



January 23, 2023

Via Electronic Mail

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

Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
Attention: James P. Sheesley, Assistant
Executive Secretary

Re: Comment Letter on the Advance Notice of Proposed Rulemaking on
Resolution-Related Resource Requirements for Large Banking Organizations

Docket No. R-1786; RIN 7100-AG44 (Board) 3064-AF86 (FDIC)

Ladies and Gentlemen:

This comment letter is being submitted jointly by five domestic banking organizations (the **non-GSIB Banks**).¹ We appreciate the opportunity to comment on the advance notice of proposed rulemaking (the **ANPR**) published by the Board of Governors of the Federal Reserve System (the **Board**) and the Federal Deposit Insurance Corporation (the **FDIC** and, together, the **Agencies**).²

We are regional banking organizations with total consolidated assets between approximately \$450 billion and \$700 billion. Collectively, we play an important role in the United States economy—our retail and commercial bank or retail brokerage business models focus on the banking and other financial services needs of American consumers, small businesses, middle-market companies, large corporations and institutions and state and municipal governments. However, none of our organizations is a global systemically important banking organization (**GSIB**).

We have relatively simple organizational structures, with only limited trading, capital markets, derivatives and cross-border operations. The vast majority of our operations are conducted through our insured depository institution (**IDI**) or retail brokerage subsidiaries. We are modest in size compared to both the U.S. banking sector and the wider U.S. economy. For example, each

¹ The non-GSIB Banks are Capital One Financial Corporation, The Charles Schwab Corporation, The PNC Financial Services Group, Inc., Truist Financial Corporation and U.S. Bancorp.

² Agencies, Advance Notice of Proposed Rulemaking, *Resolution-Related Resource Requirements for Large Banking Organizations*, 87 Fed. Reg. 64170 (October 24, 2022).

of us accounts for less than 3% of national deposits, and our *combined* total consolidated assets are less than 75% of those of the single largest U.S. GSIB.

The ANPR solicits public comment on “whether an extra layer of loss-absorbing capacity” should be imposed on domestic large banking organizations (**LBOs**) that are not GSIBs (**non-GSIB LBOs**) to “improve optionality in resolving a large banking organization or its [IDI]”³ The ANPR focuses exclusively on whether to propose an extra layer of loss-absorbing capacity in the form of long-term debt (**LTD**), rather than going-concern capital plus an extra layer of total loss-absorbing capacity in the form of both additional qualifying equity capital and LTD (**TLAC**). The ANPR also solicits public comment on whether to impose certain clean holding company requirements on non-GSIB LBOs.⁴

The ANPR defines non-GSIB LBOs as any “domestic bank holding company [**BHC**], or domestic savings and loan holding company [**SLHC**] that has \$100 billion or more in total consolidated assets but is not a GSIB”⁵ The non-GSIB LBOs correspond “to Category II through IV firms under the Board’s tiering framework for enhanced prudential standards.”⁶ Each of our organizations is a Category III firm. According to the ANPR, its focus is on “domestic large banking organizations in Category II and Category III, which generally exceed a threshold of \$250 billion in total consolidated assets.”⁷ Nevertheless, then FDIC Acting Chairman Martin Gruenberg issued a statement in connection with the FDIC’s approval of the ANPR, indicating that the Agencies might expand the covered non-GSIB LBOs to include any banking organization with total assets of \$50 billion or more.⁸

Under the Board’s existing TLAC rule,⁹ only the U.S. GSIBs and U.S. intermediate holding companies (**IHCs**) of foreign GSIBs are currently required to maintain an extra layer of “loss-absorbing capacity” in the form of eligible LTD and comply with clean holding company requirements. The GSIB TLAC Rule was designed to support the feasibility of the single-point-of-entry (**SPOE**) resolution strategies of the GSIBs.¹⁰ It was not designed for other resolution strategies that provide the Agencies with reasonable optionality to resolve a non-GSIB LBO without being forced to sell it to a GSIB or another non-GSIB LBO in a whole-bank transaction.

We do not believe that the gone-concern LTD or any other requirement in the GSIB TLAC Rule should be extended to us or any of the other non-GSIB LBOs. We are far simpler than the U.S. GSIBs and do not perform any market-critical functions. This key difference is illustrated by

³ Id. at 64170.

⁴ Id. at 64174.

⁵ Id. at 64171 note 4.

⁶ Id. See also EPS Tailoring Rule, *infra* note 89.

⁷ ANPR, *supra* note 2, at 64171 note 4.

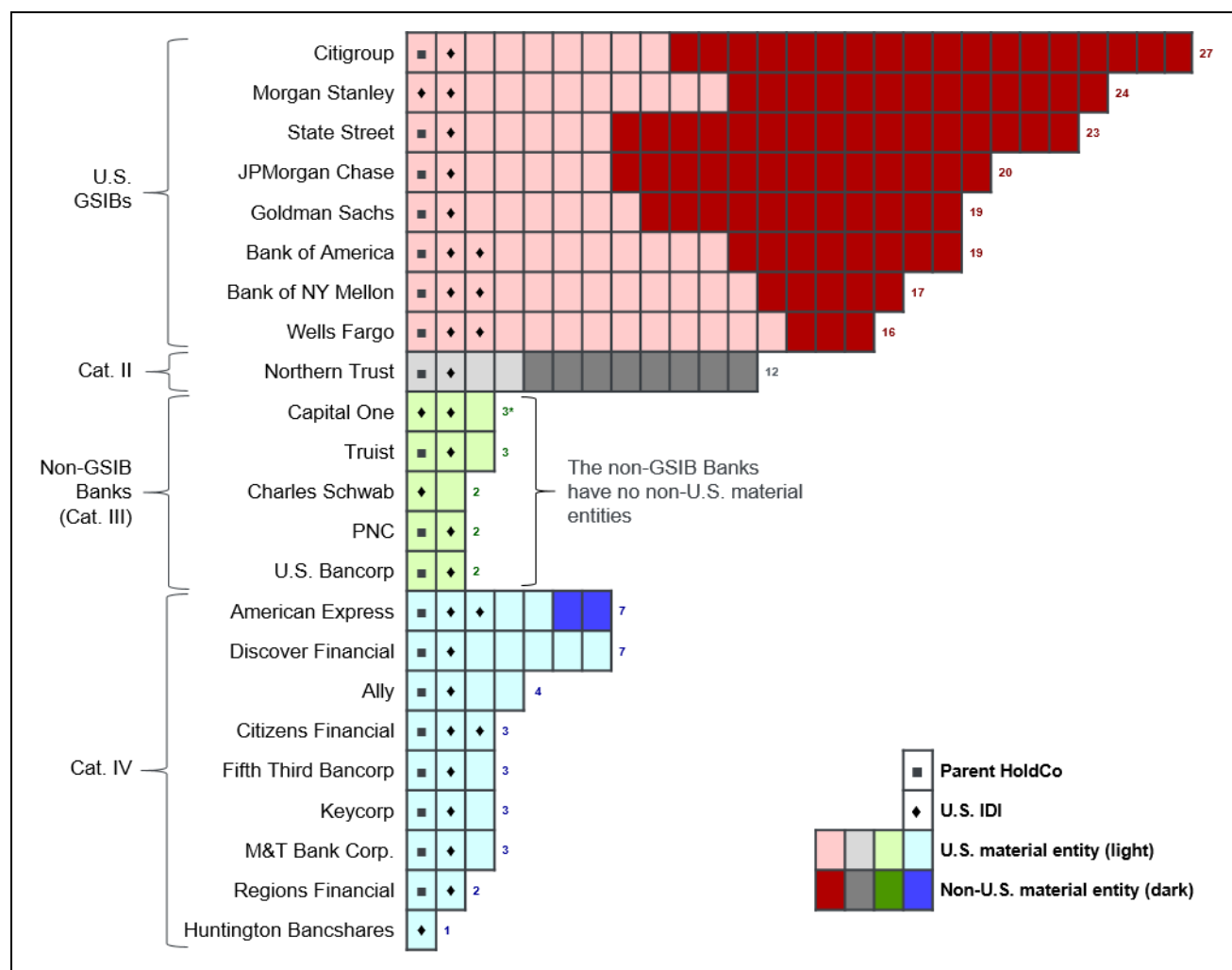
⁸ See Statement, *infra* note 80.

⁹ Board, Final Rule, *Total Loss-Absorbing Capacity, Long-Term Debt, and Clean Holding Company Requirements for Systemically Important U.S. Bank Holding Companies and Intermediate Holding Companies of Systemically Important Foreign Banking Organizations*, 82 Fed. Reg. 8266 (January 24, 2017) (**GSIB TLAC Rule**).

¹⁰ Board, Proposed Rule, *Total Loss-Absorbing Capacity, Long-Term Debt, and Clean Holding Company Requirements for Systemically Important U.S. Bank Holding Companies and Intermediate Holding Companies of Systemically Important Foreign Banking Organizations*, 80 Fed. Reg. 74926, 74928 (Nov. 30, 2015) (**Proposed GSIB TLAC Rule**).

Figure 1, which shows that we have far fewer material entities than the U.S. GSIBs and no foreign material entities. The same is true for all but two of the other non-GSIB LBOs. It is also illustrated by **Figure 2**, which shows that our Method 1 GSIB scores are far lower than those of the US GSIBs. Indeed, at December 31, 2021, our highest Method 1 GSIB score was only 58, which is less than half the 130-point threshold that divides GSIBs from non-GSIBs¹¹ and is much closer to the scores of the Category IV banking organizations, which are not the current focus of the ANPR.

Figure 1. Material Entities

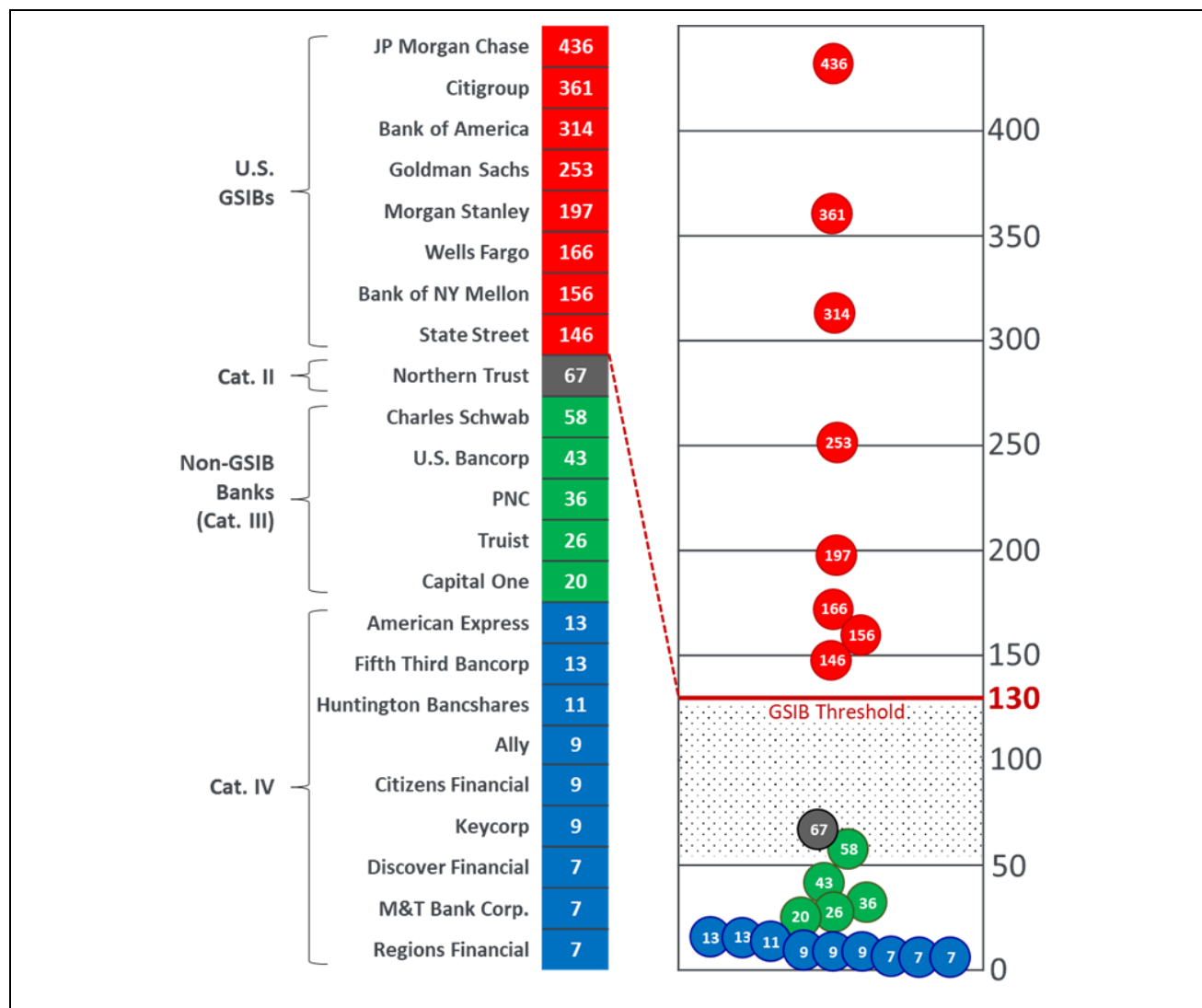


* As of October 2022, Capital One merged their U.S. IDIs and now has two material entities in total rather than three. Figure includes domestic firms only.

Sources: Public portions of the most recent 165(d) or IDI resolution plans of the domestic Category I through IV banking organizations (as of December 2022).

¹¹ 12 C.F.R. § 217.402.

Figure 2. GSIB Scores – Method 1



Method 1 GSIB scores as of December 31, 2021. Figure includes domestic firms only.
Source: GSIB scores calculated by the Bank Policy Institute.

Moreover, none of us has found it necessary to develop an SPOE resolution strategy. Each of us can be resolved without any loss to the Deposit Insurance Fund (DIF) or material adverse effect on U.S. financial stability using our current non-SPOE resolution strategies. Importantly, our required resolution plans all include a reasonable option to resolve us by separating our businesses into multiple components, and selling those components to multiple purchasers not limited to GSIBs or other LBOs within a reasonable period of time. These plans also include a reasonable option for all or most of the uninsured deposit liabilities of our IDIs to be assumed by these purchasers.

These options provide the Agencies with sufficient optionality to resolve each of our organizations without being forced to sell it to a GSIB or another non-GSIB LBO in a whole-bank transaction. The LTD and clean holding company requirements of the GSIB TLAC Rule are not necessary to

make our non-SPOE resolution strategies feasible. Accordingly, no such requirements should be imposed on us or any of the other non-GSIB LBOs or our IDI subsidiaries if we maintain such optionality in our non-SPOE resolution strategies.

This comment letter proceeds as follows. After a brief introduction framing the issues in **Part I**, **Part II** explains why—

- We are highly resilient against failure and far more resilient than we were in 2008.
- We are also resolvable with non-SPOE resolution strategies that provide the Agencies with sufficient optionality to resolve us without being forced to sell us to a GSIB or another non-GSIB LBO in a whole-bank transaction.
- The Board’s TLAC, LTD and clean holding company requirements were designed to support the feasibility of the SPOE resolution strategy, which is the only strategy that allows the U.S. GSIBs to be resolved without government bailouts or a substantial risk to U.S. financial stability.
- We and the other non-GSIB LBOs can be resolved with non-SPOE resolution strategies that are feasible without the need for any gone-concern LTD or clean holding company requirements.
- Accordingly, there is no need to extend any gone-concern LTD or clean holding company requirements to us or the other non-GSIB LBOs.

Part III explains why if, despite the strong arguments in Parts II and IV for not doing so, the Agencies decide to propose extending any LTD or clean holding company requirements to us and the other non-GSIB LBOs, the Agencies should—

- Proceed slowly and carefully, taking into account both past and forthcoming regulatory actions;
- Provide us and the other non-GSIB LBOs with reasonable optionality in how any LTD requirement can be satisfied; and
- Calibrate any proposed gone-concern LTD requirements at levels substantially below those in the GSIB TLAC Rule.

Part IV explains why—

- The costs of extending the gone-concern LTD requirement in the GSIB TLAC Rule to us and the other non-GSIB LBOs would almost certainly greatly outweigh any reasonably expected benefits; and
- The proposal would also require substantial justification under the Administrative Procedure Act (**APA**) since it would amount to a reversal of the Agencies’ longstanding and carefully considered policy to impose LTD requirements only on the U.S. GSIBs and the U.S. IHCs of foreign GSIBs.

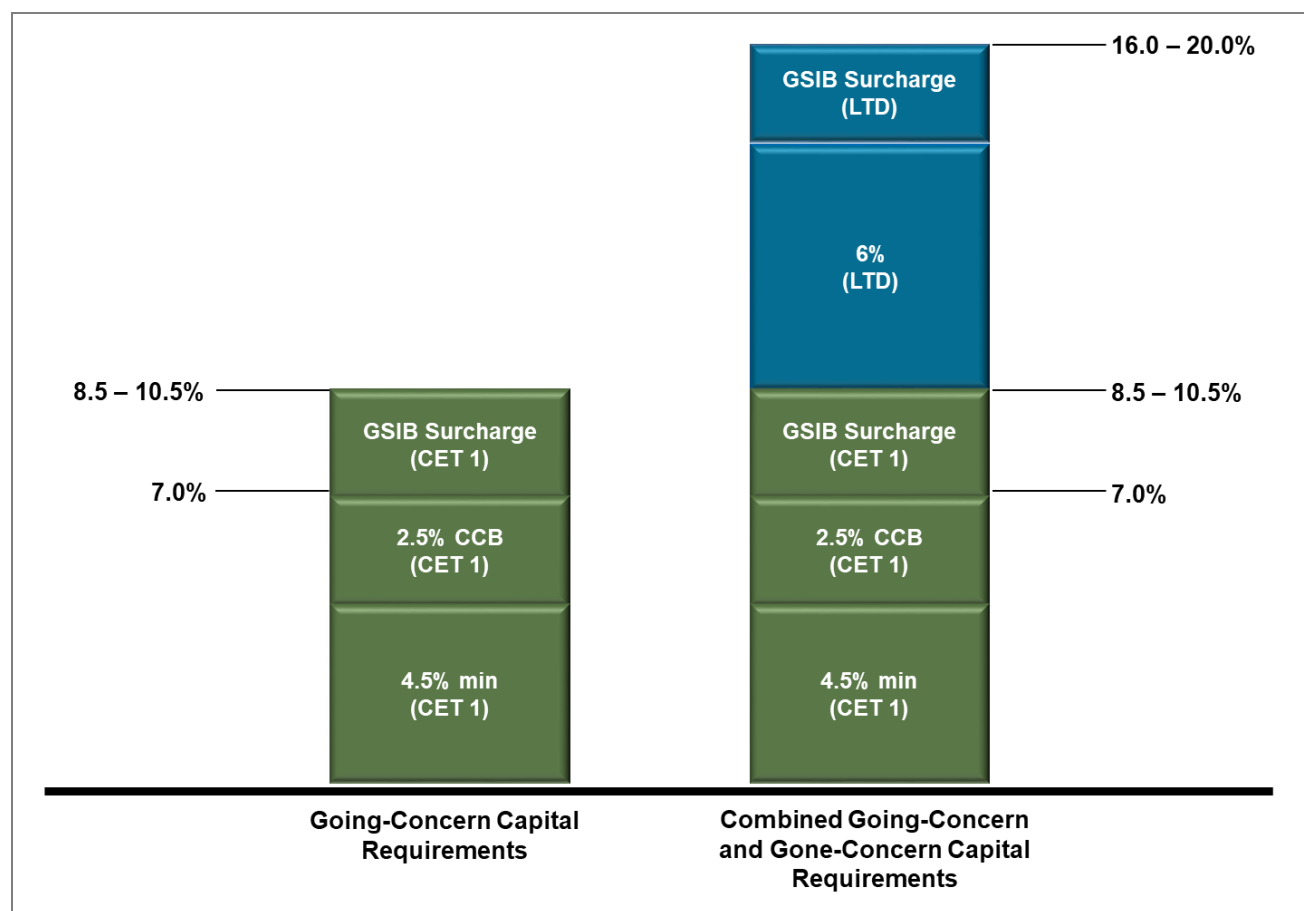
In **Appendix A**, we provide responses to each of the specific requests for public comment in the ANPR.

In **Appendix B**, we list the individuals at our organizations or advisors who should be contacted if the Agencies have any questions about this comment letter.

I. Background

TLAC consists of a banking organization's total regulatory capital on a going-concern basis (**going-concern capital**) and an extra layer of loss-absorbing capacity in the form of LTD or other gone-concern loss-absorbing capacity (**GLAC**).¹² TLAC is just another name for total capital as Michael Barr, the Board's Vice Chair for Supervision, has recognized.¹³ As shown by **Figure 3**, the Board's GSIB TLAC Rule essentially **doubled** the amount of total capital the U.S. GSIBs are required to maintain in the form of going-concern CET 1 capital plus gone-concern LTD.

Figure 3. Going-Concern CET 1 Risk-Based Capital and Gone-Concern LTD Requirements under GSIB TLAC Rule



Source: Modeled on Davis Polk Visual Memorandum, Federal Reserve's Final Rule on Total Loss-Absorbing Capacity and Eligible Long-Term Debt, Slide 18 (Jan. 11, 2017).

The qualifying elements of TLAC under the GSIB TLAC Rule are virtually identical to the qualifying elements of total regulatory capital under the Board's capital rules. Just as total regulatory capital consists of common equity tier 1 (**CET 1**), additional tier 1 (**AT1**) and qualifying

¹² GSIB TLAC Rule, *supra* note 9, at 8267. See also Michael S. Barr, *Why Bank Capital Matters*, p. 12, Remarks at the American Enterprise Institute (Dec. 1, 2022), available at <https://www.bis.org/review/r221202b.pdf>.

¹³ *Id.* at 9.

tier 2 subordinated debt (**T2 Debt**) capital,¹⁴ TLAC consists of CET 1, AT1 and eligible subordinated long-term debt capital, including most T2 Debt.¹⁵ The only material difference is that, under the GSIB TLAC Rule, TLAC is required, not merely permitted, to include a minimum amount of LTD.¹⁶ To qualify as eligible LTD, LTD must be structurally or contractually subordinated to short-term debt and certain other liabilities.¹⁷ LTD would also qualify as eligible LTD if it were subordinated by statute to short-term liabilities the way it would be with respect to domestic deposits under the depositor preference rule in the Federal Deposit Insurance Act (**FDI Act**).¹⁸

To reinforce the structural subordination of parent company debt to operating subsidiary liabilities in a typical BHC structure,¹⁹ the GSIB TLAC Rule includes clean holding company requirements. These requirements prohibit top-tier parents from issuing any external short-term debt, having certain other prohibited external liabilities, or having more than an immaterial amount of external non-TLAC debt.²⁰ As explained by former Comptroller of the Currency, John Dugan, the clean holding requirements reinforce structural subordination by requiring short-term debt and other runnable liabilities to be pushed down to the operating subsidiary level.²¹

The primary purpose of gone-concern LTD, clean holding company and other TLAC requirements is to support the feasibility of an SPOE resolution strategy for the GSIBs.²² SPOE is the preferred strategy of each of the U.S. GSIBs in their resolution plans under Section 165(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (**Dodd-Frank Act**).²³ The FDIC has indicated that SPOE is also the strategy most likely to be used by the FDIC in resolving a U.S. GSIB under Title II of the Dodd-Frank Act.²⁴

An SPOE resolution strategy is designed to fully recapitalize the IDIs and other material operating subsidiaries of a U.S. GSIB so that they can “continue normal operations, without entering resolution or taking actions (such as asset firesales) that could pose a risk to the financial stability

¹⁴ 12 C.F.R. § 217.20.

¹⁵ 12 C.F.R. § 252.63.

¹⁶ Compare 12 C.F.R. § 217.20 with 12 C.F.R. § 252.62.

¹⁷ GSIB TLAC Rule, supra note 9, at 8283-8284. See also Proposed GSIB TLAC Rule, supra note 10, at 74928.

¹⁸ 12 U.S.C. § 1821(d)(11).

¹⁹ Proposed GSIB TLAC Rule, supra note 10, at 74928.

²⁰ 12 C.F.R. § 252.64.

²¹ John C. Dugan, *Addressing the Fundamental Banking Policy Problem of Runs: Effectively Subordinating Large Amounts of Long-Term Debt to Short-Term Debt to end “Too-Big-to-Fail”*, 22 N.C. Banking Inst. 11, 31-38 (2018).

²² Proposed GSIB TLAC Rule, supra note 10, at 74928. For a graphical illustration of how SPOE works, see *Resolution of Global Systemically Important Financial Institutions Under the Bankruptcy Code*, Wharton Financial Institutions Center (December 7, 2016) (**Wharton Conference Document**), available at <https://wifpr.wharton.upenn.edu/wp-content/uploads/2022/12/Wharton-SPOE-Resolution-under-Bankruptcy-Code-12-2016-Public-Version65.pdf>.

²³ See 165(d) resolution plans, available at <https://www.fdic.gov/resources/resolutions/resolution-authority/resplans/index.html>. There are 8 U.S. GSIBs: Bank of America Corporation, The Bank of New York Mellon Corporation, Citigroup Inc., The Goldman Sachs Group, Inc., JPMorgan Chase & Co., Morgan Stanley, State Street Corporation and Wells Fargo & Company.

²⁴ FDIC, Notice and Request for Comments, *Resolution of Systemically Important Financial Institutions: The Single Point of Entry Strategy*, 78 Fed. Reg. 76614 (Dec. 18, 2013) (**SPOE Notice**). See also Joint Paper by the FDIC and the Bank of England, *Resolving Globally Active, Systemically Important, Financial Institutions* (Dec. 10, 2012) (**Joint FDIC-Bank of England Paper**).

of the United States.”²⁵ SPOE “would avoid the need for separate proceedings for separate legal entities run by separate authorities across multiple jurisdictions and the associated destabilizing complexity.”²⁶ The SPOE resolution strategy was designed to give the Agencies a reasonable alternative to the Hobson’s choice between rescuing a U.S. GSIB from failure through a taxpayer-funded bailout and risking a collapse of the U.S. financial system.²⁷

The TLAC requirements were calibrated at levels designed to “ensure that GSIBs have sufficient loss-absorbing capacity to absorb significant losses and then be recapitalized to the level necessary for them to face the market on a going-concern basis without public sector support.”²⁸ This approach is essentially a capital refill model that assumes a GSIB’s going-concern capital would be fully depleted by the time it activated its resolution plan. It is consistent with an international standard developed by the Financial Stability Board designed to ensure GSIBs – and only GSIBs – could be fully recapitalized if they ran out of going-concern capital by the time they activated their resolution plans.²⁹

The LTD requirements in the GSIB TLAC Rule were similarly calibrated “primarily on the basis of a ‘capital refill’ framework,”³⁰ assuming that a GSIB’s going-concern capital would be “significantly or completely depleted in the lead up to a bankruptcy or resolution.”³¹ Therefore, a U.S. GSIB would need to have gone-concern LTD ratios equal to their risk-based CET 1 and enhanced supplementary leverage ratio (**eSLR**) capital ratios, less a balance-sheet depletion allowance to reflect the fact that “pre-failure losses would result in a smaller balance sheet”³² That would ensure a GSIB would have sufficient gone-concern LTD at its point of nonviability that could be converted to equity to fully recapitalize its material operating subsidiaries under an SPOE strategy so that subsidiaries could “re-emerge from resolution with sufficient capital to successfully operate as a going concern”³³

II. The Agencies should not propose extending any gone-concern LTD or clean holding company requirements to us, the other non-GSIB LBOs or our IDIs.

We are all highly resilient against failure and far more resilient than we were in 2008. We are also resolvable with non-SPOE resolution strategies that provide the Agencies with sufficient optionality to resolve us without being forced to sell us to a GSIB or another non-GSIB LBO in a whole-bank transaction. Indeed, our required resolution plans include a reasonable option to separate our businesses into multiple components and sell them to multiple purchasers not limited to GSIBs or other LBOs within a reasonable period of time. The Board’s gone-concern LTD and clean holding requirements were designed to support the feasibility of the SPOE

²⁵ Proposed GSIB TLAC Rule, *supra* note 10, at 74928.

²⁶ *Id.*

²⁷ Randall D. Guynn, *Are Bailouts Inevitable?*, 29 *Yale J. Reg.* 121, 127-29 (2012).

²⁸ *Id.* at 74932.

²⁹ Financial Stability Board, *Principles of Loss-Absorbing and Recapitalisation Capacity of G-SIBs in Resolution: Total Loss-absorbing Capacity (TLAC) Term Sheet* (Nov. 9, 2015) (**GSIB TLAC International Standard**), available at <https://www.fsb.org/wp-content/uploads/TLAC-Principles-and-Term-Sheet-for-publication-final.pdf>.

³⁰ Proposed GSIB TLAC Rule, *supra* note 10, at 74932.

³¹ GSIB TLAC Rule, *supra* note 9, at 8267.

³² Proposed GSIB TLAC Rule, *supra* note 10, at 74932.

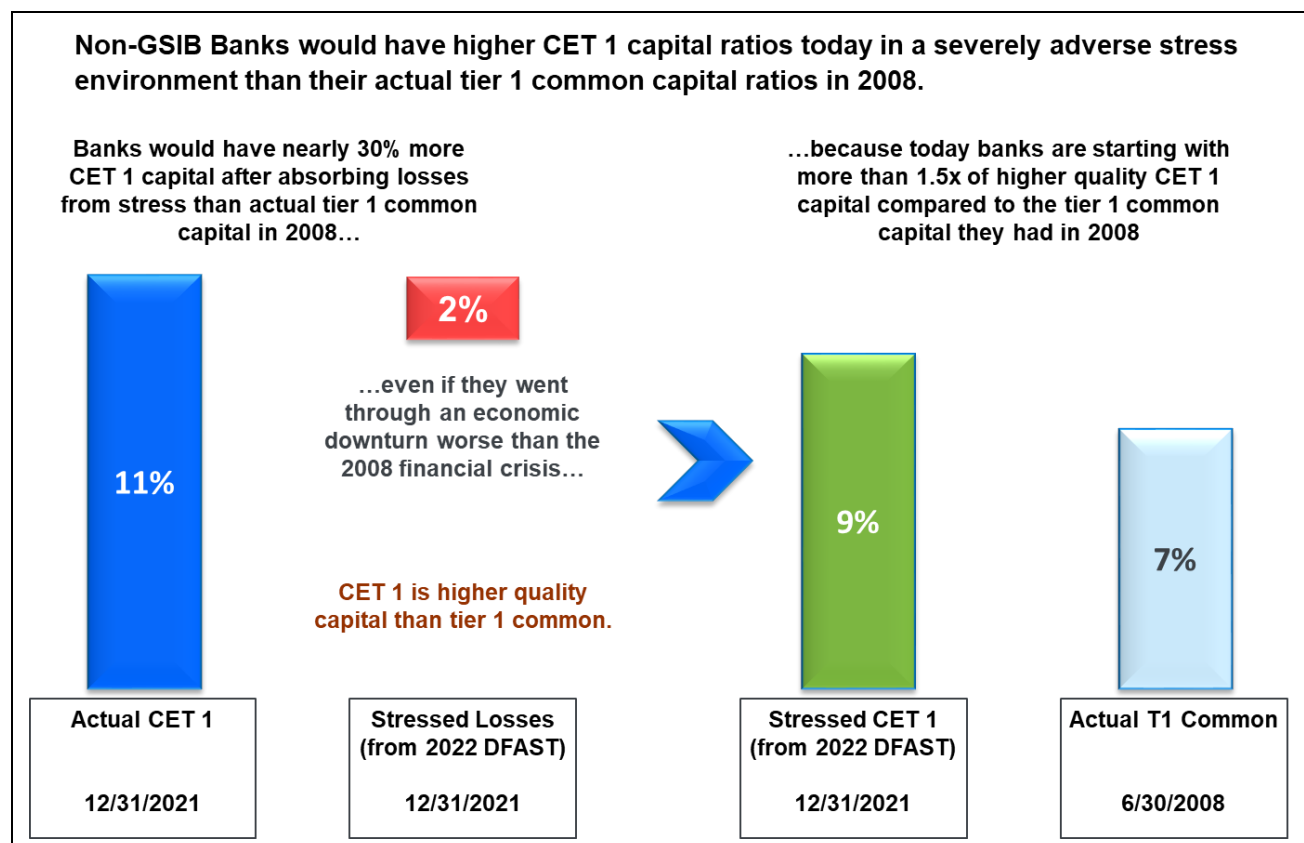
³³ *Id.*

resolution strategies of the U.S. and foreign GSIBs. Our non-SPOE resolution strategies are feasible without the need for any LTD or clean holding company requirements. Accordingly, the Agencies should not propose imposing any LTD or clean holding company requirements on us, the other non-GSIB LBOs or our IDIs.

A. We are highly resilient against failure and far more resilient than we were in 2008.

We and any other non-GSIB LBOs with a similar capital, liquidity and risk-management profile are highly resilient against failure and far more resilient than we or they were in 2008. For example, **Figure 4** shows that we had more than one and a half times as much capital at December 31, 2021 compared to what we had on the eve of the financial crisis at June 30, 2008. Moreover, the CET 1 capital we have today is a higher quality and more loss-absorbing form of capital than the tier 1 common capital present in 2008.³⁴ The figure also shows that we are likely to have 30% more CET 1 capital than necessary to meet all minimum going-concern capital requirements even after an economic event more severe than the 2008 financial crisis, based on the results of the Board’s 2022 Dodd-Frank Act Stress Testing (**DFAST**) supervisory stress test results.³⁵

Figure 4. Capital of Non-GSIB Banks – Today vs. 2008



³⁴ The tier 1 common capital measure from 2008 included common equity, subject to certain deductions and adjustments in place prior to Basel III, whereas CET 1 is subject to a more comprehensive framework of deductions and adjustments under Basel III, 12 U.S.C. § 324.20(b).

³⁵ 2022 Federal Reserve Stress Test Results, p. 17 (June 2022).

For purposes of this figure, the non-GSIB Banks refer to Capital One Financial Corporation, The PNC Financial Services Group, Inc., Truist Financial Corporation, and U.S. Bancorp. All capital ratios presented on an aggregate (weighted average) basis. Actual tier 1 common as of 6/30/2008 reflects the tier 1 ratio in effect prior to Basel III for the non-GSIB Banks, adjusted to remove non-common elements such as preferred stock and then-qualifying hybrid instruments. Stressed CET 1 as of 12/31/2021 reflects the minimum CET 1* ratio (under Basel III) under the supervisor-run severely adverse scenario, based on supervisory results of the 2022 DFAST** process, for the non-GSIB LBOs. Actual CET 1 reflects the reported CET 1 ratio for the non-GSIB Banks.

* CET 1 = Common Equity Tier 1 capital, a measurement of a bank's core equity capital, subject to adjustments and deductions under Basel III

** DFAST = Dodd-Frank Act Stress Testing

Sources: S&P Capital IQ Pro; 2022 Federal Reserve Stress Test Results

Our key individual going-concern capital ratios, as compared to the minimum requirements, are shown in **Figure 5**.

Figure 5. Individual Going-Concern Capital Ratios of the Non-GSIB Banks

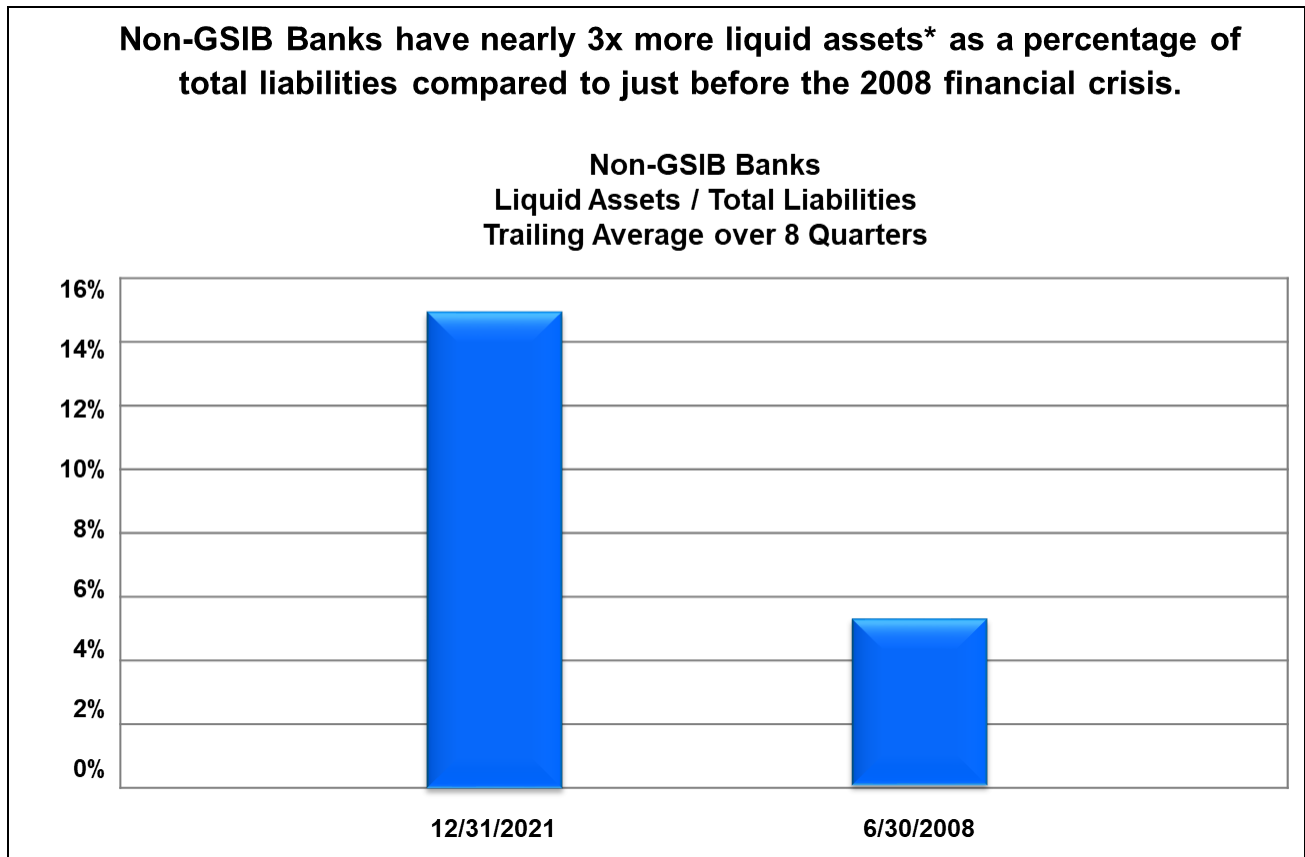
Non-GSIB Banks	Total Risk-Based Capital Ratios	CET 1 Risk-Based Capital Ratios	Supplementary Leverage Ratios
	(At September 30, 2022)		
Minimum Requirements for BHCs⁽¹⁾	8.0%	4.5%	3.0%
Capital One	15.7%	12.2%	9.4%
Charles Schwab	28.3%	21.2%	6.8%
PNC	12.9%	9.3%	7.3%
Truist	12.6%	9.1%	7.3%
U.S. Bancorp	13.3%	9.7%	7.1%

(1) See 12 C.F.R. § 217.10(a).

Sources: Quarterly Reports on Form 10-Q of the non-GSIB Banks (Sept. 30, 2022); Quarterly Reports on Form FR-Y9C of the non-GSIB Banks (Sept. 30, 2022).

Similarly, as shown in **Figure 6**, we now have nearly three times the amount of liquid assets as a percentage of total liabilities compared to what we had on the eve of the financial crisis at June 30, 2008. We also have more than twice the amount of liquid assets as a percentage of total deposits compared to 2008.

Figure 6. Liquid Assets of Non-GSIB Banks – Today vs. 2008



* Because of the lack of historical data on HQLAs, this graphic is based on reported financial data for “liquid assets,” which we define as cash and balances due from banks (including Federal Reserve banks) and U.S. Treasury, Agencies and GSE debt securities (held to maturity measured at amortized cost, and available for sale measured at fair value). This definition roughly corresponds to Level 1 and Level 2A liquid assets in the LCR rule, except that we exclude non-U.S. government debt securities and include vault cash and balances due from commercial banks. We do not include any Level 2B liquid assets, which consist of certain corporate debt and equity securities and municipal debt securities and are generally included in HQLAs at 50% of fair value. Liquidity ratios reflect the weighted average for Capital One, PNC, Truist and U.S. Bancorp.

Sources: S&P Capital IQ Pro; Regulatory Filings

Our key individual liquidity metrics are shown on **Figure 7**.

Figure 7. Individual Liquidity Figures for the non-GSIB Banks

Non-GSIB Banks	HQLAs ⁽¹⁾ (in billions)	LCR	HQLAs as a percentage of			
			Total Assets	Total Liabilities	Total Deposits	Uninsured Deposits
(At September 30, 2022)						
Capital One	\$51	139%	11.5%	13.0%	16.2%	29.9%
Charles Schwab	\$112	118%	19.3%	20.7%	28.2%	131.7%
PNC	\$95	109%	17.0%	18.6%	21.7%	47.2%
Truist	\$89	111%	16.2%	18.4%	21.1%	47.6%
U.S. Bancorp	\$142	121%	23.6%	25.6%	30.1%	63.5%

(1) As defined in 12 C.F.R. § 249.20, which includes central bank reserves, U.S. Treasury securities, U.S. agencies securities guaranteed by the full faith and credit of the United States, and certain foreign government and international organization debt securities.

Sources: Quarterly Reports on Form 10-Q of the non-GSIB Banks (Sept. 30, 2022); Quarterly Reports on Form FR-Y9C of the non-GSIB Banks (Sept. 30, 2022); Call Reports of the IDI subsidiaries of the non-GSIB Banks (Sept. 30, 2022); Basel Pillar III and LCR Disclosures of the non-GSIB Banks (Sept. 30, 2022).

As shown in **Figure 8**, we and the other non-GSIB LBOs are also subject to substantially higher and more comprehensive prudential standards and enhanced supervisory oversight compared to 2008.

Taken together, these requirements make us and the other non-GSIB LBOs highly resilient against failure and more resilient than we were 2008. We are deeply committed to maintaining our high degree of resiliency against failure, and believe most if not all of the other non-GSIB LBOs are as well.

Figure 8. Enhanced Regulatory Requirements Post Financial Crisis

Requirements for Category III Banking Organizations	
Recovery and Resolution	Section 165(d) and/or IDI Resolution Plans Recovery Plans
Capital	Countercyclical Capital Buffer (if deployed) Supplemental Leverage Ratio (3%) Supervisory Stress Testing Capital Planning (CCAR) CET 1 Capital Ratios (including adjustments/deductions from CET 1 Capital) Stress Capital Buffer (SCB) / Capital Conservation Buffer Company-Run Stress Testing
Liquidity	Liquidity Coverage Ratio Net Stable Funding Ratio Internal Liquidity Stress Testing / Liquidity Buffer Liquidity Risk Management Liquidity Reporting (FR 2052a)
Risk Management	Volcker Rule Risk Committee and Other Governance Requirements Single Counterparty Credit Limits FDIC Recordkeeping Rule

Source: Modeled on figure in Michael S. Barr, Howell E. Jackson & Margaret E. Tahyar, *Financial Regulation: Law and Policy*, p. 787 (3d ed. 2021).

The COVID-19 pandemic provided a real-world test of our resiliency. During this period, we were able to support the government’s efforts to preserve financial stability by serving as a source of strength for the U.S. financial system and wider economy. Furthermore, the Section 165(d) targeted resolution plans submitted in 2021 addressed the impact of the COVID-19 pandemic on resolvability. As American businesses scrambled to raise cash at the outset of the pandemic, banks increased commercial and industrial loans by \$482 billion between March 11 and April 1, 2020—that is, by 6% per week, or 50 times the weekly average over the past 45 years.³⁶ The unprecedented increase in loans was “based on existing capital levels and [the banks] raised no safety and soundness concerns.”³⁷

³⁶ Lei Li, Philip E. Strahan & Song Zhang, *Banks as Lenders of First Resort: Evidence from the COVID-19 Crisis*, p. 2, NBER Working Paper 27256 (May 2020), available at https://www.nber.org/system/files/working_papers/w27256/w27256.pdf.

³⁷ Greg Baer & Francisco Covas, *As U.S. Regulators Implement the 2017 Basel Accord, It’s Time for a Reality-Based Assessment of Current Capital Levels*, Bank Policy Institute (Nov. 10, 2022), available at <https://bpi.com/as-u-s-regulators-implement-the-2017-basel-accord-its-time-for-a-reality-based-assessment-of-current-capital-levels/>.

This is in sharp contrast to the large banking organizations that failed during the 2008 financial crisis, and that some policymakers suggest support implementation of an LTD requirement for non-GSIB LBOs. The three largest and most problematic failures in 2008 were the failures of Wachovia, Washington Mutual (**WaMu**), and IndyMac. Wachovia, with \$812 billion in assets, was acquired by Wells Fargo without any government support,³⁸ after the FDIC and the U.S. Treasury had initially agreed to provide government capital and liquidity support to facilitate an assisted sale of Wachovia to Citigroup.³⁹ WaMu, with \$307 billion in assets, was closed and initially placed into an FDIC receivership by the Office of Thrift Supervision (**OTS**), before the FDIC sold WaMu in a whole-bank transaction to JPMorgan Chase, without any loss to the DIF.⁴⁰ IndyMac, with \$32 billion in assets, was initially closed and placed into an FDIC receivership by the OTS. Substantially all of IndyMac's assets and its non-brokered insured deposits were then transferred to a bridge bank and the bridge bank was placed into conservatorship. The FDIC operated the bridge bank as conservator for about eight months, before selling IndyMac's business to One West Bank at a substantial loss to the DIF.⁴¹

We and the rest of the non-GSIB LBOs are far more resilient against failure than Wachovia, WaMu and IndyMac were in 2008 for two reasons. First, we have significantly more and higher quality capital than those banking organizations had in 2008, as illustrated by **Figure 9**.

Second, the regulatory framework is substantially stronger now than it was in 2008—we and the other non-GSIB LBOs are required to comply with higher prudential standards than any of those banking organizations in 2008, as shown in **Figure 8** above. The enhanced capital, liquidity and prudential requirements discussed above mean that we are far less likely to fail than the large banking organizations that failed in 2008. Finally, we have more diversified business models than Wachovia, WaMu or IndyMac, which all had significant concentrations in mortgage lending.

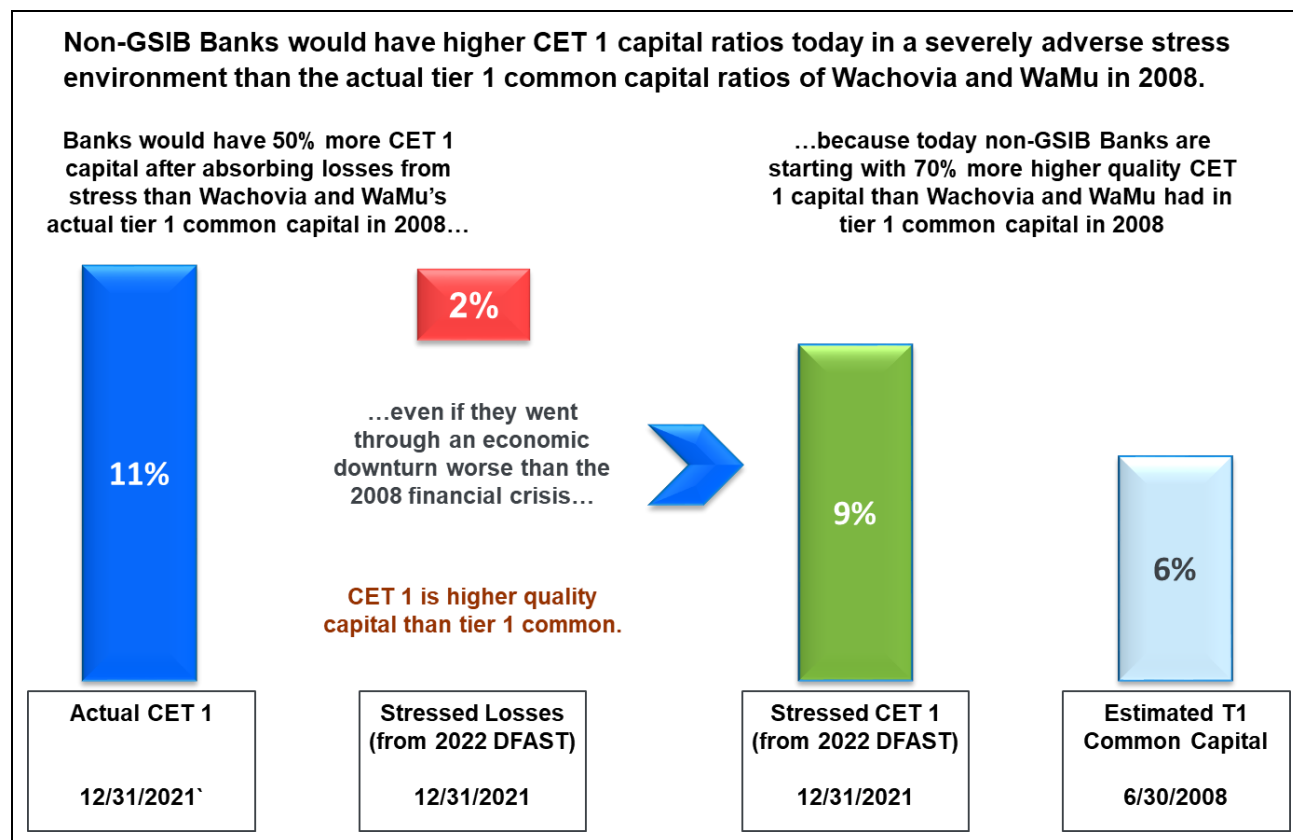
³⁸ Wells Fargo Press Release (Oct. 3, 2008), available at <https://www.bizjournals.com/charlotte/stories/2008/09/29/daily57.html>.

³⁹ Citigroup Press Release (Sept. 29, 2008), available at <https://www.citigroup.com/citi/news/2008/080929a.htm>. See also *The Acquisition of Wachovia Corporation by Wells Fargo & Company: Hearing before the Financial Crisis Inquiry Commission*, Washington, D.C., 111th Cong. (September 1, 2010) (Statement of Scott G. Alvarez, Board General Counsel), available at <https://www.federalreserve.gov/newsevents/testimony/alvarez20100901a.htm>; National Commission on the Causes of the Financial and Economic Crisis in the United States, *THE FINANCIAL CRISIS INQUIRY REPORT*, p. 369 (2011).

⁴⁰ FDIC, Status of Washington Mutual Bank Receivership (last updated 10/23/2020), available at: <https://www.fdic.gov/resources/resolutions/bank-failures/failed-bank-list/wamu-settlement.html>.

⁴¹ FDIC, Failed Bank Information for IndyMac (last updated 9/10/2020), available at <https://www.fdic.gov/resources/resolutions/bank-failures/failed-bank-list/indymac.html>. See also John F. Bovenzi, IndyMac, in *INSIDE THE FDIC: THIRTY YEARS OF BANK FAILURES, BAILOUTS, AND REGULATORY BATTLES*, pp.1-20 (2015) (Bovenzi, the Chief Operating Officer of the FDIC, served as chairman of the board of directors of IndyMac while it was in the FDIC conservatorship).

Figure 9. Wachovia and WaMu in 2008 vs. non-GSIB Banks Today



For purposes of this figure, the tier 1 common figures in 2008 are for Wachovia and WaMu at June 30, 2008. The CET 1 and stressed losses in 2021 and 2022 are for the non-GSIB Banks, which for purposes of this table are Capital One Financial Corporation, The PNC Financial Services Group, Inc., Truist Financial Corporation, and U.S. Bancorp. All capital ratios presented on an aggregate (weighted average) basis. Estimated tier 1 common as of 6/30/2008 reflects the tier 1 ratio in effect prior to Basel III for Wachovia and WaMu, adjusted to deduct preferred stock, trust preferred securities and other non-common stock instruments that were included in Tier 1 capital prior to Basel III. Stressed CET 1 as of 12/31/2021 reflects the minimum CET 1* ratio (under Basel III) under the supervisor-run severely adverse scenario, based on supervisory results of the 2022 DFAST** process, for the non-GSIB Banks. Actual CET 1 reflects the reported CET 1 ratio for the non-GSIB Banks.

* CET 1 = Common Equity Tier 1 capital, a measurement of a bank's core equity capital, subject to adjustments and deductions under Basel III

** DFAST = Dodd-Frank Act Stress Testing

Sources: S&P Capital IQ Pro; 2022 Federal Reserve Stress Test Results

B. We are resolvable with non-SPOE resolution strategies that provide the Agencies with sufficient optionality to resolve us without being forced to do so by selling us to a GSIB or another non-GSIB LBO in a whole-bank transaction.

In the unlikely event that we were to fail despite our increased resiliency against failure, we are resolvable with non-SPOE resolution strategies. These strategies provide the Agencies with sufficient optionality to resolve us without being forced to do so by selling us to a GSIB or another non-GSIB LBO in a whole-bank transaction.⁴² We and the other non-GSIB LBOs have submitted

⁴² The Agencies indicated in the preamble to the ANPR that their principal concern was to have a reasonable option for resolving non-GSIB LBOs other than being forced to sell them to a GSIB or another non-GSIB LBO. See

resolution plans for our IDIs pursuant to a regulation issued by the FDIC.⁴³ Our plans are all designed to be credible and provide the FDIC with sufficient optionality to resolve our IDIs under the FDI Act, without any extraordinary government support, loss to the DIF or material disruption to U.S. financial stability. Our plans can be executed successfully without any extra layer of gone-concern LTD.⁴⁴ The FDIC has not rejected any of our IDI plans as not credible or unable to facilitate an orderly resolution under the FDI Act.

We have also submitted resolution plans under Section 165(d) of the Dodd-Frank Act, where required. These resolution plans are similarly designed to be credible and facilitate the orderly resolution of our organizations, subsidiary IDIs and other material operating subsidiaries (if any) under the Bankruptcy Code, FDI Act or the Security Investor Protection Act (**SIPA**), without any loss to the DIF or material adverse effect on U.S. financial stability. They can be executed successfully without any extra layer of capital in the form of gone-concern LTD or other GLAC, extraordinary government support, loss to the DIF or material adverse effect on U.S. financial stability. The Board and the FDIC have not rejected any of our plans as not credible or unable to facilitate our orderly resolution under the Bankruptcy Code.

In addition, our required resolution plans all include a reasonable option to resolve us by separating our businesses into multiple components and selling those components to multiple purchasers not limited to GSIBs or other LBOs within a reasonable period of time. In our required recovery plans, we have governance mechanisms that trigger recovery actions before our going-concern capital would be significantly depleted, and our required resolution plans would be activated if our recovery plans were unsuccessful. Furthermore, we maintain forward-looking stressed measures for both capital (i.e., the stress capital buffer) and liquidity (i.e., the LCR and internal liquidity stress testing), and associated governance mechanisms in our capital policies that would trigger recovery and/or resolution actions before our going-concern capital would be significantly depleted. Finally, we have all conducted analyses of the universe of potential acquirers for these objects of sale, as well as identifying and mitigating potential obstacles to such sales.

For example, in its 2021 resolution plan under Section 165(d), Capital One stated that in addition to whole bank sales, its resolution strategy considers “alternate strategies such as the sale of the

ANPR, supra note 2, at 64171, 64172 (“During the global financial crisis, there were limited and undesirable options available to the FDIC for resolving the largest failed IDIs including disruptive and costly liquidation strategies or the sale of large banks to even larger financial institutions. . . . [We need] optionality for resolving large IDIs across a range of scenarios in a manner that is least costly to the DIF without resorting to the sale of the firm being resolved to another large banking organization or GSIB.”) See also Michael J.Hsu, Acting Comptroller of the Currency, Financial Stability and Large Bank Resolvability, Remarks at Wharton Financial Regulation Conference (April 1, 2022) (“In other words, if a large regional bank were to fail today, the only viable option would be to sell it to one of the GSIBs. This is precisely what happened in 2008 when the FDIC resolved the failed Washington Mutual Bank, with approximately \$300 billion in assets, through a P&A transaction with JPMorgan Chase & Co.”).

⁴³ 12 CFR § 360.10.

⁴⁴ Regulators already can take action without having to wait for going-concern capital to run out. An IDI’s chartering authority or the FDIC has the statutory authority to put the IDI into receivership without waiting for the IDI to run out of going-concern capital based on the authority to put an IDI into receivership if it is in an unsafe or unsound condition to transact business. 12 U.S.C. § 1821(c)(5)(C).

Banks' businesses to multiple acquirers."⁴⁵ Charles Schwab similarly describes the availability of a multiple acquirer strategy.⁴⁶ PNC states that its resolution plan provides for "a strategic sale of the franchise through a series of strategic sales of markets, national lines of business and loan portfolios. Potential third-party purchasers of PNC Bank, or a geographic portion of its business, from a bridge bank would include a range of global, national or regional financial institutions."⁴⁷ Truist states that "[t]he options for the sale and disposition of Truist Bank include strategies to . . . segment Truist Bank into discrete parts and sell those parts in multiple transactions"⁴⁸ Finally, U.S. Bancorp describes the availability of a multiple acquirer resolution strategy which "provides options for business unit component sales dependent on pricing and available buyers, which includes domestic and foreign financial institutions and other competitors of the business unit components that have the ability for a successful conversion."⁴⁹

These options, which have been developed over the past decade since the post-crisis resolution planning requirements were enacted, should already provide the Agencies with the type of optionality the ANPR says they need.⁵⁰

Our required resolution plans also include a reasonable option for all or most of our uninsured deposits to be assumed by these purchasers. Although both insured and uninsured deposits spiked during the COVID-19 pandemic, uninsured deposits have declined for three straight quarters in 2022, offset in part by a continued rise in insured deposits, as recently noted by then FDIC Acting Chair Martin Gruenberg.⁵¹ Below is **Chart 10** from his remarks, illustrating the spike in both insured and uninsured deposits during the pandemic and the decline in uninsured deposits during 2022 offset in part by a continued rise in insured deposits.

⁴⁵ Capital One Financial Corporation 2021 Resolution Plan: Public Section, pp. 14-15.

⁴⁶ Charles Schwab Bank 2018 Resolution Plan: Public Section, p. 11.

⁴⁷ The PNC Financial Services Group, Inc. 2021 Resolution Plan: Public Executive Summary, p. 27.

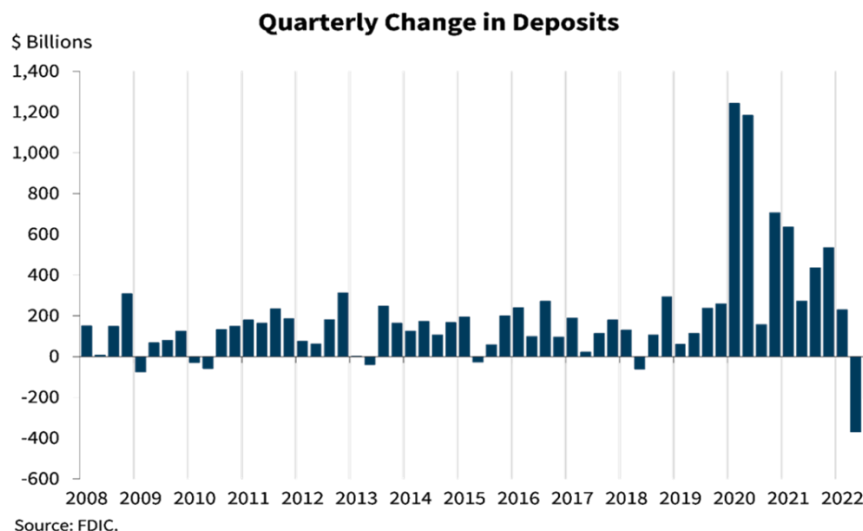
⁴⁸ Truist Financial Corporation 2021 Resolution Plan: Public Executive Summary, p. 35.

⁴⁹ U.S. Bancorp 2021 Resolution Plan: Public Section, p. 6.

⁵⁰ See supra note 42.

⁵¹ Remarks of FDIC Acting Chairman Martin Gruenberg on Third Quarter 2022 Quarterly Banking Profile (Dec. 1, 2022), available at <https://www.fdic.gov/news/speeches/2022/spdec0122.html>.

Chart 10:



Our resolvability is in sharp contrast to the situation in 2008. None of the firms that failed in 2008 were required to maintain formal and actionable resolution plans for their IDIs or other material entities in the event of failure. The FDIC was unable to rapidly separate their businesses into multiple components and sell them to multiple purchasers not limited to GSIBs or other LBOs. Instead, the FDIC was forced to sell them in whole-bank transactions to GSIBs and at a substantial loss.⁵²

C. The Board's LTD, TLAC and clean holding company requirements were designed to support the feasibility of the SPOE resolution strategy, which is the only strategy that allows the U.S. GSIBs to be resolved without government bailouts or a substantial risk to U.S. financial stability.

The Board's LTD and other TLAC requirements were designed to support the feasibility of the SPOE resolution strategy, which is the only strategy that allows a U.S. GSIB to be resolved without government bailouts or a substantial risk to U.S. financial stability.

The Board's LTD and other TLAC requirements were designed to support the feasibility of the SPOE resolution strategy for the U.S. GSIBs. The SPOE strategy was designed to keep a U.S. GSIB's market-critical operations and cross-border material subsidiaries out of multiple, competing bankruptcy or other resolution proceedings in the U.S. and foreign jurisdictions.⁵³ It was also designed to resolve the U.S. GSIBs and their IDIs without any material adverse effect on U.S. financial stability given their systemic footprint, as evidenced by their GSIB scores.

⁵² Plaintiff's Consolidated Response to Motion to Dismiss, *Washington Mutual v. FDIC*, No. 1:09-cv-00533 (D.D.C. July 16, 2009) (alleging that the FDIC sold WaMu for a price substantially less than its fair value to JPMorgan Chase).

⁵³ Proposed TLAC Rule, *supra* note 10, at 74928.

The SPOE resolution strategy was originally designed to be implemented by the FDIC under its Orderly Liquidation Authority (**OLA**) created by Title II of the Dodd-Frank Act.⁵⁴ It was then adapted to be used under the Bankruptcy Code.⁵⁵ It is widely recognized as the only current strategy that allows U.S. and non-U.S. GSIBs to be resolved without the need for government bailouts or undue risk to the U.S. or global financial systems.⁵⁶ Under SPOE, the top-tier parent of a U.S. GSIB recapitalizes its systemically important and cross-border operating subsidiaries by contributing certain financial assets to the operating subsidiaries before the parent enters a bankruptcy or other resolution proceeding. An SPOE strategy keeps the material operating subsidiaries of a U.S. GSIB out of competing bankruptcy or other resolution proceedings in the U.S. and foreign jurisdictions, with only the top-tier parent entering a bankruptcy or other resolution proceeding. The gone-concern LTD and other TLAC requirements provide the loss-absorbing capacity necessary to recapitalize these subsidiaries and allow them to continue operating as going concerns, thereby avoiding individual resolution proceedings (including jurisdictional ringfencing) and the resulting disruptions to critical functions and other negative impacts on financial stability.⁵⁷

D. We and the other non-GSIB LBOs can be resolved with non-SPOE resolution strategies that are feasible without the need for any LTD or clean holding company requirements.

We and the other non-GSIB LBOs are far simpler than the U.S. GSIBs. We do not have material cross-border operations and do not perform the sort of market-critical functions that the U.S. GSIBs do.⁵⁸ We and any other non-GSIB LBO with similar characteristics do not need an SPOE resolution strategy to preserve the uninterrupted operation of such critical functions or to avoid multiple competing insolvency proceedings in multiple countries affecting material subsidiaries. We can be resolved without a loss to the DIF or a material adverse effect on U.S. financial stability using our current non-SPOE resolution strategies. Unlike the U.S. GSIBs, our non-SPOE strategies do not depend on an extra layer of gone-concern LTD or clean holding company

⁵⁴ SPOE Notice, *supra* note 24.

⁵⁵ See John F. Bovenzi, Randall D. Guynn & Thomas H. Jackson, *Too Big to Fail: The Path to a Solution*, A Report of the Failure Resolution Task Force of the Financial Regulatory Reform Initiative of the Bipartisan Policy Center (May 2013); Thomas H. Jackson, *Building on Bankruptcy: A Revised Chapter 14 Proposal for the Recapitalization, Reorganization, or Liquidation of Large Financial Institutions*, in MAKING FAILURE FEASIBLE: HOW BANKRUPTCY REFORM CAN END “TO BIG TO FAIL,” (Kenneth E. Scott, Thomas H. Jackson & John B. Taylor, eds. 2015); Donald S. Bernstein, *Averting the Next Financial Crisis: Recapitalizing the Failing SIFI*, 2017 New York City Bankruptcy Conference, American Bankruptcy Institute (May 18, 2017).

⁵⁶ See, e.g., Randall D. Guynn, *Framing the TBTF Problem: The Path to a Solution*, in ACROSS THE DIVIDE: NEW PERSPECTIVES ON THE FINANCIAL CRISIS, pp. 282-291 (Martin Neil Baily & John B. Taylor, eds. 2014).

⁵⁷ E.g., Financial Stability Board, Principles on Loss-absorbing and Recapitalisation Capacity of G-SIBs in Resolution, p. 5 (Nov. 9, 2015) (“There must be sufficient loss-absorbing and recapitalisation capacity available in resolution to implement an orderly resolution that minimises any impact on financial stability, ensures the continuity of critical functions, and avoids exposing taxpayers (that is, public funds) to loss with a high degree of confidence. This is the main guiding principle from which the other principles flow. Instruments or liabilities that are not eligible as TLAC will still be subject to potential exposure to loss in resolution, in accordance with the applicable resolution law.”).

⁵⁸ See, e.g., Financial Stability Board, Recovery and Resolution Planning for Systemically Important Financial Institutions: Guidance on Identification of Critical Functions and Critical Shared Services (July 16, 2013).

requirements to make them feasible. And unlike the U.S. GSIBs, our failure or that of any similarly situated non-GSIB LBO would not threaten U.S. financial stability.

These critical differences between us and similarly situated non-GSIB LBOs, on the one hand, and the U.S. GSIBs, on the other, are illustrated by the chasm between the Method 1 GSIB scores of the U.S. GSIBs, our GSIB scores and those of the other non-GSIB LBOs, including Category IV banking organizations. As shown in **Figure 2** above, the U.S. GSIBs had Method 1 scores ranging from 146 to 436 at December 31, 2021. Our highest Method 1 GSIB score was only 58 at the same date. That is less than half the 130-point threshold that divides GSIBs from non-GSIBs.⁵⁹ Indeed, as shown in **Figure 2** above, our Method 1 GSIB scores are much closer to those of the Category IV banking organizations than to those of the U.S. GSIBs. Category IV firms are not currently the primary focus of the ANPR,⁶⁰ although we understand that the ANPR could be extended to them.⁶¹

Furthermore, as shown in **Figure 1** above, a comparison of material entities demonstrates that we are far simpler and more domestic than the U.S. GSIBs—i.e., we have far fewer material entities and no foreign material entities. The same is true for all but two of the other non-GSIB LBOs.

We are, therefore, already resolvable (with optionality) without any loss to the DIF or a material adverse effect on U.S. financial stability. Accordingly, a gone-concern LTD or other GLAC requirement is neither necessary nor justified for us or any similarly situated non-GSIB LBO to execute our resolution strategies.⁶²

E. Accordingly, there is no need to extend any LTD or clean holding company requirements to us or the other non-GSIB LBOs.

Accordingly, there is no need to extend any LTD or clean holding company requirements to us or any similarly situated non-GSIB LBO since our resolution plans include a reasonable option to separate our businesses into multiple components and sell them to multiple purchasers not limited to GSIBs or other LBOs within a reasonable period of time. They are also designed to

⁵⁹ 12 C.F.R. § 217.402.

⁶⁰ ANPR, *supra* note 2, at 64171 note 4 (Category II and Category III firms are the focus of the ANPR).

⁶¹ See Statement, *infra* note 80.

⁶² These concerns were echoed by Senator Pat Toomey in a recent oversight hearing before the Senate Banking, Housing and Urban Affairs Committee: “Federal banking regulators have also been preoccupied with establishing new rules, the need for which are, in some cases, dubious. For example, last month the Fed and the FDIC proposed potential new requirements concerning the resolvability of regional banks. This proposal is predicated on the assumption that the only realistic option to resolve a large regional bank would be to sell it to an even larger bank. It’s not at all clear that that assumption is warranted or that new requirements are appropriate for regional banks for at least two reasons. First, the Fed and the FDIC have approved regional bank resolution plans for nearly a decade. And nowhere do those plans contemplate wholesale acquisition by larger banks. Second, large regional banks have roughly doubled their most loss-absorbing capital since the financial crisis. This dramatically improves their resiliency and dramatically decreases the likelihood that they would need to be resolved. Some regulators seem to hold the misguided view that the benefits of new requirements always outweigh the costs. But we know that regulation isn’t without cost. As regulation increases, financial activities will continue to migrate out of the banking system.” Opening Statement of Ranking Member Pat Toomey (R-Pa.), *Oversight of Financial Regulators: A Strong Banking and Credit Union System for Main Street*, pp. 2-3 (Nov. 15, 2022), available at <https://www.banking.senate.gov/imo/media/doc/Toomey%20Statement%2011-15-226.pdf>.

result in the purchasers assuming most or all of our uninsured deposit liabilities, along with insured deposits. Timely sales of such components to healthy, third-party purchasers, where most all of our uninsured deposit liabilities would be assumed by such buyers, should mitigate any material risk of runs by uninsured depositors or contagion throughout the U.S. financial system, without the need for a whole-bank sale to another banking organization.

Extending the GSIB TLAC Rule to us or any similarly situated non-GSIB LBO is also unnecessary to foster market discipline. Under our required resolution plans, we and our shareholders would internalize the full cost of any potential failures. Market discipline would only be undermined if some of the costs of failure were externalized, such as imposing them as externalities on taxpayers through taxpayer-funded bailouts, which is not the case under our resolution plans.

III. If, despite the strong arguments in Parts II and IV for not doing so, the Agencies decide to propose extending any LTD or clean holding company requirements to us, the other non-GSIB LBOs or our IDIs, the Agencies should comply with the following principles.

A. *The Agencies should proceed slowly and carefully and take into account forthcoming regulatory actions.*

If, notwithstanding the reasons given in Parts II and IV above, the Agencies decide to propose an extra layer of gone-concern LTD or clean holding company requirements on us or the other non-GSIB LBOs, the Agencies should proceed slowly and carefully and take into account forthcoming regulatory actions before doing so.

First, the Agencies should consider the forthcoming Basel III endgame rules⁶³ and associated impact of any changes on minimum going-concern capital levels. In a speech at the American Enterprise Institute in December 2021, then Board Vice Chair for Supervision Randal Quarles stated that “implementing the remaining elements of Basel III could result in a material increase in capital levels, perhaps up to 20 percent for our largest holding companies.”⁶⁴ He went on to state, however, that “[e]ndlessly increasing capital levels is not costless. . . . What policymakers will need to do as they implement the Basel III reforms is determine whether adjustments to other parts of the capital framework are necessary to ensure that we do not unduly increase the level of required capital in the system.”⁶⁵ Proposing a regulation that could effectively double our total capital requirements in the form of an extra layer of gone-concern LTD would further increase the direct and indirect costs of the overall package of increased capital requirements.

Second, the Agencies have also announced their intention to propose and adopt resolution planning guidance for certain Category II and III firms.⁶⁶ According to the 2022 Template Letter

⁶³ The Board, OCC and FDIC announced that they will revise the U.S. regulatory capital requirements to align them with the regulatory capital standards finalized by the Basel Committee on Banking Supervision (**BCBS**) in December 2017 (the **Basel III endgame rules**). See Press Release, *Agencies Reaffirm Commitment to Basel III Standards* (September 9, 2022).

⁶⁴ Speech by Randal K. Quarles, Board Vice Chair for Supervision, *Between the Hither and the Farther Shore: Thoughts on Unfinished Business*, American Enterprise Institute, Washington, D.C., (December 2, 2021).

⁶⁵ *Id.*

⁶⁶ See Board, *Agencies announce results of resolution plan review for certain domestic and foreign banks* (December 16, 2022), including Template Letter to Category II and III Firms with Resolution Plans Due in December

for Category II and III firms, that guidance “may include . . . providing one or more options for exit from a bridge depository institution, applying certain criteria; and calculating liquidity needs in resolution and analyzing how those needs would be met.”⁶⁷ These are topics relevant to determining the appropriateness, necessity and calibration of any gone-concern LTD or clean holding company requirements.

We and the other non-GSIB LBOs cannot effectively comment on a notice of proposed rulemaking related to an extra layer of gone-concern LTD or clean holding company requirements, without knowing what changes will be made to the capital framework under the Basel III endgame rules or what this forthcoming resolution planning guidance will say. Therefore, the Agencies should not propose any such gone-concern LTD requirements until they have proposed and finalized any Basel III endgame amendments and any such resolution planning guidance through a notice and comment process.

B. The Agencies should provide optionality in how any LTD requirement can be satisfied.

To the extent that the Agencies propose any additional layer of gone-concern LTD for us and the other non-GSIB LBOs, the Agencies should provide us and the other non-GSIB LBOs with several options to satisfy any such requirement.

BHC or Material Operating Subsidiary Level

First, because we and most other non-GSIB LBOs have significantly fewer domestic or foreign material operating subsidiaries than the U.S. GSIBs, as shown by **Figure 1** above, the Agencies should give us and any similarly situated non-GSIB LBOs the option to satisfy any gone-concern LTD requirements at either our top-tier parent level or the level of our IDIs or other material operating subsidiaries. This optionality makes sense because, unlike the U.S. GSIBs, our non-SPOE resolution strategies do not contemplate using parent company resources to fully recapitalize our material operating subsidiaries and keeping them open and operating, and outside their own resolution proceeding.

External or Internal Debt

Second, the Agencies should give non-GSIB LBOs the option to satisfy any extra layer of gone-concern LTD requirement at the IDI or other material operating subsidiary level with either external or internal debt. This would be similar to the optionality provided to resolution covered IHCs of foreign GSIBs under the Board’s TLAC rule.⁶⁸ If we or another non-GSIB LBO elects to satisfy any gone-concern LTD or other TLAC requirement at the IDI level with internal debt, we

2021 (**2022 Template Letter**), available at <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20221216b.htm>; Board, *Agencies announce forthcoming resolution plan guidance for large banks and deliver feedback on resolution plan of Truist Financial Corporation* (September 30, 2022), available at: <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20220930a.htm>.

⁶⁷ 2022 Template Letter, *supra* note 66, at p. 4.

⁶⁸ See GSIB TLAC Rule, *supra* note 9, at 8270, 8294; 12 C.F.R. § 252.161 (definitions of “Eligible Covered IHC debt security”, “Eligible internal debt security” and “Eligible external debt security”).

should also have the option of satisfying that requirement with internal debt of any maturity, including debt that is due on demand. This option could be conditioned on us or any other non-GSIB LBO entering into a secured support agreement pursuant to which we would pledge our receivables to secure an obligation to provide capital support to our IDI or other material operating subsidiaries if our required resolution plans were activated.

Either LTD or Additional Equity

Third, the Agencies should give us and the other non-GSIB LBOs the option to satisfy any additional layer of gone-concern LTD requirement by substituting an equivalent amount of CET 1 or AT1 equity capital for any required gone-concern LTD. It is counterintuitive to force us or the other non-GSIB LBOs to take on more leverage in order to improve resolvability, as long as we clearly distinguish between our equity that functions as going-concern capital and any equity that we would treat as gone-concern capital. Giving non-GSIB LBOs the option to satisfy any gone-concern LTD requirement with additional CET 1 or AT1 equity capital would be more consistent with the total regulatory capital requirements, which permit, but do not require, banks to satisfy a portion of their total regulatory capital requirements with either Tier 2 subordinated debt or CET 1 or AT1 equity capital.

Contractual Subordination

Fourth, the Agencies should give us and the other non-GSIB LBOs the option to contractually subordinate any internal liability, including any internal deposit liability, to the claims of short-term creditors or other runnable liabilities, but not to the claims of long-term creditors or other liabilities that do not give their holders the contractual or other legal right to be paid within one year of the date of issuance of such internal liabilities. Such an option would be analogous to the option in the GSIB TLAC Rule that allows U.S. GSIBs to have external non-TLAC instruments in excess of the limits on such instruments if the U.S. GSIBs contractually subordinate the eligible external LTD at the top-tier parent level to the parent's other liabilities.⁶⁹

Secured Support Agreements

Finally, the Agencies should give us and the other non-GSIB LBOs the option to satisfy any requirement that internal LTD or other internal debt be subordinate to the liabilities covered by the clean holding company requirements either by contractual or structural subordination, including with a secured support agreement, as most GSIBs do. For example, a secured support agreement could be used to require the top-tier parent of a non-GSIB LBO to suspend its right to repayment on internal liabilities of an IDI, including any internal deposit liabilities, if its required resolution plan were activated. Claims on internal liabilities, including internal deposit liabilities, could be left behind in the IDI's receivership in a bridge bank resolution plan to be satisfied in accordance with the priority of the holder's claims against the receivership.

⁶⁹ See GSIB TLAC Rule, *supra* note 9, at 8283-8284.

C. Any gone-concern LTD requirements proposed for the non-GSIB LBOs should be calibrated substantially below the calibrations in the GSIB TLAC Rule.

Any gone-concern LTD requirements that may be proposed for us or the other non-GSIB LBOs—despite the strong arguments for not doing so in Part II—should also be calibrated at levels substantially lower than the calibrations of gone-concern LTD in the GSIB TLAC Rule, as shown in **Figure 10**, for several reasons.

Figure 10. Calibration of Gone-Concern LTD Ratios under the GSIB TLAC Rule

Type of GSIB	Risk-Based LTD Ratios (RWA denominator)	Tier 1 SLR (total leverage exposure denominator)	Tier 1 Leverage LTD Ratios (average total assets denominator)
U.S. GSIBs	6% + GSIB surcharge	4.5%	N/A
U.S. IHCs of Foreign GSIBs	6%	2.5%	3.5%

Source: Based on Davis Polk, *Visual Memorandum, Federal Reserve’s Final Rule on Total Loss-Absorbing Capacity and Eligible Long-Term Debt*, Slides 17, 37-38 (Jan. 11, 2017).

First, we and the other non-GSIB LBOs are not subject to GSIB surcharges or the leverage buffer component of the eSLR under the Board’s capital requirements. As a result, the starting point for calibrating any gone-concern LTD requirements that may be proposed for us should not be the requirements for the U.S. GSIBs, but rather those for the U.S. IHCs of foreign GSIBs.

Second, the calibrations under the GSIB TLAC Rule assume that the going-concern capital of the GSIBs would be fully depleted by the time their SPOE resolution strategy were launched. However, that is not a reasonable assumption for us or any similarly situated non-GSIB LBOs. Our going-concern capital may decline during the period leading up to resolution, but it will not be fully or even significantly depleted before our required resolution plans are activated. Instead, our required resolution plans may be activated based on an unexpected, large outflow of cash or other adverse event, while we still have a substantial portion of our regulatory going-concern capital. Following passage of the Dodd-Frank Act, the Federal Reserve introduced a host of capital and liquidity reforms as part of the enhanced prudential standards framework (e.g., capital planning, stress testing, capital buffers, and requirements for capital policies with early warning indicators) that would both provide firms and supervisors with early warning signals of capital depletion and make significant or full capital depletion at the time of resolution much less likely.

As Diamond and Dybvig have famously shown, banks generally fail not because they run out of going-concern capital, but because they suffer runs on their cash and other liquidity reserves, making them unable to satisfy their obligations in the ordinary course of their business.⁷⁰ This is consistent with historical experience. While the FDIC has broad grounds for putting IDIs into receivership including balance-sheet insolvency,⁷¹ it has typically put large banks into

⁷⁰ Douglas W. Diamond & Philip H. Dybvig, *Bank Runs, Deposit Insurance, and Liquidity*, 91 J. Pol. Econ. 401 (1983). Diamond and Dybvig recently won the Nobel Prize in economics for their model on why banks fail.

⁷¹ 12 U.S.C. § 1821(c)(4), (c)(5)(C). See supra note 44.

receivership when they run out of cash to satisfy their obligations in the ordinary course of business, or are determined to be in an unsafe or unsound condition to transact business, well before their capital is significantly or fully depleted.⁷² But even if the FDIC failed to do so on this ground, it would have the authority or be required to do so under the prompt corrective action framework before a large IDI's going-concern capital falls below certain levels.⁷³ Moreover, beyond the prompt corrective action framework, other aspects of the current regulatory framework would provide the Agencies with insight into potential financial distress at a non-GSIB LBO long before the capital of a non-GSIB LBO is significantly or fully depleted. For example, the capital rules currently include buffer requirements that apply in addition to the minimum requirements, and non-GSIB LBOs participate in the Federal Reserve's supervisory stress tests on an annual basis.

Third, the calibrations under the GSIB TLAC Rule are based on a capital refill model. That model assumes that the GSIBs have adopted an SPOE resolution strategy that requires them to fully recapitalize their IDIs and other material operating subsidiaries. But that assumption does not apply to us or any other non-GSIB LBO that has a non-SPOE resolution strategy that does not require full recapitalization of all material operating subsidiaries. Based on our non-SPOE resolution strategies, we only need enough capital to execute our strategies successfully. That amounts to only a fraction of the amount necessary for full recapitalization.

In short, we expect to have residual going-concern capital when our required resolution plans are activated. Our resolution strategy only requires us to have enough capital to execute our non-SPOE resolution strategy successfully. That amounts to a fraction of the amount necessary for full recapitalization. Indeed, we expect the amount of our residual going-concern capital to be sufficient for us to execute our non-SPOE plan successfully without the need for any gone-concern LTD.

IV. Cost-Benefit Analysis and the APA.

A. The costs of extending the gone-concern LTD requirement in the GSIB TLAC Rule to non-GSIB LBOs would almost certainly greatly outweigh any reasonably expected benefits.

The Agencies have made public commitments to conduct a rigorous cost-benefit analysis before engaging in any rulemaking. As independent agencies, the Federal Reserve and the FDIC are not bound by the various Executive Orders (EOs) and Office of Management and Budget (OMB) Circulars that require executive agencies to conduct cost-benefit analyses.⁷⁴ However, in July

⁷² See John L. Douglas, former General Counsel to the FDIC, and Randall D. Guynn, *Resolution of US Banks and Other Financial Institutions*, in DEBT RESTRUCTURING, §§ 8.76-8.78 (Oxford Univ. Press 2d ed. 2016); OTS, *Receivership of a Federal Savings Association* (Sept. 25, 2008), available at <https://web.archive.org/web/20081001163846/http://files.ots.treas.gov/680024.pdf>.

⁷³ 12 U.S.C. § 1831o(f)(2)(J), (h)(3).

⁷⁴ See, e.g., EO 12866 (September 1993), available at <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf>, and OMB Circular A-4 (September 2003), available at https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/.

2011, President Obama issued EO 13579, which encourages independent regulatory agencies like the Federal Reserve and FDIC to undertake such cost-benefit analyses.⁷⁵

Both the Federal Reserve and the FDIC have publicly committed to perform cost-benefit analyses. For example, shortly after President Obama issued EO 13579, Board Chairman Ben Bernanke sent a letter to the Office of Information and Regulatory Affairs (**OIRA**) stating that the Federal Reserve “believe[s] that [its] regulatory efforts should be designed to minimize regulatory burden consistent with the effective implementation of [its] statutory responsibilities.”⁷⁶

Similarly, in 1998, the FDIC issued a Statement of Policy, which provided that “[o]nce the need for a regulation or statement of policy is determined, the FDIC seeks to minimize to the extent practicable the burdens which such issuance imposes on the banking industry and the public Prior to issuance, the potential benefits associated with the regulation or statement of policy are weighed against the potential costs.”⁷⁷ The FDIC reconfirmed its commitment to this policy in September 2021, when it issued a public statement on its website that the 1998 Statement of Policy “recognizes the FDIC’s commitment to minimizing regulatory burdens on the public and the banking industry and the need to ensure that FDIC regulations and policies achieve regulatory goals effectively.”⁷⁸

Those public commitments would apply to extending any gone-concern LTD or clean holding company requirements to the non-GSIB LBOs.

As shown in **Figure 3** above, the GSIB TLAC Rule requires the U.S. GSIBs and the U.S. IHCs of foreign GSIBs to maintain gone-concern LTD that essentially doubles their risk-based CET 1 capital requirements. If the Agencies propose a similar gone-concern LTD requirement on the non-GSIB LBOs, we could be subject to this type of double capital requirements as well.

The direct and indirect costs of any additional layer of gone-concern LTD or any clean holding company requirements that might be proposed for us or the other non-GSIB LBOs depends on how the Agencies define the universe of covered non-GSIB LBOs. The ANPR defines non-GSIB LBOs as any “domestic [BHC], or domestic [SLHC] that has \$100 billion or more in total consolidated assets but is not a GSIB”⁷⁹ And we understand that the Agencies might expand the covered non-GSIB LBOs to include any banking organization with total assets of \$50 billion or more.⁸⁰

⁷⁵ Executive Order 13579 (July 2011), available at: <https://obamawhitehouse.archives.gov/the-press-office/2011/07/11/executive-order-13579-regulation-and-independent-regulatory-agencies>.

⁷⁶ Letter from Board Chairman Ben Bernanke (November 8, 2011), available at <https://www.federalreserve.gov/foia/files/regulatory-burden-reduction-111115.pdf>.

⁷⁷ FDIC, Statement of Policy on the Development and Review of Regulations, 63 Fed. Reg. 25157 (May 7, 1998).

⁷⁸ FDIC’s Plans to Review Existing Regulations for Continued Effectiveness (Sept. 23, 2021), available at <https://www.fdic.gov/resources/regulations/plans/index.html>.

⁷⁹ ANPR, *supra* note 2, at 64171 note 4.

⁸⁰ Statement by Martin Gruenberg, Acting Chairman, FDIC Board of Directors, Advance Notice of Proposed Rulemaking: Resolution-Related Resource Requirements for Large Banking Organizations (October 18, 2022), available at <https://www.fdic.gov/news/speeches/2022/spoct1822b.html>.

The direct and indirect costs also depend on whether the Agencies calibrate any proposed gone-concern LTD requirements at the levels for the U.S. GSIBs or U.S. IHCs of foreign GSIBs, or at a significantly lower level in light of the significant differences between us and the other non-GSIB LBOs, on the one hand, and the U.S. GSIBs and U.S. IHCs of foreign GSIBs, on the other.

Depending on the answers to these questions, the costs of extending such requirements to us and the other non-GSIB LBOs could be as significant as imposing them on the U.S. GSIBs. But, as discussed below, the reasonably expected benefits from extending such requirements to us and the other non-GSIB LBOs are likely to be significantly lower.

The costs would include the direct costs on us and the other non-GSIB LBOs from being required to raise or otherwise maintain gone-concern LTD. These direct costs would include higher borrowing and other funding costs. In conducting their cost-benefit analysis, the Agencies should carefully take into account current macro-economic uncertainties, such as supply-side disruptions, geopolitical tensions and surging inflationary pressures that could affect the cost of raising any gone-concern LTD.

The costs of these requirements would also include indirect costs to the economy, including to U.S. households and businesses in the form of a reduction in our capacity and that of the other non-GSIB LBOs to supply credit, and an increase in the cost of that credit. Such a contraction in the supply and increase in the cost of credit would harm the American economy. It would reduce our capacity and that of the other non-GSIB LBOs to compete effectively with the U.S. GSIBs, giving the U.S. GSIBs an incentive and greater capacity to grow even larger and more complex, at least organically.

If the shadow banking sector steps in to supply the credit no longer supplied by us or the other non-GSIB LBOs, the indirect costs would also include the increased risks to U.S. financial stability of substituting shadow banks for us and the other non-GSIB LBOs in providing a growing percentage of the nation's credit supply. In a recent speech, Federal Reserve Vice Chair for Supervision Michael Barr stated that the percentage of the nation's credit supply being provided by nonbank financial intermediaries has grown from 30% to nearly 60% since 1980.⁸¹ Shadow banks are not as resilient or resolvable as the non-GSIB LBOs. They are not subject to significant capital, liquidity, risk management or resolution planning requirements. As a result, they are more likely to fail. If they do so in large numbers at the same time, they could pose a significant threat to U.S. financial stability. A financial crisis can be sparked by failures in the shadow banking sector, as shown by the run on repurchase agreement (**repo**) funding on shadow banks that arguably ignited the 2008 global financial crisis.⁸² Therefore, reducing our ability or that of the other non-GSIB LBOs to compete with them in the supply of credit will increase, not decrease, the overall risks to U.S. financial stability.

The indirect costs from a contraction of credit or shifting a greater percentage of the nation's credit from us and the other non-GSIB LBOs to the shadow banking sector would be particularly harmful at this point in time when the U.S. economy is entering into what many believe will be a

⁸¹ Michael S. Barr, *supra* note 12.

⁸² Gary Gorton & Andrew Metrick, *Securitized Banking and the Run on Repo*. 104 *J. Fin. Econ.* 425 (2012).

recession, especially to U.S. households, small and medium-sized businesses, and state and local governments. In addition, requiring us and the other non-GSIB LBOs to raise an extra layer of gone-concern LTD now would conflict with the statutory mandate in the Dodd-Frank Act to adjust capital requirements on a countercyclical basis—i.e., increase them during periods of economic expansion but decrease them during periods of economic contraction.⁸³

The benefits of imposing gone-concern LTD or clean holding company requirements on the U.S. GSIBs are substantial and may well outweigh their costs. The U.S. GSIBs are engaged in market-critical and material cross-border operations. If they fail, they need SPOE to keep their market-critical operations open and operating and their foreign material operating subsidiaries out of multiple competing insolvency proceedings in multiple countries to avoid destabilizing the U.S. financial system. The benefits of requiring the U.S. GSIBs to maintain an extra layer of gone-concern LTD are therefore clear.

But the benefits of proposing gone-concern LTD or clean holding company requirements on us and the other non-GSIB LBOs are remote, speculative and uncertain. They are based on a failure scenario that is highly unlikely to occur and even if it did occur would have little to no effect on U.S. financial stability. It would be inconsistent with the public commitments of the Agencies to perform a rigorous cost-benefit analysis in good faith to simply presume that the benefits of imposing an extra layer of gone-concern LTD or other GLAC requirement would outweigh their significant costs.

In short, the Agencies should not propose any gone-concern LTD or clean holding company requirements on us or the other non-GSIB LBOs without sufficient evidence that the reasonably expected benefits of such requirements exceed their significant and immediate costs.⁸⁴ Any proposed rule should explain the costs and benefits in a manner consistent with the principles outlined in Executive Order 12866 and subsequent Executive Orders and Circulars, as the Agencies have committed to do.⁸⁵ As noted above, it is important, when comparing these costs and benefits to balance the actual direct and indirect costs against the remote and contingent benefits, if any, to be gained in a future failure scenario that may never occur.

B. The proposal would require substantial justification under the APA since it would amount to a major reversal of a longstanding, carefully considered policy of the Agencies to impose gone-concern LTD requirements only on the U.S. GSIBs and the U.S. IHCs of foreign GSIBs.

Any proposal to extend gone-concern LTD and clean holding company requirements to us or the other non-GSIB LBOs would require adequate justification under the APA. It would amount to a

⁸³ Dodd-Frank Act, 124 Stat. 1376, 111th Cong. § 616(a)(2) (2010).

⁸⁴ See Statement by Governor Bowman on advance notice of proposed rulemaking on resolution requirements for large Banks and application by U.S. Bancorp (October 14, 2022) (“In considering any changes, however, it is important to consider possible costs and unintended consequences. For example, the ANPR solicits feedback on whether large banking organizations should be required to issue more long-term debt, which could be ‘bailed in’ to improve resolvability. Increased reliance on long-term debt funding could adversely impact the cost and availability of credit”), available at <https://www.federalreserve.gov/newsevents/pressreleases/bowman-statement-20221014.htm>.

⁸⁵ See *supra* notes 76-78.

reversal of a major, longstanding and carefully considered policy of the Board and the FDIC to limit any gone-concern LTD and clean holding company requirements to the U.S. GSIBs and the U.S. IHCs of foreign GSIBs, and not to extend them to us or the other non-GSIB LBOs.

The Board has long had a policy to limit its GSIB TLAC Rule to U.S. GSIBs and the U.S. IHCs of foreign GSIBs. After a multi-year rulemaking process that began in 2015, the Board published the final GSIB TLAC Rule in 2017.⁸⁶ It had the opportunity to extend the requirements to the non-GSIB LBOs, but deliberately chose not to do so. In numerous statements during this period, the Federal Reserve and its principals explained the purpose of the rule and why it was appropriate for U.S. GSIBs and the IHCs of foreign GSIBs, without mentioning any of the non-GSIB LBOs.⁸⁷ The Board and the FDIC have similarly had the opportunity to extend such requirements to us and the other non-GSIB LBOs or our IDIs under their resolution planning authority under Section 165(d) of the Dodd-Frank Act and, in the case of the FDIC, the FDI Act, and they have chosen not to. Similarly, when the Financial Stability Board developed its international TLAC standard in 2014, it limited its proposed and final standard to U.S. and non-U.S. GSIBs.⁸⁸

Most relevant to the ANPR, when the Board established its tailoring rules for enhanced prudential standards (**EPS**) just three years ago, it had the opportunity to extend the GSIB TLAC Rule to the non-GSIB LBOs and it deliberately chose not to do so in the face of letters and speeches by prominent policymakers urging it to extend the rule to large regional banks.⁸⁹ The Board and the FDIC similarly had the opportunity to extend the requirements to the non-GSIB LBOs under their resolution planning authority under Section 165(d) of the Dodd-Frank Act and, in the case of the FDIC, to extend them to IDIs under the FDI Act, but they chose not to do so in the face of such exhortations.

For example, the Systemic Risk Council, then led by Paul Tucker, the former Governor for Financial Stability at the Bank of England and former FDIC Chair Sheila Bair, wrote a letter to Board Chair Jerome Powell and FDIC Chair Jelena McWilliams in July 2019, urging them to

⁸⁶ *Supra* note 9.

⁸⁷ See, e.g., Testimony by Scott Alvarez, Board General Counsel, *Too Big to Fail* (April 16, 2013) (“The Federal Reserve has been working with the FDIC, both as the FDIC develops its OLA framework, and to consider the merits of a regulatory requirement that the largest, most complex U.S. banking firms maintain a minimum amount of parent-level, long-term unsecured debt that would ultimately facilitate a single-point-of-entry approach to OLA.”); Press Release, *Federal Reserve Board proposes new rule to strengthen the ability of largest domestic and foreign banks operating in the United States to be resolved without extraordinary government support or taxpayer assistance* (October 30, 2015) (“To reduce the systemic impact of the failure of a GSIB, an orderly resolution process should allow a GSIB to fail, and its investors to suffer losses, while the critical operations of the firm continue to function. Requiring GSIBs to hold sufficient amounts of long-term debt, which can be converted to equity during resolution, would facilitate this by providing a source of private capital to support the firms’ critical operations during resolution”); GSIB TLAC Rule, *supra* note 9, at 8269 (“The [GSIB TLAC Rule] is intended to improve the resolvability of the most systemically important banking firms—[GSIBs] without extraordinary government support or taxpayer assistance by establishing [TLAC] standards for the GSIBs and requiring them to issue a minimum amount of LTD.”).

⁸⁸ Financial Stability Board, *Adequacy of loss-absorbing capacity of global systemically important banks in resolution*, Consultative Document (Nov. 10, 2014) (**Proposed GSIB TLAC International Standard**); GSIB TLAC International Standard, *supra* note 29.

⁸⁹ Board, Final Rule, *Prudential Standards for Large Bank Holding Companies, Savings and Loan Holding Companies, and Foreign Banking Organizations*, 84 Fed. Reg. 59032 (Nov. 1, 2019) (**EPS Tailoring Rule**). See Davis Polk, Visual Memorandum, *The Final Tailoring Rules for U.S. Banking Organizations* (Nov. 21, 2019), available at https://www.davispolk.com/sites/default/files/2019-11-21_final_tailoring_rules_for_u.s._banking_organizations.pdf.

extend gone-concern LTD requirements to all U.S. regional banks, which appeared to mean all regional banks with total assets of \$50 billion or more.⁹⁰ Similarly, then FDIC Vice Chair Gruenberg noted in October 2019 that the resolution of large regional banks would pose a number of challenges to the FDIC in part because they were not subject to gone-concern LTD requirements similar to those applicable to the U.S. GSIBs.⁹¹ He defined “large, regional banks” as banks with total assets of \$50 billion or more.⁹² Despite these calls for extending the GSIB TLAC Rule by prominent public policymakers, the Board and the FDIC chose not to do so.

Congress also had the opportunity to extend the GSIB TLAC Rule to the non-GSIB LBOs, or direct the Agencies to do so, when it enacted the Economic Growth, Regulatory Relief, and Consumer Protection Act (**EGRRCPA**) in 2018, but it chose not to do so.

We and most or all of the other non-GSIB LBOs relied on this policy determination and made business decisions based on the understanding that the gone-concern LTD and clean holding company requirements would not be extended to us.

Moreover, although certain of us have grown since November 2019, there has been no material increase in our risk to U.S. financial stability as seen by the relatively small changes in our Method 1 GSIB scores since that date (see **Figure 11**). Indeed, all but one of our scores increased or decreased by 2 points or less and the largest increase was 29, resulting in a score of 58, which is still more than 70 points under the GSIB threshold of 130.

⁹⁰ Letter dated July 16, 2019 from the Systemic Risk Council to the Honorable Jerome H. Powell and Jelena McWilliams, p. 7.

⁹¹ See Martin J. Gruenberg, Vice Chair, FDIC, *Underappreciated Risk: The Resolution of Large Regional Banks in the United States*, Remarks at the Brookings Institution, pp. 5-6 (Oct. 16, 2019).

⁹² *Id.* at 1.

Figure 11. Changes in Method 1 GSIB Scores Since 2019

Cat.		2019 GSIB Score	2021 GSIB Score	Change
I – U.S. GSIBs	JPMorgan Chase	421	436	15
	Citigroup	369	361	-8
	Bank of America	315	314	-1
	Goldman Sachs	225	253	28
	Morgan Stanley	207	197	-10
	Wells Fargo	220	166	-54
	Bank of NY Mellon	156	156	0
	State Street	142	146	4
II	Northern Trust	62	67	5
III	Charles Schwab	29	58	29
	U.S. Bancorp	45	43	-2
	PNC	35	36	1
	Truist	26	26	0
	Capital One	21	20	-1
IV	American Express	15	13	-2
	Fifth Third Bancorp	13	13	0
	Huntington Bancshares	10	11	1
	Ally	10	9	-1
	Citizens Financial	9	9	0
	Keycorp	9	9	0
	Discover Financial	7	7	0
	M&T Bank Corp.	7	7	0
	Regions Financial	7	7	0

Method 1 GSIB scores of December 31, 2021. List includes domestic firms only.

Source: GSIB scores calculated by the Bank Policy Institute.

In *FCC v. Fox Television*,⁹³ the U.S. Supreme Court held that administrative agencies are not permitted to reverse a major policy consistent with the APA unless they provide adequate justification, when the prior policy was widely relied on and the pertinent underlying facts have not changed materially.⁹⁴

⁹³ 556 U.S. 502 (2009).

⁹⁴ *Id.* at 515-16.

The major policy here was developed in 2015 and reconfirmed just three years ago in the face of calls by the Systemic Risk Council and the then Vice Chair of the FDIC to reverse it. We and the other non-GSIB LBOs have relied on this policy and made important decisions based on it. Those are the sort of reliance interests described in the *Fox Television* case. Moreover, the underlying facts have not changed in any material way that would justify extending gone-concern LTD and clean holding requirements to us now after the Board, the FDIC and most importantly Congress considered the issue and deliberately chose not to do so as recently as three years ago. Under these circumstances, we do not believe that the Agencies could reverse the prior policy decision not to extend gone-concern LTD or clean holding company requirements to us and the other non-GSIB LBOs consistent with the APA without providing substantial justification.⁹⁵

V. Conclusion

It is unnecessary and unjustified for the Agencies to propose any gone-concern LTD or clean holding company requirements on us or any of the other non-GSIB LBOs. We and most, if not all, of the other non-GSIB LBOs are highly resilient against failure and resolvable without any loss to the DIF or any material adverse impact on U.S. financial stability, without the need for any additional layer of gone-concern LTD or clean holding company requirements. In particular, we have all submitted resolution plans, where required, that include reasonable options to separate our businesses into components that could be sold to multiple firms including those that are not GSIBs or non-GSIB LBOs within a reasonable period of time. These non-SPOE options provide the Agencies with the optionality to safely resolve a non-GSIB LBO without being forced to sell the entire entity to a GSIB or other single purchaser in a whole-bank transaction.

If, despite these strong arguments for not extending any gone-concern LTD or clean holding company requirements to us or the other non-GSIB LBOs, the Agencies decide to propose doing so, they should do so consistent with three principles. First, they should do so slowly and carefully, taking into account the other regulatory changes coming down the pike, including the Basel III endgame rules and the forthcoming resolution planning guidance. Second, they should provide optionality for non-GSIB LBOs in complying with any such rule. Third, they should calibrate any such requirements at levels substantially below the levels imposed on the U.S. GSIBs or the U.S. IHCs of foreign banks, because it is not realistic to assume that our going-concern capital or that of any similarly non-GSIB LBOs will be fully depleted and the assumption

⁹⁵ Beyond the APA-related concerns discussed here, the Agencies should consider whether a proposed rule that seeks to impose gone-concern LTD and clean holding company requirements on non-GSIB LBOs would trigger the major questions doctrine described by the Supreme Court in *West Virginia v. EPA*, 597 U.S. ___ (2022). Under the standard outlined by the Supreme Court in the *West Virginia* case, a proposal to extend such requirements to us and the other non-GSIB LBOs might trigger the major questions doctrine if “the history and the breadth of the authority that [an agency] has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority.” *Id.*, slip op. at 17 (internal quotation marks omitted). The Agencies should consider whether the sweep and impact of a proposed rule that would significantly impact the competitiveness of the banking market in a manner contrary to the most recent expressions of Congressional intent relative to the appropriate tailoring of prudential regulatory standards would trigger the major questions doctrine. If a proposed rule triggered the major questions doctrine, the Agencies would be required to identify a statute giving them “clear congressional authorization” to propose the rule.

that the GSIBs need sufficient gone-concern LTD to fully recapitalize their material operating subsidiaries does not apply to us because we have non-SPOE resolution strategies.

Depending on how widely any such gone-concern LTD and clean holding company requirements would be applied and how high they are calibrated, the direct and indirect costs of any proposed gone-concern LTD and clean holding company requirement could greatly exceed their reasonably expected benefits, which are likely to be remote, speculative and contingent. Moreover, since the Board and the FDIC have long had policies of limiting any gone-concern LTD and clean holding company requirements to the U.S. GSIBs and U.S. IHCs of foreign GSIBs, any reversal of that policy would require substantial justification.

* * * * *

We are grateful for the opportunity to comment on the ANPR.

Very truly yours,

Capital One Financial Corporation
The Charles Schwab Corporation
The PNC Financial Services Group, Inc.
Truist Financial Corporation
U.S. Bancorp

Please see **Appendix B** for a list the individuals at our organizations or advisors who should be contacted if the Agencies have any questions about this comment letter.

Appendix A

Specific Request for Public Comments

A. Structure of Potential Minimum LTD Requirement

Question 1 (Minimum Amount of LTD): *“The agencies invite comment on whether and how a requirement to maintain a minimum amount of long-term debt could enhance a large banking organization’s resolvability.”*

- **Optionality.** *“How might long-term debt be beneficial for improving optionality when conducting the resolution of a U.S. large banking organization or its insured depository institution?”*

For the reasons set forth in Parts II and IV of our comment letter, we do not believe that requiring us or any of the other non-GSIB LBOs to maintain an extra layer of gone-concern LTD will improve optionality in resolving us, the other non-GSIB LBOs or our IDI subsidiaries. Our required resolution plans already provide the Agencies with reasonable options to resolve us and our IDIs without being forced to sell us or our IDIs to a GSIB or another non-GSIB LBO in a whole-bank transaction. In particular, they all include reasonable options to separate our businesses into components and sell them to multiple purchasers not limited to GSIBs or other non-GSIB LBOs within a reasonable period of time, without the need for an extra layer of gone-concern LTD to make those options feasible.

- **Optimal Structure.** *“What would be the optimal structure of the long-term debt?”*

For the reasons set forth in Parts II and IV of our comment letter, we do not believe that any gone-concern LTD requirement should be imposed on us or any of the other non-GSIB LBOs. But, if the Agencies choose to propose any gone-concern LTD requirement on us or the other non-GSIB LBOs despite the reasons set forth in Parts II and IV of our comment letter, they should give us and the other non-GSIB LBOs the option to satisfy any such requirements at either their top-tier holding companies or at their IDI or other material operating subsidiaries and through a variety of mechanisms, including contractual subordination, as more fully discussed in Part III.B of our comment letter.

- **Other Requirements.** *“[W]hat other requirements would be necessary to ensure that it remains available to utilize in resolution?”*

See our response to the question on optionality.

- **Ideal Issuer of External LTD.** *“Which entity in a large banking organization’s corporate structure would be the ideal issuer of long-term debt externally to the market?”*

For the reasons set forth in Parts II and IV of our comment letter, we do not believe that any gone-concern LTD requirement should be imposed on us or any of the other non-GSIB LBOs. But if the Agencies choose to propose any gone-concern LTD requirement on us or

the other non-GSIB LBOs despite the reasons set forth in Parts II and IV of our comment letter, they should give us and the other non-GSIB LBOs the option to satisfy any such requirement at either their top-tier holding companies or at their IDI or other material operating subsidiaries, as more fully discussed in Part III.B of our comment letter.

- **Costs.** *“What would be the costs of a long-term debt requirement for large banking organizations or their customers?”*

See Part IV.A of our comment letter for a detailed discussion of the potentially significant direct and indirect costs that a gone-concern LTD requirement would impose on the non-GSIB LBOs, consumers, small and medium-sized businesses and other market participants, including in the form of a reduction in the supply and increase in the cost of credit.

- **Alternative Approaches.** *“What alternative approaches are available to address possible concerns about the resolvability of large banking organizations or their insured depository institutions?”*

As described in Part II of our comment letter, we believe that such concerns are unfounded—at least with respect to the non-GSIB Banks because our resolution plans provide optionality and have not been found not credible or unable to facilitate the orderly resolution of our IDIs or material operating subsidiaries under the Bankruptcy Code, FDI Act or SIPA. As discussed in Part II.B of our comment letter, our resolution plans allow our organizations to be resolved through the separation of our businesses into multiple components and the sale of such components to multiple purchasers not limited to GSIBs or other LBOs within a reasonable period of time, without an extra layer of gone-concern LTD or other TLAC, loss to the DIF, or material adverse effect on U.S. financial stability.

Question 2 (Alternative Approaches). *“The agencies invite comment on alternative approaches for determining the appropriate scope of application of a potential long-term debt requirement to the population of large banking organizations.”*

- **Scope of Application.** *“In particular, what criteria would be relevant to determine whether a large banking organization should be subject to the requirement?”*

For the reasons set forth in Parts II and IV of our comment letter, we do not believe that any gone-concern LTD requirement should be imposed on us or any of the other non-GSIB LBOs.

- **Category II and Category III Firms.** *“Should all Category II and, Category III firms (including SLHCs, which are not subject to resolution planning requirements) be subject to a long-term debt requirement? Why or why not?”*

For the reasons set forth in Parts II and IV of our comment letter, we do not believe that any gone-concern LTD requirement should be imposed on us or any other Category II or Category III firms, including those that are SLHCs.

- **Additional Factors.** *“What additional factors – for example, the presence of significant non-bank operations, critical operations, critical services outside the bank chain, cross-border operations, or extent of reliance on uninsured deposits – should the agencies consider when determining the scope of application of any long-term debt requirement to large banking organizations?”*

For the reasons set forth in Part II, we believe that a gone-concern LTD requirement is only necessary and appropriate for firms that rely on an SPOE resolution strategy, and should be limited to firms, such as the U.S. GSIBs, that have Method 1 GSIB scores above 130 because of their material market-critical operations and cross-border operations. But for the reasons set forth in Parts II and IV of our comment letter, they should not be imposed on firms like us and the other non-GSIB LBOs, which are relatively simple and domestic, as shown by Figure 1 and Figure 2, and which have adopted non-SPOE resolution plans that provide the Agencies with reasonable options to be resolved in a manner that is not limited to being sold to a GSIB or another non-GSIB LBO in a whole-bank transaction.

- **Increased Financial Stability Risk.** *“Given the practical and market limitations for selling large insured depository institutions, especially during a crisis, what is the appropriate scope of application for a loss absorbing debt requirement to expand the range of strategies available to the FDIC?”*

As discussed in Part II of our comment letter, the non-GSIB Banks have all submitted credible resolution plans, where required, that include resolution strategies to separate their businesses into components (e.g., by business line and/or geographic area) and sell those components to multiple purchasers not limited to GSIBs or other LBOs within a reasonable period of time without the need for any gone-concern LTD requirement. Thus, it is unnecessary and unjustified to impose a gone-concern LTD requirement on the non-GSIB Banks and any other non-GSIB LBOs that have submitted similar resolution plans, where required.

- **Standalone IDIs.** *“How should IDIs that are not part of a group under a BHC be considered?”*

Such IDIs that are non-GSIB LBOs should be treated the same way as other non-GSIB LBOs.

Question 3 (US IHC of foreign GSIBs and other FBOs). *“The agencies invite comment on how any new requirements should be applied to the U.S. subsidiaries of foreign banking organizations. Top-tier U.S. intermediate holding company (IHC) subsidiaries of foreign GSIBs are currently subject to long-term debt requirements.”*

- **Modifications for Competitive Equality Reasons.** *“To what extent should those top-tier U.S. holding companies of foreign firms or their insured depository institutions that have a similar risk profile to the domestic large banking organizations that might be subject to any long-term debt requirement considered in this ANPR, be subject to any new requirements in line with those applied to domestic large banking organizations?”*

As discussed in Part II of our comment letter, the Agencies should take into account the significant differences between the non-GSIB LBOs, on the one hand, and the U.S. GSIBs and U.S. IHCs of foreign GSIBs, on the other.

Question 4 (Counting Subsidiary LTD). *“The agencies invite comment on the appropriateness of recognizing debt issued by various legal entities within a holding company structure in determining compliance with any long-term debt requirement imposed on the top tier holding company.”*

- **Impact of Type of Resolution Strategy.** *“Specifically, to what extent should the Board consider whether a large banking organization’s resolution strategy is an SPOE or MPOE strategy, whether the long-term debt is issued by the parent holding company or the insured depository institution, or other factors in determining the requirement?”*

For the reasons set forth in Parts II and IV of our comment letter, we do not believe that any gone-concern LTD requirement should be imposed on us or any of the other non-GSIB LBOs that have developed credible non-SPOE resolution strategies, where required. But if the Agencies nevertheless decide to do so, they should provide us and the other non-GSIB LBOs with the optionality described in Part III.B.

B. Calibration

Question 5 (Calibration). *“The agencies invite comment on the appropriate calibration of a long-term debt requirement for large banking organizations.”*

- **Same as U.S. IHCs for foreign GSIBs.** *“Should the agencies establish the same calibration as is currently in effect for intermediate holding companies of foreign GSIBs or establish a different calibration?”*

For the reasons set forth in Parts II and IV of our comment letter, we do not believe that any gone-concern LTD requirement should be imposed on us or any of the other non-GSIB LBOs. But if the Agencies decide to impose such requirements on the non-GSIB LBOs despite the reasons in Parts II and IV of our comment letter, they should calibrate the requirements at levels substantially below the levels in the Board’s GSIB TLAC Rule, including those for the U.S. IHCs of foreign GSIBs, as more fully set forth in Part III.C of our comment letter.

- **Make Continuation Strategies feasible under SPOE or MPOE.** *“What are the advantages and disadvantages of applying a calibration designed to require sufficient resources to recapitalize a large banking organization’s subsidiaries in the event equity capital is fully depleted, in order to continue operations either under an SPOE or MPOE resolution strategy?”*

For the reasons set forth in Parts II and IV of our comment letter, we do not believe that it would be necessary or appropriate to impose a gone-concern LTD requirement on us or the other non-GSIB LBOs, in part because we have adopted non-SPOE resolution strategies that do not contemplate the full recapitalization and continuation of our

subsidiaries and because those plans would be activated long before our going-concern capital would be significantly or fully depleted.

In contrast, as explained in Part II.C of our comment letter, the calibrations in the Board's GSIB TLAC rule may be needed to support the feasibility of an SPOE resolution strategy that seeks to fully recapitalize the material operating subsidiaries of a U.S. GSIB and continue their operations on a standalone basis and out of separate resolution proceedings in the U.S. or foreign jurisdictions, assuming their going-concern capital is fully depleted in the lead up to bankruptcy or resolution.

If despite the reasons for not doing so in Parts II and IV of our comment letter, the Agencies decide to impose any gone-concern LTD requirements on us or the other non-GSIB LBOs, such requirements should be calibrated at levels much lower than those applicable to the U.S. GSIBs or U.S. IHCs of foreign GSIBs, for the reasons set forth in Part III.C.

- **Cost-Benefit Analysis.** *“How should the agencies weigh the burden of additional requirements against the potential benefit to financial stability?”*

As described more fully in Part IV.A of our comment letter, the Agencies should weigh the immediate direct and indirect costs of imposing a gone-concern LTD and clean holding company requirements on us and the other non-GSIB LBOs against the remote and contingent benefits, if any, to be gained in a future failure scenario that may never occur and that all of the enhanced prudential standards make much less likely.

- **Other Factors.** *“What other factors should the agencies consider to calibrate a long-term debt requirement for large banking organizations or insured depository institutions that would provide sufficient optionality to address material distress or failure in a manner that limits risk to financial stability over time?”*

For the reasons set forth in Parts II and IV of our comment letter, we do not believe that any gone-concern LTD requirement should be imposed on us or any of the other non-GSIB LBOs. Our resolutions plans already provide sufficient optionality to address material distress or failure in a manner that limits risk to financial stability over time, without the need for an extra layer of gone-concern to make those plans feasible.

- **Competitive Equality with U.S. GSIBs and U.S. IHCs of FBOs.** *“How should the agencies consider competitive equality in calibrating any long-term debt requirements for large banking organizations relative to existing requirements for GSIBs and top tier IHC holding companies of foreign banking organizations?”*

For the reasons set forth in Parts II and IV of our comment letter, we do not believe that any gone-concern LTD requirement should be imposed on us or any of the other non-GSIB LBOs. But if despite the those reasons the Agencies decide to impose a gone-concern LTD requirement on us or any of the other non-GSIB LBOs, they should take into account the significant differences between us and the other non-GSIB LBOs and our

non-SPOE resolution strategies, on the one hand, and the U.S. GSIBs and U.S. IHCs of foreign GSIBs and their SPOE resolution strategies, on the other.

Because of those significant differences, we and the other non-GSIB LBOs are not equivalent to the U.S. and foreign GSIBs for purposes of applying the principle of competitive equality to the calibration of any gone-concern LTD requirement. Indeed, for the reasons set forth in Part III.C of our comment letter, any gone-concern LTD requirement on us or the non-GSIB LBOs should be calibrated at levels significantly below those applicable to the U.S. GSIBs or the U.S. IHCs of foreign GSIBs.

- **Data.** *“What data should be considered to support calibration determinations?”*

See answer to the first calibration question above.

Question 6 (Costs). *“The agencies invite comment on the potential effect of a long-term debt requirement on large banking organizations in different tiering categories (for example, Category II and Category III) and on the capacity of these firms to issue such debt into the market throughout an economic cycle.”*

- **Costs on LBOs.** *“What are the potential effects of a long-term debt requirement on these firms’ funding model and funding costs, including any associated effect on market discipline and overall firm resiliency?”*

See Part IV.A of our comment letter for a discussion of the adverse effects of a gone-concern LTD requirement on funding models and funding costs, including any associated effect on market discipline and resiliency.

- **Impact on Cost and Availability of Credit.** *“What, if any, are the potential effects of a long-term debt requirement on the cost and availability of credit?”*

See Part IV.A of our comment letter for a discussion of the adverse effects of a gone-concern LTD requirement on the cost and availability of credit.

C. BHC Requirements

Question 7 (FRB Questions). *“The Board invites comment on the pros and cons of permitting eligible long-term debt issued externally by a large banking organization’s principal insured depository institution subsidiary to count toward a requirement at the top-tier holding company.”*

- **Benefits of LTD at BHC Level.** *“In what situations might requiring issuance at the holding company level be most beneficial?”*

As discussed in Part II.C of our comment letter, gone-concern LTD requirements at the BHC level may be needed to support the feasibility of the SPOE resolution strategies of the U.S. GSIBs. But they are not needed or justified in the case of the non-GSIB LBOs based on their MPOE resolution strategies that do not depend on any gone-concern LTD to make them feasible.

- **Alternative Approaches to External LTD issued at BHC Level.** *“What range of approaches – other than requiring issuance by the top-tier holding company – may be available to ensure that eligible long-term debt will be available to absorb losses incurred at appropriate legal entities within a given large banking organization’s corporate group?”*

For the reasons set forth in Parts II and IV of our comment letter, we do not believe that any gone-concern LTD requirement should be imposed on us or any of the other non-GSIB LBOs. But if contrary to the reasons set forth in Parts II and IV of our comment letter the Agencies nevertheless impose gone-concern LTD requirements on the non-GSIB LBOs, they should give non-GSIB LBOs the option to satisfy those requirements either at the top-tier BHC level or at the level of their IDIs or other material operating subsidiaries, as well as the option to satisfy any gone-concern LTD requirements at the IDI or other material operating subsidiary level with either internal debt, including intercompany deposit liabilities, or external LTD, as more fully discussed in Part III.B of our comment letter.

Question 8 (Governance Mechanics). *“The agencies invite comment on whether requirements on governance mechanics should be put in place to ensure that entry into resolution will occur at a time when the eligible long-term debt will be available at the insured depository institution and/or the holding company level to absorb losses.”*

In our required recovery plans, we have governance mechanisms that trigger recovery actions before our going-concern capital would be significantly depleted, and our required resolution plans would be activated if our recovery plans were unsuccessful. Furthermore, we maintain forward-looking stressed measures for both capital (i.e., the stress capital buffer) and liquidity (i.e., the LCR and internal liquidity stress testing), and associated governance mechanisms in our capital policies that would trigger recovery and/or resolution actions before our going-concern capital would be significantly or fully depleted. We do not believe that any separate governance mechanics are needed for our required resolution plans.

- **Distribution of GLAC and related HQLAs around the group.** *“Should such requirements include whether the loss absorbing capacity can absorb losses incurred at appropriate legal entities within a given large banking organization’s corporate group?”*

We do not believe that any such governance requirements should be overly prescriptive, but instead should be flexible and tailored to the particular non-GSIB LBO and its preferred resolution strategy in the resolution planning process.

- **Alignment with Recovery Plans.** *“To what extent should such mechanics be aligned with internal recovery planning frameworks to coordinate resolution preparation actions with recovery actions?”*

The mechanics should be aligned with internal recovery planning frameworks so that they work together appropriately.

Question 9 (Clean Holding Company Requirements). *“The agencies invite comment on whether subjecting the operations of the top-tier holding company of large banking organizations*

to “clean holding company” limitations similar to the ones imposed on GSIBs would further enhance the resolvability of a large banking organization. Why or why not?”

We do not believe that the Agencies should impose clean holding company requirements on us or the other non-GSIB LBOs for the reasons set forth in Part II of our comment letter. The clean holding company requirements, like the gone-concern and other GLAC requirements in the GSIB TLAC Rule, were designed to support the feasibility of SPOE resolution strategies for GSIBs. But as discussed in Part II of our comment letter, the non-GSIB Banks and most if not all of the other non-GSIB LBOs have adopted non-SPOE strategies that do not depend on clean holding company requirements for their feasibility.

Question 10 (Eligibility Requirements for eligible LTD)

- ***Which eligibility criteria for GSIB LTD (i.e., eligible debt securities) should apply here. “Among the other requirements that must be satisfied under the existing GSIB TLAC rule in order for debt issued by the parent company to qualify as eligible long-term debt (for example, relating to “plain vanilla” characteristics, minimum remaining maturity, governing law), which requirements would remain essential in order for long-term debt instruments issued by large banking organizations to properly function as a loss-absorbing resource in resolution?”***

For the reasons set forth in Parts II and IV of our comment letter, we do not believe that any gone-concern LTD requirement should be imposed on us or any of the other non-GSIB LBOs. But if the Agencies decide to propose gone-concern LTD requirements on non-GSIB LBOs despite those reasons, they should at least grandfather existing long-term debt issued by any LBOs or their IDIs or other material operating subsidiaries to the same extent that the Board grandfathered existing long-term debt issued by the U.S. GSIBs in the GSIB TLAC Rule. They should also provide a sufficient transition period. Depending on the type of debt that may be mandated, the non-GSIB LBOs may need a longer transition period than the U.S. GSIBs, given that non-GSIB LBOs have traditionally been more reliant on stable deposit funding (as opposed to market-based LTD funding) than the GSIBs.

- ***Tailoring of Eligibility Criteria. “What modifications of such requirements, if any, should the agencies consider in the large banking organization context with respect to loss absorbing debt at insured depository institutions and/or holding companies?”***

See response to the immediately preceding question.

D. Disclosure Requirements

Question 11 (Disclosure Requirements). *“The agencies invite comment on the appropriate form and content of the disclosure large banking organizations should be required to provide to their long-term debt investors with respect to the potential treatment of such debt in resolution.”*

- **Modifications to GSIB disclosure requirements.** *“If LTD requirements are imposed on large banking organizations, what, if any, adaptations should be made relative to the disclosure requirements that apply to GSIBs?”*

While we do not believe that it would be necessary or justified to impose gone-concern LTD requirements on the non-GSIB LBOs, if the Agencies decide to do so any disclosure requirements should be limited to disclosures that would be material to investors.

E. Separability

Question 12 (Separability)

- **Separability Requirements.** *“Should the agencies impose any separability requirements for recovery or resolution on all large banking organizations, including GSIBs?”*

As explained in Part II of our comment letter, the non-GSIB Banks have all submitted credible resolution plans, where required, that include resolution strategies to separate their business into pieces and sell them to multiple purchasers not limited to GSIBs of other LBOs within a reasonable period of time. Thus, there is no need to impose any separability requirements for resolution on the non-GSIB Banks. But if for some reason the Agencies decided to impose such requirements, we believe they should do so initially through guidance rather than by rule.

- **Benefits.** *“To what extent would imposing new separability requirements add net benefits against the backdrop of other existing requirements?”*

We do not believe that imposing any new separability requirements on the non-GSIB LBOs would add any material net benefits, given their non-SPOE strategies in their required resolution plans.

- **Harmonization.** *“In what fashion can or should these requirements be harmonized to promote their effectiveness?”*

It would be useful to harmonize these requirements, if any, for purposes of resolution under the Bankruptcy Code and the FDI Act.

Appendix B

Contacts

If the Agencies have any questions regarding this comment letter, please direct them at the following representatives of the non-GSIB Banks and our advisors:

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