
OCC Proposes Recovery Plans for Large Banks

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On December 17, 2015, the Office of the Comptroller of the Currency (OCC) proposed guidelines establishing enforceable standards for recovery planning by certain large national banks, federal savings associations and insured federal branches with average consolidated assets of \$50 billion or more.¹ The proposed guidelines would require each covered bank to maintain a recovery plan that identifies bank-specific and market-wide stress scenarios and details options for responding to those scenarios to ensure the bank continues as a going concern. The OCC would enforce these guidelines under the special enforcement procedures for safety and soundness standards. Comments on the proposal are due February 16, 2016.

Background

The proposed guidelines formalize the supervisory guidance that the OCC has been providing some large banks as they have developed recovery plans to complement their resolutions plans.² The proposed guidelines are also a continuation of the OCC's attention to risk management and corporate governance practices, for example its recent heightened standards for large banks,³ and an extension of the OCC's supervisory focus on the management of cybersecurity and other operational risks.⁴

Coverage

Like the OCC's heightened standards, the proposed guidelines would apply only to large insured national banks, insured federal savings associations and insured federal branches of foreign banks with average consolidated assets of \$50 billion or more. The OCC notes that the \$50 billion threshold is consistent with the thresholds adopted by the Federal Deposit Insurance Corporation and the Board of Governors of the Federal Reserve System for their resolution planning requirements.⁵ The OCC reserves the right to apply the guidelines to other banks that are highly complex or otherwise present a heightened risk, but "the OCC expects to use this authority infrequently."

Recovery Plan Guidelines

Under the proposed guidelines, a covered bank would be required to develop a recovery plan that identifies triggers and options for responding to a wide range of severe internal and external stress

scenarios and that would restore the bank to financial and operational strength and viability in a timely manner.

- *Bank overview.* The recovery plan must describe the bank's organizational and legal structure, including its material entities, critical operations, core business lines and core management informational systems.
- *Triggers.* The plan must identify triggers that are tailored to the bank's particular vulnerabilities. A trigger would be defined as a quantitative or qualitative indicator of the risk or existence of severe stress that should always be escalated to management or the board of directors, as appropriate, for purposes of initiating a response. Examples of triggers in the proposal include Tier 1 capital falling below the regulatory minimum, liquidity or market capitalization falling below defined thresholds, credit rating downgrades and nonperforming loans rising above a specified percentage.
- *Recovery options.* The plan must identify a wide range of credible options a bank could undertake to continue to operate as a going concern and avoid liquidation or resolution. Examples of recovery options provided in the proposal include issuing new capital, selling non-strategic assets or business lines, reducing new loan originations, reducing expenses and accessing the Federal Reserve's discount window.
- *Impact assessments.* For each recovery option, the plan must describe how the option would affect the bank, including (i) the effect on capital, liquidity, funding and profitability, (ii) the effect on the bank's material entities, critical operations, core business lines and reputation and (iii) any legal or market impediments or regulatory requirements that must be addressed or satisfied to implement the option.
- *Escalation procedure.* For each trigger, the plan must specify a process for escalating decision-making to senior management or the board of directors, as appropriate.
- *Management reports.* The plan must require reports that contain sufficient data and information for senior management or the board of directors, as applicable, to make timely decisions regarding the appropriate actions necessary to respond to the breach of a trigger.
- *Communication procedures.* The plan must include procedures to notify the OCC of any significant breach of a trigger, as well as when and how the bank will notify internal and external parties of its actions under the plan.

Each covered bank should, to the extent possible, align its recovery plan with its other related planning, including its contingency, stress testing, liquidity and resolution planning. Additionally, the covered bank's management must review and revise the recovery plan at least annually and in response to a material event, while the board of directors must review and approve the recovery plan annually.

Enforcement of the Guidelines

The Federal Deposit Insurance Corporation Improvement Act of 1991 authorizes the OCC and the other federal banking agencies to establish safety and soundness standards either by regulation or by guideline.⁶ A bank's failure to perform a safety and soundness regulation requires the federal

banking agency to require the bank to submit a plan to achieve compliance. A bank's failure to perform a safety and soundness guideline, in contrast, leaves the federal banking agency discretion to require a compliance plan. The compliance plan would remain non-public in either case, but if the bank fails to submit a plan or fails in any material respect to implement the plan, the OCC must then take formal, and therefore public, action against the bank by issuing an order to compel compliance. The proposed guidelines would be issued as safety and soundness guidelines, and not as safety and soundness regulations or as regulations issued under other statutory authorities, which will leave the OCC considerable flexibility as to how it enforces compliance.

Issues and Considerations

Consistent with the OCC's recent supervisory focus on operational risk management, the proposed guidelines would require that the recovery plan extend beyond financial stress events to cover operations-related stress events, such as cyberattacks, business interruptions and leadership vacancies. There would as a result be significant overlap with a covered bank's existing business continuity and related planning. Similarly, because the recovery plan would address capital and liquidity stress events, there would also be considerable overlap with the existing stress testing, liquidity and resolution planning.

The OCC acknowledges this overlap and states that it "do[es] not intend for the recovery planning . . . to duplicate these efforts" and that it "encourage[s] covered banks to leverage their existing planning." As a practical matter, the recovery plan would apparently include or reference existing contingency, capital, liquidity and resolution plans. The integration of these plans into the recovery plan could in turn give the OCC some indirect role in regulating and supervising these other planning processes, including the stress testing and resolution planning processes that are already supervised and regulated by other federal banking agencies.

It is also noteworthy that the proposed guidelines are not especially prescriptive as to the expected level of granularity or detail in the triggers, and instead "the number and nature of triggers should be appropriate for the covered bank's business and risk profile." This risk-based approach to recovery planning will leave considerable discretion to the OCC examiners in assessing recovery plans. Consistent treatment across covered banks will hopefully be facilitated by the OCC's expansion of the functions and responsibilities of its large bank supervision lead expert program.⁷

Related to this, because the proposed guidelines would be issued as safety and soundness guidelines, the OCC would have significant discretion in enforcing these guidelines, including as to whether and when it pursues formal, public enforcement action or instead requires a non-public compliance plan.

Finally, the OCC states that each "covered bank should integrate its recovery plan into its corporate governance and risk management functions" and similarly that "this process should complement the institution's risk management and corporate governance functions" Reading this together with the OCC's encouragement "to leverage their existing planning," the practical effect of the proposed guidelines would be to establish an enforceable expectation that each of the various recovery-related planning processes—including those for contingency, stress testing, liquidity and

resolution planning—should be integrated on a consistent basis into a covered bank’s risk management and governance frameworks.

Conclusion

The proposed guidelines are a continuation of the OCC’s focus on the risk management and governance frameworks at large banks, especially with respect to operational risk management. The OCC will have considerable discretion in construing and enforcing the proposed guidelines. Each covered bank should assess whether it has carefully considered and documented the specific roles and responsibilities of the frontline business units, the risk management function and internal audit in each of the various recovery-related planning processes, whether the board of directors has a meaningful opportunity to challenge related management determinations and, more generally, whether these planning processes result in an integrated and comprehensive recovery plan that would satisfy the proposed guidelines.

¹ Proposed guidelines, *Guidelines Establishing Standards for Recovery Planning*, 80 Fed. Reg. 78,681 (Dec. 17, 2015).

² See Testimony of Thomas J. Curry, Comptroller of the Currency, Before the Senate Committee on Banking, Housing and Urban Affairs, 113th Cong. (Jul. 11, 2013) (“In conjunction with resolution planning, some institutions are also preparing recovery plans outlining the steps they would take, as going concerns, to remain viable in the case of severe financial pressure.”); *id.* (“the OCC has worked closely with other regulators to provide appropriate informal supervisory guidance for recovery planning, and further coordination is underway.”).

³ Final rule and guidelines, *OCC Guidelines Establishing Heightened Standards*, 79 Fed. Reg. 54,518 (Sep. 11, 2014) (codified at 12 C.F.R. part 30, App. D).

⁴ See, e.g., Office of the Comptroller of the Currency, *Semiannual Risk Perspective* (Fall 2015) at 7 (“Operational risk is high as banks adapt business models, transform technology and operating processes, and respond to increasing cyber threats.”); Remarks by OCC Comptroller Curry before the New England Council (May 16, 2014) (“[T]here are few issues more important to me, to the OCC, and to our country’s economic and national security than the risk posed by the increasing sophistication and growing number of cyberattacks.”); Remarks by OCC Comptroller Curry before the Exchequer Club (May 16, 2012) (“Given the complexity of today’s banking markets and the sophistication of technology that underpins it, it is no surprise that the OCC deems operational risk to be high and increasing. Indeed, it is currently at the top of the list of safety and soundness issues for the institutions we supervise.”).

⁵ See 12 C.F.R. §§ 381.2(f), 243.2(f); *see also* 12 C.F.R. § 360.10.

⁶ See 12 U.S.C. § 1831p-1; 12 C.F.R. part 30.

⁷ See OCC Press Release, *OCC Announces Actions to Respond to International Peer Review Recommendations* (May 28, 2014).

Authors



**Franca Harris
Gutierrez**

PARTNER

Chair, Financial Institutions
Practice

✉ franca.gutierrez@wilmerhale.com

☎ +1 202 663 6557