerns.[168] Either way, the chances of FRB and FDIC officials following a sound course of action before and during the next financial crisis seem improved.[169]

---

[165] *See id.*
[166] *See* Baradaran, *supra* note 17, at 1307.
[167] *See supra* Part II.C. To make the analogy explicit, the FDIC could be seen as playing "bad cop" in signaling readiness to use enforcement authorities, while the FRB is playing "good cop" in signaling patience that is running thin.
[168] *See* Dudley, *supra* note 115.
[169] *See* Posner, *supra* note 27, at 29.

Some might object that this exaggerates the scope of information that regulators gain from living wills. To illustrate, consider the views of a former Lehman executive, Kimberly Summe. Summe has posited that it is a popular misconception that regulators lacked adequate information about Lehman's financial condition before it filed for bankruptcy.[170] She cites the bankruptcy examiner's report as being "explicit that regulatory agencies sat on mountains of data but took no action to regulate [Lehman's] conduct" prior to its collapse.[171] She also states that "[n]o regulator ever suggested that senior officials with [Lehman] failed to provide any requested information."[172] One cannot doubt that Summe is correct when she writes that regulators had extensive data about Lehman and broad authority to request more.[173] But that still leaves room to doubt whether regulators had actionable information, or whether they possessed insight about what further information to request to formulate effective policy. If nothing more, regulators equipped with living wills may be better positioned to mine data that they have already collected and know what else to collect.

2. Regulating with Big Data

Another plausible benefit of the living will regime, derivative of its information-forcing quality, is that it could ultimately assist regulators in tailoring capital requirements and other prudential rules to the vulnerabilities of particular institutions.[174] For example, limits on an institution's overnight funding from repurchase agreements could be imposed and calibrated according to changes in the market value of its assets, or limits on an institution's exposure to a second institution could be imposed and calibrated according to changes in the market value of that second institution's assets. This would happen as computers at regulatory agencies mined data derived from

---

[170] Kimberly Summe, *Misconceptions About Lehman's Bankruptcy*, STAN. L. REV. ONLINE (Nov. 28, 2011), http://www.stanfordlawreview.org/online/misconceptions-about-lehman-brothers-bankruptcy [https://perma.cc/5FXJ-VV46].

[171] *Id*.

[172] *Id*.

[173] *See id.*

[174] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-195, FINANCIAL REGULATORY REFORM: REGULATORS HAVE FACED CHALLENGES FINALIZING KEY REFORMS AND UNADDRESSED AREAS POSE POTENTIAL RISKS 14 (2013).

living wills and other disclosures, generating alerts when a worrisome development is identified. To be clear, the potential upside here is generating smarter regulation, not simply more regulation.

Something approximating this Big Data approach to oversight was proposed in February 2009 by the Squam Lake Working Group on Financial Reform, a non-partisan cohort of fifteen prominent academics that was organized as the financial crisis deepened in late 2008.[175] The idea of regulating by way of data mining and predictive analytics may sound farfetched, but it is not. One market analyst has estimated that the world's financial institutions collectively generate enough data each hour to fill One World Trade Center a hundred times over, but that it would cost only about $150 million annually to store it all, a modest sum relative to spending on information technology in the industry.[176] Thus, "the obstacles to accessing the data that regulators might need are now political rather than technical."[177] It should be apparent at this point that Dodd-Frank's living will regime largely cuts away at these political obstacles; massive, recurring disclosure of sensitive information has become part of the game for the world's largest financial institutions.[178] The bigger challenge now is figuring out how to mine the information to promote financial stability. Complexity alone should not drive us away from the possibility.

---

[175] *See* Squam Lake Working Grp. on Financial Regulation, A New Information Infrastructure for Financial Markets (Council on Foreign Relations, Working Paper, 2009), http://www.cfr.org/content/publications/attachments/Squam_Lake_Working_Paper1.pdf [https://perma.cc/Q54W-Q9EP]. Of course, financial regulation is not the only legal field in which Big Data might be exploited. For a discussion of its potential in fields such as consumer contracts, medical malpractice, and labor law, see Ariel Porat & Lior J. Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 112 Mich. L. Rev. 1417 (2014).

[176] Barrie Wilkinson, OliverWyman, Big Data for Financial Regulators 2 (2014), http://www.oliverwyman.com/content/dam/oliver-wyman/global/en/2014/dec/RJ2014%2001_Big%20Data_Ipad.pdf [https://perma.cc/R4UP-ZZBM].

[177] *Id*.

[178] Congress would also need to confer financial agencies with the discretion to impose bespoke regulations, of course. Such authority arguably exists currently for institutions designated "systemically important" under Section 113(a) of Dodd-Frank. *See* 12 U.S.C. § 5365(b)(1)(B)(iv) (2010).

3. Improving Visibility and Accountability

Skeptics of regulation generally, and the type of "regulation by deal"[179] that characterized the government's response to the last crisis in particular, will not overlook the fact that the benefits defined above accrue largely to regulators and presume an objectivity and effectiveness in regulators' work. While this may be true, there is a third benefit of the living will regime that such skeptics especially should appreciate—living wills offer an *ex ante* baseline against which to compare the decisions of regulators *ex post*, particularly decisions about how to allocate losses when a firm has failed. An example might make this idea clearer.

Suppose that Bank of America files a living will that the FRB and FDIC accept as credible. Suppose further that Bank of America later becomes insolvent, jolting the financial system and economy. And finally suppose that regulators coping with this crisis decide to deviate significantly from the course that Bank of America had charted in its living will—a course that the FRB and FDIC had endorsed. It will be immediately apparent to Bank of America officials that an *ad hoc* resolution was pursued. Questions would be posed to regulators about why they chose what they did. Regulators may have compelling reasons, including that the plan worked fine in theory but not in practice. Or there may be less compelling reasons—perhaps a public choice story about a politically influential group that was facing major losses, or regulatory capture. The point is not that Bank of America's living will confined the range of action available to regulators. To the contrary, Section 165(d) makes clear that living wills "shall not be binding on a bankruptcy court, a receiver appointed under [Title II's OLA], or any other authority that is authorized or required to resolve [a failing company]."[180] Rather, the point is that Bank of America's living will offered a frame of reference that improved visibility into the government's response. And visibility should yield accountability.

Staying within the bounds of the hypothetical, skeptics might respond that visibility and accountability remain poor because third parties neither participate in drafting Bank of America's living will

[179] I borrow the phrase from Steven M. Davidoff Solomon & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463 (2009).
[180] § 5365(d)(6).

nor are able to study it.[181] This argument has purchase in light of the paucity of details available in the public sections of most living wills. But it is not a fatal critique, and its implication is not the dismantlement of the living will regime. Better than repealing Section 165(d) and Regulation QQ would be amending them to include a requirement that the government explain any deviation from a living will that the FRB and FDIC previously endorsed. Alternatively, an amendment could prescribe that any institution's living will must be released in its entirety within a year of liquidation or reorganization.

4. Nudging Corporate Executives

A fourth plausible benefit of the living will regime is that simply maintaining compliance should tend to improve the decisions of corporate executives.[182] What is contemplated here is not just the evident possibility that an executive, having reviewed his institution's living will, might decide to rationalize corporate structure or substitute toward a more stable source of funding. These would be desirable, but they are not insights uniquely gleaned from a living will. Instead, what is contemplated is a more subtle effect on the executive's disposition and decisions from reviewing a plan for managing the firm's demise.

Hypothesizing and then strategizing about worst-case scenarios should militate against well-understood cognitive biases toward overconfidence and uncritical optimism that pervade corporate culture.[183] Daniel Kahneman and Gary Klein have endorsed this

[181] *See* Abby H. McCloskey & Paul H. Kupiec, *Why the Living Will Process Sets Banks Up for Failure*, AM. BANKER (Aug. 11, 2014), https://www.americanbanker.com/opinion/why-the-living-will-process-sets-banks-up-for-failure [https://perma.cc/CS5K-K46M].

[182] *See* Steve Culp, *"Living Will" Regulatory Initiatives Can Help Banks Plan for Growth*, FORBES (Apr. 20, 2012), http://www.forbes.com/sites/steveculp/2012/04/20/living-will-regulatory-initiatives-can-help-banks-plan-for-growth/#4841f4f45478 [https://perma.cc/T4C2-QK23].

[183] *See* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 255–65 (2011); Steven L. Schwarcz, *Regulating Shadows: Financial Regulation and Responsibility Failure*, 70 WASH. & LEE L. REV. 1781, 1821 (2013) ("[The living will requirement] addresses the bounded rationality problem of information failure because it forces the firm's managers to think through and more clearly confront the reality of the firm's possible failure."). *See generally* Vincent DiLorenzo, *Corporate Wrongdoings: Interactions of Legal Mandates and Corporate Culture*, 35 REV. BANKING & FIN. L. 207 (2016) (discussing the interplay of corporate culture and regulatory enforcement in the United States

sort of "premortem" exercise as a partial remedy for these biases.[184] Kahneman describes the exercise as follows:

> The procedure is simple: when the organization has almost come to an important decision but has not formally committed itself, . . . gather[ ] for a brief session a group of individuals who are knowledgeable about the decision. The premise of the session is a short speech: "Imagine that we are a year into the future. We implemented the plan as it now exists. The outcome was a disaster. Please take 5 to 10 minutes to write a brief history of that disaster."[185]

There is a close and interesting analogy between the premortem exercises that Kahneman and Klein prescribe and the living wills that Dodd-Frank demands. The analogy is even more interesting if one recalls regulators' complaints about firms planning too optimistically in the July 2014 living wills, and the assumptions that Regulation QQ requires firms to use. For example, all living wills must incorporate "baseline, adverse, and severely adverse economic conditions" that the FRB has postulated.[186] More importantly, companies may not assume "provision of extraordinary support by the United States or any other government" to either the company or its subsidiaries in the event of failure.[187] Perhaps the assumption of no bailouts lacks credibility among executives at systemically important financial institutions, but Kahneman and Klein suggest that mandatory, sober contemplation of a world without bailouts would invite doubts about the certainty of a world with bailouts. Less certainty about bailouts, on the margin, should entail less risky behavior predicated on the calculus of private gains and social losses. And that would be a considerable benefit from basically a nudge.[188]

---

and United Kingdom).

[184] KAHNEMAN, *supra* note 183.

[185] *Id.* at 257.

[186] *See* 12 C.F.R. § 243.4(a)(4)(i).

[187] § 243.4(a)(4)(ii).

[188] *See generally* RICHARD THALER & CASS SUNSTEIN, NUDGE (2008) (explaining how a change to the manner in which individuals are presented with choices—"choice architecture"—impacts the choices made).

IV. Some Suggested Reforms

Part III developed a defense of Dodd-Frank's living will regime as a pragmatic feature of post-crisis regulatory reform. But to demonstrate that the living will regime is sound policy is not to disprove any need for reform. Part IV proposes two specific reforms. The decision of the U.S. District Court for the District of Columbia in March 2016 in *MetLife, Inc. v. Financial Stability Oversight Council* is discussed first because it informs the proposals that follow.[189] Indeed, *MetLife* instructs that these reforms may be necessary if the living will regime is to withstand foreseeable litigation or repeal.[190]

A. Impetus for Reform: *MetLife v. FSOC*

MetLife has its origins in Section 113 of Dodd-Frank,[191] the provision briefly discussed in Part II of this article that authorizes the FSOC to designate certain nonbank financial institutions as "systemically important."[192] Designation as a systemically important financial institution (SIFI) brings with it more stringent prudential regulations and more vigorous oversight.[193] To designate a company as a SIFI, Section 113 provides that the FSOC must determine by a two-thirds vote that "material financial distress" at the company "could pose a threat to the financial stability of the United States."[194] To determine if material financial distress "could pose a threat to the financial stability of the United States," Section 113 instructs the FSOC to consider eleven factors, spanning from "the extent and nature of the off-balance-sheet exposures of the company" to "the importance of the company as a source of credit for low-income, minority, or underserved communities," as well as "any other risk-related factors that [the FSOC] deems appropriate."[195]

---

[189] *See generally* MetLife, Inc. v. Fin. Stability Oversight Council, 177 F. Supp. 3d 219 (D.D.C. 2016).
[190] *See id*. at 242.
[191] *See id.* at 229; 12 U.S.C. § 5323.
[192] § 5323(a); *see* discussion *supra* Part II.B.2.
[193] *See* § 5365(b)(1)(A)–(B).
[194] § 5323(a)(1). Another criterion for designating a SIFI, not relevant in *MetLife*, is if the "nature, scope, size, scale, concentration, [or] interconnectedness" of the company's activities "could pose a threat to the financial stability of the United States." *See id.*
[195] § 5323(a)(1)–(2).

In December 2014, the FSOC voted 9-1 to designate MetLife, an insurance company, as a SIFI.[196] The FSOC notified MetLife that the designation followed from four conclusions.[197] First, MetLife's counterparties could suffer significant losses if MetLife experienced material financial distress.[198] Second, material financial distress might prompt MetLife to liquidate assets quickly, thereby disrupting global capital markets.[199] Third, standard regulatory tools were likely inadequate to protect against either of these occurrences.[200] Fourth, the FSOC was concerned that MetLife's complexity would hinder its orderly resolution in case of insolvency.[201] In January 2015, MetLife filed a complaint in the U.S. District Court for the District of Columbia[202] challenging the FSOC's designation as a violation of the Administrative Procedure Act (APA).[203] More specifically, MetLife challenged the designation as "arbitrary and capricious" within the meaning of APA Section 706, which permits a reviewing court to vacate "agency action, findings, and conclusions" deemed "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[204]

In March 2016, the district court ruled in favor of MetLife, concluding that the FSOC's designation was indeed arbitrary and capricious.[205] The court's opinion pointed to several failings of the

[196] *MetLife*, 177 F. Supp. 3d at 229. Interestingly, the lone vote against the designation belonged to S. Roy Woodall, the only voting member with a professional background in the insurance industry. *See* Victoria McGrane & Leslie Scism, *MetLife Vote Wasn't Unanimous,* WALL ST. J. (Dec. 19, 2014), http://www.wsj.com/articles/risk-council-voted-9-1-to-designate-metlife-systemic-1418997624 [https://perma.cc/5WAD-ERH5]. MetLife cited Woodall's dissent as a favorable fact in its complaint. *See* Plaintiff's Complaint at 2, Metlife, Inc. v. Fin. Stability Oversight Council, No. 15-45, 2015 WL 4064567 (D.D.C. Jan. 13, 2015). It might also represent regulatory capture.
[197] *MetLife*, 177 F. Supp. 3d at 229.
[198] *Id.*
[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] MetLife also brought federal constitutional claims, but the district court did not reach those claims. *Id.* at 242.
[203] *Id.* at 226; Plaintiff's Complaint at 1, *Metlife*, 2015 WL 4064567. *See generally* 5 U.S.C. §§ 500 *et seq*. (2012).
[204] 5 U.S.C. § 706(2)(A).
[205] MetLife, Inc. v. Fin. Stability Oversight Council, 177 F. Supp. 3d 219, 223

designation process as compelling this conclusion.[206] Two of these failings are worth examining in detail for their relevance to the living will regime. First, the court found that the FSOC had "hardly adhered to any standard when it came to assessing MetLife's threat to U.S. financial stability."[207] Instead, the FSOC simply "assumed that any [material financial distress at MetLife] would affect the market in a manner that would . . . inflict significant damage on the broader economy," and that "[t]hese kinds of assumptions pervade [the FSOC's] analysis."[208] The court's conclusion in this regard was emphatic:

> This Court cannot affirm a finding that MetLife's distress would cause severe impairment of financial intermediation or of financial market functioning—even on arbitrary-and-capricious review—when FSOC refused to undertake that analysis itself. *Predictive judgment must be based on reasoned predictions; a summary of exposures and assets is not a prediction.*[209]

Second, the court determined that the FSOC had acted unreasonably in refusing to consider the cost of designating MetLife.[210] The court acknowledged that Dodd-Frank does not expressly require the FSOC to consider cost, but it cited the Supreme Court's decision in *Michigan v. EPA*[211] for the proposition that cost must be considered where Congress has directed an agency to regulate as "appropriate."[212] Congress did just that in Section 113 of Dodd-Frank, the court concluded, when it directed the FSOC to designate SIFIs only after considering "risk-related factors that [the FSOC] deems *appropriate*."[213] The court rejected an argument that cost

(D.D.C. 2016).

206 *Id*. at 237.

207 *Id*.

208 *Id*.

209 *Id.* (emphasis added).

210 *See id.* at 239.

211 Michigan v. Envtl. Prot. Agency, 135 S. Ct. 2699, 2707 (2015) ("There are undoubtedly settings in which the phrase 'appropriate and necessary' does not encompass cost. But this is not one of them.").

212 *See MetLife*, 177 F. Supp. 3d at 240.

213 *Id.* at 225 (citing 12 U.S.C. § 5323(a)(1)) (emphasis added).

is not a risk-related factor by reasoning that the burdens associated with a SIFI designation could make MetLife more vulnerable to financial distress.[214] "Because FSOC refused to consider cost as part of its calculus," the court stated, "it is impossible to know whether its designation does significantly more harm than good. . . . [T]hat renders [MetLife's SIFI designation] arbitrary and capricious."[215]

A. Specific Proposals

MetLife concerned the FSOC's designation of SIFIs under Section 113 of Dodd-Frank, but the court's reasoning seems just as applicable to the FRB and FDICs' review of living wills under Section 165(d) of Dodd-Frank and Regulation QQ.[216] Recall from Part II that the FRB and FDIC rejected calls to undertake cost-benefit analysis during the notice-and-comment period for Regulation QQ, and that the term "not credible" is undefined in both Section 165(d) and Regulation QQ.[217] Recall also that the FRB and FDIC recently announced that they have determined that Wells Fargo's living will is "not credible," and that the bank is barred from creating new international units or acquiring nonbank subsidiaries for the indefinite future.[218] Is it not foreseeable that Wells Fargo might mount an arbitrary-and-capricious challenge to the "not credible" determination, leaning heavily on *MetLife*?[219] Indeed, there may be little alternative to an arbitrary-and-capricious challenge, as neither Section 165(d) nor Regulation QQ provides a mechanism for appealing an adverse determination or enforcement action.[220] The notice of rulemaking that accompanied

---

[214] *See id*. at 240 ("In the end, cost must be balanced against benefit because '[n]o regulation is 'appropriate' if it does significantly more harm than good.'").

[215] *Id*. at 241.

[216] *See* discussion *supra* Part II.B.2 ("In short, if the FRB and FDIC jointly determine that a company's living will is "not credible," and if the company fails to submit timely fixes, the agencies may impose heightened capital, liquidity, or leverage requirements.").

[217] *See* discussion *supra* Part II.B.2 ("After making 'appropriate revisions,' . . . the agencies jointly promulgated the final version of Regulation QQ . . . .").

[218] *See* discussion *supra* Section II.C ("The agencies barred the bank from creating new international units or acquiring nonbank subsidiaries . . . .").

[219] *See MetLife*, 177 F. Supp. 3d at 240.

[220] The APA states that "final agency action for which there is no other adequate remedy in a court is subject to judicial review." 5 U.S.C. § 704 (2012). However, it is unclear whether a "not credible" determination qualifies as a

Regulation QQ suggests that disputes should be resolved informally through an "iterative supervisory process" and "ongoing dialogue,"[221] but that is unlikely to pacify a company facing sanctions after many rounds of iteration and dialogue. If the living will regime is to be secure after *MetLife*—and in light of recent reports that the Trump Administration might look to dismantle Dodd-Frank[222]—two reforms are advisable. Combined they would bolster the legitimacy and legality of the regime.

1. Undertake Cost-Benefit Analysis

The first advisable reform is for the FDIC and FRB to subject Regulation QQ to cost-benefit analysis (CBA).[223] To be sure, there is no legal requirement that these agencies undertake CBA.[224] Executive agencies have been required to do CBA for major regulations since 1981, but independent agencies, such as the FRB and FDIC, are not subject to that level of presidential control.[225] Additionally, the textual hook for requiring CBA under *Michigan v. EPA* was probably stronger in *MetLife* than it would be in a hypothetical challenge to Section 165(d)'s living will regime, because Section 165(d) does not use the word "appropriate."[226] But then again, the textual hook was not all that strong in *MetLife*.[227] The court had to labor to find a CBA requirement built into Section 113, ultimately grounding it in the supposition that the cost of MetLife adhering to oversight as a SIFI was related to the risk of MetLife failing and posing a "threat to the financial stability of

---

final agency action for purposes of Section 704. *See* Bennett v. Spear, 520 U.S. 154, 177–78 (1998) (setting out two conditions for finality).

[221] Resolution Plans Required, 76 Fed. Reg. 67,323, 67,324 (Nov. 11, 2011) (to be codified at 12 C.F.R. 381).

[222] *See* Jesse Hamilton & Elizabeth Dexheimer, *Trump Team Pledges to Dismantle Dodd-Frank*, BLOOMBERG (Nov. 10, 201), https://www.bloomberg.com/news/articles/2016-11-10/trump-s-transition-team-pledges-to-dismantle-dodd-frank-act [https://perma.cc/K95E-LM&6].

[223] *See* Eric A. Posner & E. Glen Weyl, *The Case for Cost-Benefit Analysis of Financial Regulations*, REG., Winter 2013–2014, at 32, https://object.cato.org/sites/cato.org/files/serials/files/regulation/2014/1/regulation-v36n4-2.pdf [https://perma.cc/4FJM-Q9A5].

[224] *See id.* at 30.

[225] *See id.* at 30–31.

[226] *See* 12 U.S.C. § 5365(d) (2012).

[227] *See MetLife*, 177 F. Supp. 3d at 239–40.

the United States."[228] Any court willing to endorse that theory might also find the broad language in Section 165(d) useful for bringing the living will regime within the ambit of *Michigan v. EPA* and mandatory CBA.

Moreover, it would be wise to subject Regulation QQ to CBA even if not strictly required. Professors Eric Posner and Glen Weyl have suggested that consistently using CBA in financial regulation "improves transparency by forcing regulators to lay bare their assumptions" and "makes it easy for regulated parties to plan and predict how regulators will respond to new industrial practices."[229] They contend that CBA "has also helped calm the ideological battles over whether industry should be regulated or deregulated by channeling the debate into a technocratic battle of the experts where empirical data substitute for rhetoric."[230] All of these sound like benefits worthy of pursuing, but Posner and Weyl's more important insight is that financial regulation is uniquely suited for CBA. Whereas environmental regulation "must contend with hard-to-value effects like those to life, health, and wilderness," they observe that "financial regulation is mostly about money."[231] This point applies with full force to Regulation QQ, which is primarily about mitigating pecuniary losses from another Lehman-like failure.[232] There are several benefits a living will requirement plausibly yields, but benefits should not be pursued at any cost. CBA helps regulators be sure of a proper balance.

2. Define "Not Credible"

In addition to undertaking CBA, the FRB and FDIC should reform Regulation QQ to define "not credible" (or equivalently, "credible"). This was a refrain in the comments the agencies received after proposing Regulation QQ,[233] yet the agencies promulgated the final rule without any definition. One can envision an arbitrary-and-capricious challenge on the ground that the agencies failed to respond meaningfully to these comments,[234] or on the ground that the agencies

---

[228] *See id.* at 240.
[229] Posner & Weyl, *supra* note 187, at 32.
[230] *Id.*
[231] *Id.*
[232] *See supra* Part II.B.2.
[233] *See* Resolution Plans Required, 76 Fed. Reg. 67,323, 67,325 (Nov. 11, 2011) (to be codified at 12 C.F.R. pt. 381).
[234] The agencies acknowledged that "a number of commenters expressed

could "hardly adhere[] to any standard" for reviewing living wills where there is no standard defined, with citation to *MetLife*.[235]

Moreover, as with CBA, this is an advisable reform even if not legally required. The declared purpose of the living will regime is to produce plans for the orderly resolution of insolvent financial companies.[236] What reason is there for obscuring the target from companies who must file living wills? And how can companies even be sure there is a target to aim for when the agencies themselves reach a different determination about the same living will?[237] Perhaps the agencies fear that setting too clear a target would allow companies to "game" the regulation, as has happened with capital requirements.[238] But there is an important distinction between a quantitative regulation, like capital requirements, and a qualitative regulation, like a requirement to file "credible" living wills. Discretion inheres in the latter; it is a standard rather than a rule, even if defined. Announcing what they mean when they say "not credible" would hardly seem to weaken the agencies' collective hand while still moving us away from administrative arbitrariness.

V. Conclusion

This article has explored the origins, enactment, and implementation of Dodd-Frank's living will regime. It has defended the living will regime as a pragmatic policy response to two aversive precedents from the most recent financial crisis—Lehman's bankruptcy and AIG's bailout. The standard theory for requiring living wills was examined and other benefits living wills might yield identified.

---

concern" about the lack of any definition, but they did not go much beyond acknowledgement. *See id*. at 67,325. That could plausibly result in an arbitrary-and-capricious finding. *Cf.* United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240 (2d. Cir. 1977) (holding that a rulemaking was arbitrary and capricious because the agency failed to meaningfully respond to empirical evidence offered at the notice-and-comment stage).

[235] *See* MetLife, Inc. v. Fin. Stability Oversight Council, 177 F. Supp. 3d 219, 236 (D.D.C. 2016).

[236] *See supra* Part II.A.

[237] *See supra* Part II.C.

[238] *See* Viral Acharya & Philipp Schnabi, *How Banks Played the Leverage "Game*", N.Y.U. STERN SCH. BUS. WHITEPAPERS PROJECT (NYU Stern Sch. of Bus., New York, N.Y.), Nov. 1 2008, at 2, http://web-docs.stern.nyu.edu/salomon/docs/crisis/Leverage_WP_Final.pdf [https://perma.cc/EWE2-K4XC].

These benefits are plausible but overlooked in the extant literature. Yet despite its defense of living wills, this article also has suggested that there is a need for reform to bolster the regime's legitimacy and legality. In the final analysis, one might conclude that there is reason to believe in the utility of living wills while also conceding that only time (and a future financial crisis) will tell if they were worth their weight in paper.