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VIA E-MAIL

Ann E. Misback
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

James P. Sheesly
Assistant Executive Secretary
Attn: Comments RIN 3064-AF86
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Re: Comments on Advance Notice of Proposed Rulemaking Regarding Resolution-Related Resource Requirements for Large Banking Organizations of the Federal Reserve System and the Federal Deposit Insurance Corporation; Federal Reserve RIN 7100-AG44, Docket No. R–1786; FDIC RIN 3064-AF86

Dear Ms. Misback and Mr. Sheesly:

This comment letter is being submitted in response to the Advance Notice of Proposed Rulemaking (the "ANPR") of the Federal Deposit Insurance Corporation ("FDIC") and the Board of Governors of the Federal Reserve System (the "Federal Reserve" and together with the FDIC, the "Agencies") in which the Agencies seek comments on whether total loss absorbing capacity ("TLAC"), long-term debt ("LTD") requirements, and other resolvability requirements currently applicable to globally systemic important banks ("G-SIBs"), should be applied to all Category II and Category III-size banking organizations, including savings and loan holding companies and insured depository institutions ("IDIs") without a holding company. The statutory framework for the applicability of such requirements is based on Section 165 of the Dodd-Frank Act, which mandates that the Federal Reserve apply certain enhanced prudential standards and supervision to bank holding companies with $250 billion in total consolidated assets and nonbank financial institutions designated as systemically important financial institutions ("SIFIs").[1] This comment letter addresses the potential legal implications of imposing

[1] *See* 12 U.S.C. § 5365.

the same enhanced prudential standards to IDIs without a holding company that have not been designated as SIFIs.

In the ANPR, one of the specific questions of the Agencies is in applying TLAC, LTD, and other G-SIB like resolvability requirements to Category II and Category III banking organizations, "[h]ow should IDIs that are not part of a group under a [bank holding company] be considered?" Considering that the framework for the applicability of TLAC and LTD requirements is based on Section 165 of the Dodd-Frank Act, which Congress intended to apply specifically to bank holding companies and designated SIFIs, applying such requirements to an IDI without a holding company that has not been designated as a SIFI raises questions under the U.S. Supreme Court's ("Court") Major Questions Doctrine.

As further discussed below, applying Section 165 enhanced prudential standards to IDIs without a holding company in the same manner as applied to bank holding companies could be viewed as a fundamental shift in the statutory framework intended by Congress, and therefore lacking in congressional authority, notwithstanding that such requirements would be considered of national and political significance and a specific issue that Congress could have addressed in enacting the Dodd-Frank Act in 2010 or by amendment with the enactment of the Economic Growth, Regulatory Relief, and Consumer Protection Act ("Economic Growth Act") in 2018.[2] In adopting a proposed and final rule, the Agencies should consider the potential legal implications of imposing TLAC and LTD requirements (and any other G-SIB like resolvability requirements under Section 165 of the Dodd-Frank Act) to IDIs without a holding company, and whether applying such requirements to such IDIs is supported by clear congressional authority, notwithstanding the statute only mandating such requirements for bank holding companies and SIFIs.

I. Under the Major Questions Doctrine, Courts Will Not Automatically Defer to Agencies' Interpretation If Agency Action Involves a Matter of National or Political Significance

The Major Questions Doctrine, also referred to as the "Major Rules Doctrine," is based on several decisions of the Court,[3] and in some instances has been treated by the Court as an exception to the Chevron doctrine.[4] While the Court may defer to an agency in the interpretation of a statute when Congress has delegated authority to the agency and

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[2] 12 U.S.C. § 5301 *et seq.*; Pub. L. 115-174 (May 24, 2018).

[3] *See*, *e.g.*, *Alabama Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485 (2021) (holding that CDC cannot impose a nationwide moratorium, which is of major national significance, without clear congressional authorization); *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 665 (2022) (holding that OSHA cannot compel private employers to require that their employees be vaccinated against COVID-19 because permitting such regulation would "significantly expand OSHA's regulatory authority without clear congressional authorization").

[4] *Id.*

the statute is ambiguous or unclear to a specific issue (i.e., Chevron Doctrine),[5] the Court has rejected an agency's position if the Court concludes that Congress has not authorized the agency to regulate the major question at issue, or in finding that the agency's interpretation was unreasonable due to lack of clear congressional support.[6]

Under the Major Questions Doctrine, the courts will generally interpret statutory language "in [its] context and with a view to [its] place in the overall statutory scheme."[7] However, when an agency's actions are questionable as overly broad or raising questions of economic and political significance, the Supreme Court has indicated that courts should "hesitate before concluding that Congress meant to confer such authority."[8] In *West Virginia v. EPA*, the Court explicitly applied the Major Questions Doctrine in rejecting the Environmental Protection Agency's ("EPA's") plan to reduce carbon pollution from fossil-fueled power plants, holding that "[I]n certain extraordinary cases … something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to 'clear congressional authorization' for the power it claims."[9] Ambiguous statutory text may be enough to delegate a "highly technical, specialized interstitial matter,"[10] but the Court "expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance."[11] If there is a reason to doubt congressional authorization over a particular action, the agency has the burden of proof to show clear congressional authorization.[12]

The "nature of the question" is critical when determining whether the Major Questions Doctrine applies.[13] The Court has not clearly defined the type of agency action that triggers the Major Questions Doctrine, nor has the Court specified the legislative acts that constitute clear congressional authorization. However, the case law on the Major Questions Doctrine provides guidance on the types of questions that the Court has identified as raising major questions. The Court has found that an agency's rule or regulation should be considered under the Major Questions Doctrine when:

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[5] The *Chevron* deference directs courts to accept an agency's reasonable interpretation of an ambiguity in a statute that the agency administers. However, even under the *Chevron* deferential standard, agencies must operate within the bounds of reasonable interpretation. *See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *see also Util. Air Regul. Grp. v. Envtl. Prot. Agency*, 573 U.S 302, 321 (2014).
[6] *See, e.g.*, fn. 2.
[7] *W. Virginia v. Envtl. Prot. Agency*, 142 S. Ct. 2587, 2607 (2022) (citing *Davis v. Mich. Dept. of Treasury*, 489 U.S. 803, 809 (1989)).
[8] *W. Virginia v. Envtl. Prot. Agency*, 142 S. Ct. at 2607-2608.
[9] *W. Virginia v. Envtl. Prot. Agency*, 142 S. Ct. at 2610.
[10] *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 90 (2007).
[11] *Util. Air Regul. Grp. v. Envtl. Prot. Agency*, 573 U.S. at 324.
[12] *W. Virginia v. Envtl. Prot. Agency*, 142 S. Ct. at 2595.
[13] *F.D.A. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

- it involves a fundamental revision of the statute, changing the existing scheme of regulation into a different kind;[14]
- the agency seeks to regulate "a significant portion of the American economy;"[15] or
- it affects a large number of people and involves a significant monetary burden for regulated and affected parties.[16]

Therefore, if an agency's actions fall in one of these three categories, and the agency is sued based on claims of lack of statutory authority, a court would likely evaluate the rule or regulation and the agency's statutory authority under the Major Questions Doctrine.

II. Imposing Additional Resolution Plan Requirements on Category II and Category III Banking Organizations, Including IDIs Without a Holding Company, Concerns a Major Question

Considering the above principles, imposing additional resolution plan requirements on all Category II- and Category III-size banking organizations, including IDIs without a holding company that have not been designated as SIFIs, is likely to face judicial scrutiny under the Major Questions Doctrine. The banking sector is undoubtedly a significant portion of the American economy. Recognizing the tremendous influence that the banking sector has on the U.S. economy as a whole, Congress enacted the Dodd-Frank Act to promote the financial stability of the United States.[17] Of the thousands of

[14] *See MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994) (holding that FCC has no authority to eliminate the tariff filing requirements for nondominant carriers because such action effected a "fundamental revision of the statute" where the agency effectively changed the statute from one scheme of regulation to another); *W. Virginia v. Envtl. Prot. Agency*, 142 S. Ct. at 2610 (rejecting EPA's adoption of the Clean Power Plan because the agency action represented a "transformative expansion of its regulatory authority" from requiring emissions performance of individual sources to improving the overall power system by forcing a shift throughout the power grid from one type of energy source to another).
[15] *See Util. Air Regul. Grp. v. Envtl. Prot. Agency,* 573 U.S at 324 (rejecting EPA's authority to require stationary sources to obtain a greenhouse gas emissions permit because the authority to require permits is "extravagant statutory power over the national economy"); *W. Virginia v. Envtl. Prot. Agency*, 142 S. Ct. at 2621 (rejecting EPA's plan to shift electricity generation from coal and fuel-fired power plants to renewable resources because it "force[s] an aggressive transformation of the electricity sector," which is "among the largest in the U.S. economy, with links to every other sector").
[16] *See Util. Air Regul. Grp. v. Envtl. Prot. Agency*, 573 U.S at 322 (holding that EPA's requirement for stationary sources to obtain greenhouse gas emissions to be a major question because it imposes massive compliance costs on millions of previously unregulated emitters); *Alabama Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. at 2489 (holding that CDC's plan to impose a nationwide moratorium concerns a major question because it involves between 6 and 17 million tenants at risk of eviction and puts a substantial financial burden on landlords); *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. at 666 (holding that OSHA's vaccine mandate involves a major question because it will force the States and employers to incur billions of dollars in unrecoverable compliance costs and will cause hundreds of thousands of employees to leave their jobs).
[17] Pub. L. 111-203.

financial institutions providing banking services, Congress decided to limit the applicability of enhanced prudential standards and enhanced supervision by the Federal Reserve to the largest bank holding companies and any other financial institutions designated as systemically important. Specifically, Congress mandated enhanced prudential standards and supervision framework to automatically apply to bank holding companies above the specified asset threshold,[18] because the introduction of a holding company creates additional organizational complexities and operational risks. Hence, an IDI without a holding company is subject to such requirements only if the Financial Stability Oversight Council ("FSOC") designates it as systemically important after an administrative proceeding and formal determination.[19] Furthermore, imposing additional resolution plan requirements to all Category II- and Category III-size banking organizations in a blanket manner would be inconsistent with the plain text of Section 165 of the Dodd-Frank Act, which mandates a targeted approach based on the risks and complexities with respect to financial stability or resolvability.[20] If the Agencies decide to apply additional resolution plan requirements to all Category II and Category III banking organizations, IDIs without a holding company who cross the $250 billion threshold will be subject to such requirements solely due to their asset size without due consideration of whether the IDI is systemically important and without following the statutorily-mandated FSOC administrative process.

In addition, imposing G-SIB resolution requirements on IDIs without a holding company would greatly increase costs to those IDIs and millions of their customers. Specifically, the proposed TLAC and LTD requirements would result in a significant increase in compliance burden, operational cost, and unnecessary leverage. These costs would undermine the ability of these IDIs to compete with G-SIBs and other Category II and Category III banking organizations that have holding companies, and ultimately reduce competition among banking organizations among large banking organizations.

III. There is No Clear Congressional Authorization to Apply G-SIB Like Requirements and Other Section 165 Enhanced Prudential Standards to IDIs Without a Holding Company that Are Not SIFIs

If a statute is clear and unambiguous, the Court, as well as the administrative agency responsible for implementing the statute, must give effect to the unambiguously expressed intent of Congress.[21] The traditional deference courts give to agency interpretation is not to be applied to alter the clearly expressed intent of Congress.[22] With the enactment of the Dodd-Frank Act in 2010, Congress was clear in its intent that

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[18] 12 U.S.C. § 5365(a)(1).
[19] 12 U.S.C. § 5323(a)(1).
[20] 12 U.S.C. § 5323(a)(2).
[21] *Chevron U.S.A. Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. at 842–843.
[22] *Bd. of Governors of Fed. Reserve. Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986); *Fin. Plan. Ass'n v. S.E.C.,* 482 F3d 481 (D.C. Cir. 2007)*; Goldstein v. S.E.C.*, 451 F.3d 873, 883 (D.C. Cir. 2006); *Am. Bankers Ass'n v. S.E.C.,* 804 F.2d 739 (D.C. Cir. 1986).

Section 165 enhanced prudential standards should apply to bank holding companies and SIFIs on a tailored basis.[23] In 2018, Congress enacted the Economic Growth Act, which amended the Dodd-Frank Act to raise the threshold of mandatory applicability of enhanced prudential standards for bank holding companies from $50 billion to $250 billion, but Congress did not expand the scope of applicability to include IDIs without a holding company. Congress could have made such a change, but decided not to, which indicates that there is a lack of congressional authority to generally extend the enhanced prudential standards under Section 165 of the Dodd-Frank Act to IDIs in the same manner as applied to bank holding companies. The text of the Dodd-Frank Act is clear on the process and requirements for applying enhanced prudential standards to an organization that is not a bank holding company. Rulemaking cannot be used to change that statutory process or those statutory requirements.

Based on the considerations above, if the Agencies were to adopt a final rule applying G-SIB type resolvability requirements under Section 165 of the Dodd-Frank Act to IDIs without a holding company in the same manner as applied to bank holding companies, the final rule would be subject to challenge. Furthermore, the Agencies would likely not withstand that challenge, as the Agencies would have asserted power beyond what Congress could reasonably be understood to have granted and in conflict with the statutory framework that requires FSOC designation under a formal process outlined in the statute for financial institutions that are not bank holding companies and their subsidiaries.

IV. The Agencies Must Conduct A Cost-Benefit Analysis to Understand the Potential Impact on IDIs Without a Holding Company

Last but not least, this comment letter is being submitted to remind the Agencies of their obligation to conduct a thorough cost-benefit analysis of the potential impact of any additional requirements imposed on IDIs without a holding company under an adopted rule. A cost-benefit analysis is an essential element of a significant rulemaking. In *Michigan v. EPA*, the EPA argued that it is not required to consider costs when promulgating rules to regulate power plants because the underlying statute does not explicitly require a cost-benefit analysis.[24] However, the Court held that the EPA "strayed far beyond [the reasonable] bounds" when it read the statute to mean that it could ignore the cost when deciding whether to regulate power plants.[25] The majority emphasized that "[a]gencies have long treated cost as a *centrally relevant factor* when deciding whether to regulate"[26] and that "[c]onsideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the

[23] *See* 12 U.S.C. §§ 5325, 5330.
[24] *Michigan v. Envtl. Prot. Agency*, 576 U.S. 743 (2015).
[25] *Michigan v. Envtl. Prot. Agency*, 576 U.S. at 751.
[26] *Michigan v. Envtl. Prot. Agency*, 576 U.S. at 752-753.

advantages and the disadvantages of agency decisions."[27] These principles are not tied to the particular statute or facts at issue in *Michigan v. EPA*; the Court suggested that an agency's interpretation of any ambiguous statutory mandate must take cost into account to be reasonable under *Chevron*. Administrative agencies must consider the economic impact of complying with rules and regulations implementing statutes, as well as all other disadvantages associated with it because "cost includes more than the expense of complying with regulations; any disadvantage could be termed a cost."[28]

As noted above, Section 165 of the Dodd-Frank Act is not ambiguous in whether the requirements should apply to IDIs without a holding company that are not SIFIs, and any such ambiguity with the Dodd-Frank Act enacted in 2010 could have been addressed by Congress in 2018 with the enactment of the Economic Growth Act. Nonetheless, if the Agencies would seek to rely on the Chevron doctrine in any challenges to its authority to apply Section 165 enhanced prudential standards to IDIs without a holding company, the Agencies should take into consideration the differences in potential costs and regulatory burden for IDIs without a holding company in having to comply with the same requirements as a bank holding company. For example, in the case of LTD requirements, bank holding companies are able to issue unsecured debt at a lower cost than IDIs without a holding company, as unsecured debt issued by an IDI is subordinated to depositors under the FDI Act. Additionally, TLAC and LTD requirements as applied to G-SIBs are intended to facilitate an orderly resolution through the Single Point of Entry approach, and to provide bail-in capital for operating subsidiaries of a holding company while the holding company is undergoing an insolvency proceeding. However, the FDIC as receiver of an IDI has several options to resolve large IDIs without a holding company, including options that do not require bail-in capital. These differences and others should be taken into consideration in applying any TLAC and LTD requirements, or any other resolvability requirements based on Section 165 of the Dodd-Frank Act, to IDIs without a holding company.

I appreciate the opportunity to provide comments on the Agencies' ANPR, and I welcome any further discussions regarding this submission.

Sincerely,

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David F. Freeman, Jr.

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[27] *Id.* at 753.
[28] *Id*. at 752.