American Bankers Association
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January 4, 2022

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: Advanced Notice of Proposed Rulemaking - Resolution-Related Resource Requirements for Large Banking Organizations (Docket No. R–1786 and RIN 7100–AG44 [Board]; RIN 3064–AF86 [FDIC])

Dear Ms. Misback and Mr. Sheesley:

The American Bankers Association (ABA)[1] is pleased to submit our response to the Advance Notice of Proposed Rulemaking (ANPR) issued by the Board of Governors of the Federal Reserve System (Board) and the Federal Deposit Insurance Corporation (FDIC, and together with the Board, the Agencies) concerning resolution resource requirements for certain large banking organizations.[2] The ANPR raises a number of questions concerning potential new requirements that would be imposed on "large banking organizations" that are not "global systemically important banking organizations" (G-SIBs). Specifically, the questions raised in the ANPR concern domestic large banking organizations in Categories II and III under the Board's tiering framework for enhanced prudential standards, and which generally exceed a threshold of $250 billion in total consolidated assets.[3]

ABA has long acknowledged that the financial crisis of 2007-2008 made clear the need for effective resolution strategies and techniques, both to maintain financial stability generally and to

[1] The American Bankers Association is the voice of the nation's $23.6 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard $19.4 trillion in deposits, and extend $12 trillion in loans.
[2] *See* 87 Fed. Reg. 641790 (October 24, 2022), *available at* https://www.fdic.gov/news/board-matters/2022/2022-10-18-notice-dis-b-fr.pdf.
[3] Throughout this letter, we refer to the institutions that would be subject to new resolution measures as "non-G-SIB LBOs," i.e., domestic Category II and III institutions. More generally, the term "large banking organization" refers to a domestic bank holding company, or domestic savings and loan holding company, that has $100 billion or more in total consolidated assets but does not meet the criteria for a G-SIB under the Board's capital rule, 12 CFR part 217. The total population of large banking organizations corresponds to Category II through IV firms under the Board's tiering framework for enhanced prudential standards. ANPR at 64171.

minimize the cost of bank failures to bank customers, public, and the Deposit Insurance Fund. We are also aware of the great progress in assuring financial stability that has occurred in the years since, both to reduce the likelihood of failure, *e.g.,* strengthened capital and liquidity requirements, and to limit the damage and cost of failures that occur, *e.g.,* comprehensive resolution planning for the largest banking organizations.

In light of that progress and the strong capital and liquidity positions that non-G-SIB LBOs have achieved and maintained since the financial crisis, ABA is concerned that adding additional resolution measures, including an extra layer of loss-absorbing capacity (which is akin to an extra layer of capital), will not result in meaningful, cost-effective benefits to the financial system or the public. Moreover, it is unclear how the possible additional measures that the ANPR contemplates will improve on the well-developed resolution plans that non-G-SIB LBOs have developed in close coordination with (and with the approval of) the Agencies. In addition, as discussed in detail below, the Agencies have long recognized that non-G-SIB LBOs do not present systemic risk. It follows that resolution techniques and resources for these institutions are different from those that may be appropriate for G-SIBs.

Finally, ABA notes that the historical regulatory record indicates the Agencies have adopted all of the needed prudential tools to ensure the safety, soundness, and resolvability of banks as required under the Dodd-Frank Act. In 2018 Congress directed the Agencies to review their post-crisis enhanced regulations under the Dodd-Frank Act to tailor them appropriately, based on institution size and complexity.[4] The Agencies have implemented a tailoring framework finalized in 2019 that addresses growth if certain asset thresholds are crossed, and the Agencies should let that framework work as intended. The Agencies must demonstrate that any additional actions along the lines suggested in the ANPR would be appropriately tailored according to Congressional direction. Consistent with the Agencies' statutory obligation to tailor regulations to the relevant risks and also as required by broader principles of administrative law,[5] the Agencies need to demonstrate the benefits of imposing additional resolution resource requirements on non-G-SIB LBOs and how these benefits outweigh costs.

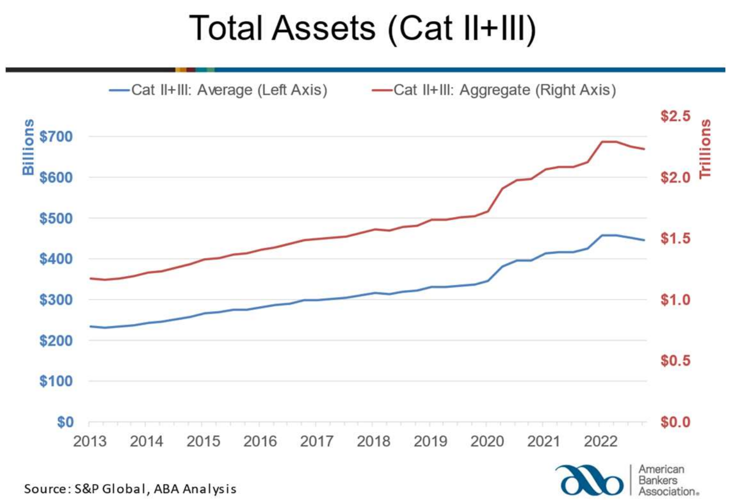
We outline several specific concerns below:

The Agencies' concerns about recent asset growth at non-G-SIB LBOs fails to recognize important details about that growth, as well as the Agencies' own tailoring framework.

As one of the key justifications for more elaborate resolutions-related measures, the Agencies cite the asset growth of non-G-SIB LBOs. In particular, they point to the example of domestic Category III firms, which grew from an average of approximately $413 billion in total consolidated assets as of December 2019 to an average of approximately $554 billion in total

[4] Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174 (05/24/2018).
[5] *See, e.g., FCC v. Fox Television Stations, Inc.,* 556 U.S. 502 (2009).

consolidated assets as of December 2021.[6] Category II and III institutions indeed grew significantly during this period:[7]



A key factor in this growth, however, was a rapid increase in deposits as the COVID-19 pandemic led to significantly increased savings rates, in part promoted by fiscal and monetary pandemic relief measures. Importantly, this overall asset growth was not reflected in the growth of banks' risk assets (loans and securities, other than government and agency securities). Instead, the proportion of non-G-SIB LBOs' asset portfolios composed of reserve balances at the Federal Reserve Banks and ultra-safe, liquid government and Federal agency securities increased significantly compared to typical economic conditions.

The facts that this recent growth was based on pandemic-related savings increases and has yet to be matched by growth in loans and other risk assets[8] weighs against the need for new resolution resources. Growth in relatively illiquid risk assets as a share of the balance sheet might indicate that the risk of failure has increased (possibly because the larger banks' operations had become more complex) or at least not been mitigated, and that managing a failure would be more difficult, and possibly more expensive, than had risk asset growth remained flat.

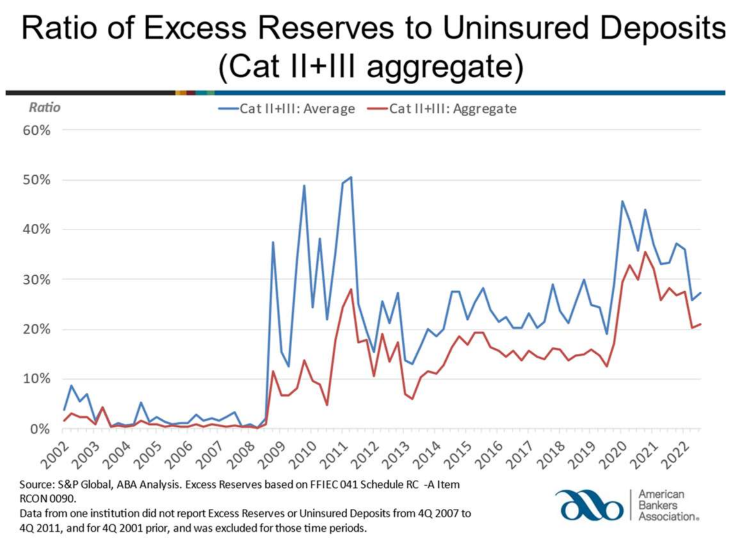
Because a significant part of the growth in the 2019-2021 period that the Agencies cite remains in very liquid, low-risk assets at the affected banks, however, the implications for resolution preparation and management are much less concerning. First, a given rate of growth reflected in low-risk, liquid assets does not present the same increase in overall risk to the institution that the same rate of growth, invested in a more typical mix of assets, would present. Second, the

[6] ANPR at 64171.
[7] In this respect, the period also saw a significant rise in the rate of asset growth for banks generally, as illustrated on Chart 1 in the Appendix.
[8] A portion of bank asset growth during the pandemic consisted of government-guaranteed loans made under pandemic relief programs to maintain employment.

Agencies arguably exaggerate the complexity and potential cost should a failure of such an institution occur, since the bank in question will have a relatively higher proportion of liquid, high-quality assets (reserve account balances and liquid securities) than banks approaching failure historically have had.[9]

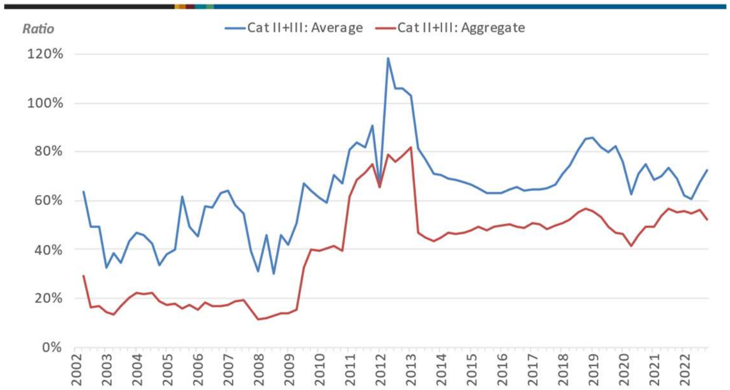
These factors are also very relevant in addressing the Agencies' concerns about the increased proportion of uninsured deposits in non-G-SIB LBOs. The Agencies note that some non-G-SIB LBOs have increased their reliance on uninsured deposits to fund their operations over the past decade and that these deposits may be less stable than insured deposits under conditions of stress.[10] Again, however, the consequences would be mitigated as long as the institutions' asset mix reflects a disproportionately high component of low-risk, highly liquid assets. This factor means, first, that serious institution-specific stress situations are relatively less likely, and, second, that any uninsured deposit runoff is relatively more manageable, making failure less likely.

Finally, ABA notes that, viewed over a longer historical period, the non-G-SIB LBOs hold a greater portion of uninsured deposits as excess reserves and as short-term liquid securities than at any previous time, other than during the years immediately after the financial crisis and during the first months of the pandemic:



[9] It is notable that banks took on these assets to largely as a result of the monetary and fiscal stimulus during the COVID-19 pandemic and participated in government lending programs, contributing to financial stability during the pandemic.
[10] ANPR at 64171. As noted in Chart 2 in the Appendix, as with asset growth generally, much of the growth in insured deposits occurred during the COVID-19 pandemic.

Ratio of Short-term Liquid Securities to Uninsured Deposits
(Cat II+III aggregate)



Source: S&P Global, ABA Analysis. Short -term Liquid Securities based on sum of FFIEC 041 Schedule RC-B Items RCON 0211, RCON 1287, RCON HT50, RCON HT53, RCON 8496, RCON 9499, RCON G300, RCON G303, RCON G304, RCON G307, RCON G312, RCON G315, RCON G316, RCON G319, RCON K142, RCON K145, RCON K150, RCON K153. Data from one institution did not report Excess Reserves or Uninsured Deposits from 4Q 2007 to 4Q 2011, and for 4Q 2001 prior, and was excluded for those time periods.

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ABA acknowledges that the particular conditions that led to balance sheet and deposit growth during the COVID-19 pandemic are likely to be temporary, and in fact the most recent FDIC *Quarterly Banking Profile* reflects that loan growth is accelerating.[11] Significantly, the report also notes that uninsured deposits have declined since the fourth quarter of 2021, while insured deposits remained essentially flat. ABA believes that, at present, the composition of non-G-SIB LBOs' asset and liability portfolios continues to present less of the risk relevant to resolution preparedness than a simplistic consideration of asset growth suggests, or than historical episodes of asset growth have presented.

Use of the tools described in the ANPR is inconsistent with non-G-SIB LBOs' significant achievements in the resolution planning process, and they may diminish the benefits of those efforts.

Since passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act, non-G-SIB LBOs have devoted extensive efforts, including significant involvement of their boards of directors, to producing and submitting highly detailed resolution plans. The plans have been carefully refined over more than 10 years and, following an exhaustive iterative process, the Agencies have deemed them to be sufficient to meet their requirements adopted pursuant to the act.

In particular, these plans take careful, thorough account of the individual situations of each institution. Most of the non-G-SIB LBOs have successfully developed multiple-point-of-entry (MPOE) resolution plans, again with the involvement and concurrence of the Agencies. Techniques and structures developed primarily to support single-point-of-entry plans will generally be inappropriate for the non-G-SIB LBOs that have adopted MPOE resolution plans. Moreover, the non-G-SIB LBOs' insured depository institution resolution plans have also been accepted by the FDIC, consistent with the need to execute IDI-level resolutions quickly and cost-

[11] *See* https://www.fdic.gov/analysis/quarterly-banking-profile/qbp/2022sep/qbp.pdf.

effectively without exacerbating systemic risk. The need for enhanced resolution options is less than those appropriate for G-SIBs, given the simpler corporate structures and operations.

Moreover, the introduction of requirements for unsecured debt issuance, clean holding companies, and other requirements applicable to more complex banking organizations could be inconsistent with the resolution plans and strategies that the Agencies have already approved. For example, the Agencies note that existing requirements for G-SIBs to maintain outstanding unsecured debt that could be used to absorb losses in a failure facilitate "single point of entry (SPOE)" resolution strategies, which all the U.S. G-SIBs have adopted.[12] Any new requirements should be consistent with the institution's approved resolution plan, and the adoption by non-G-SIB LBOs of SPOE strategies and their supporting unsecured debt would mark a radical and unnecessary shift for the non-GSIB LBOs. Variations in their existing approved plans suggest that new broad-brush requirements will be inappropriate and may undo much of the progress the resolution planning process has yielded.

The strengthened capital and liquidity positions across the banking industry have not only reduced the likelihood of a non-G-SIB LBO failure – they also mean that a specific failure is less likely than ever to have systemic implications.

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 both would provide firms and supervisors with early warning signals of capital and liquidity depletion, as well as making capital depletion much less likely. Recent supervisory reporting by the Agencies has generally reflected continued strong capital and liquidity conditions, both across the banking industry as a whole and within the subset of larger institutions.[13] Importantly, despite increases in loan growth during 2022 to date, the ratio of loans to deposits remains low by historical standards, reflecting higher-than-usual industry liquidity.[14]

Though by definition strong capital no longer exists for a specific firm entering resolution, strong capital and liquidity elsewhere in the industry are highly significant for both containing the cost of resolution and easing its execution. Even small-scale resolutions can strain FDIC resources when regional or national financial conditions are under widespread stress, as for example in the southwestern United States in the late 1980s. Conversely, when the banking industry is generally healthy, resolving a failed bank when multiple other institutions are in a position to bid on its operations both reduces FDIC's dependence on a single or a small number of potential acquirers and provides greater potential markets for any assets that remain after the bulk of the resolution has been completed. In addition, since 1991 the Agencies and the Office of the Comptroller of the Currency have had the option to intervene through "prompt corrective action" to impose

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[12] ANPR at 64172.
[13] *See, e.g., Federal Reserve Supervision and Regulation Report, November 2022, available at* https://www.federalreserve.gov/publications/files/202211-supervision-and-regulation-report.pdf. As described in this report, "large institutions" includes both G-SIBs and non-G-SIB LBOs.
[14] *Id.* at 6.

progressively more stringent restrictions on troubled institutions as their financial condition deteriorates.[15] These factors, in addition to others discussed below, cast significant doubt on the relevance of the examples often cited of large regional bank failures as posing dangers to financial stability and risks of higher resolution costs.[16]

Moreover, assessing appropriate and necessary resolution techniques for non-G-SIB LBOs versus those appropriate for G-SIBs must consider the significant differences in potential systemic impact. Using the model developed by international supervisors and adopted by the Board for rating institutions' systemic risk, the Board has for some time highlighted the difference in potential systemic impact posed by the non-G-SIB LBOs, compared to the US G-SIBs:

> According to the Board's analysis across many potential metrics, there is a clear separation in systemic risk profiles between the eight U.S. top-tier bank holding companies that would be identified as GSIBs under the proposed methodology and other bank holding companies. … Drawing the cut-off line within this target range [of scores under the model reflecting a significant break between the smallest U.S. G-SIB and the next largest institution] is reasonable because firms with scores at or below 51 [the highest non-G-SIB score] were much closer in size and complexity to financial firms that had previously been resolved in an orderly fashion than they were to the largest financial firms, which had scores between three and nine times as high [with a minimum score of 140] and are significantly larger and more complex.[17]

During the years since, the Board has continued to designate U.S. G-SIBs by applying the same methodology, notwithstanding growth that has occurred in some non-G-SIB LBOs in the meantime. As other industry advocates have noted, there is no evidence that casts doubt on the continuing validity of the Board's analysis.[18] By definition, the non-G-SIB LBOs do not present systemic risks, and this analysis casts serious doubt on the appropriateness for non-G-SIB LBOs of resolution techniques designed to address such risk. This distinction is reflected more broadly in the Agencies' tailoring framework.

In addition to the stringent post-crisis capital and liquidity requirements already in place, the Agencies are considering further revisions as part of their implementation of the "Basel III endgame" capital reforms. The details and impact of any such additional measures remain

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[15] *See* 12 USC §1831o.
[16] *See, e.g.,* Speech by Martin J. Gruenberg, Member, Board of Directors, FDIC, at The Brookings Institution, Center on Regulation and Markets, Washington, D.C. (October 16, 2019), *available at* https://www.brookings.edu/wp-content/uploads/2019/09/Gruenberg-Remarks.pdf (hereafter, Gruenberg Speech).
[17] 80 Fed. Reg. at 49084-49085 (August 14, 2015), *available at* https://www.govinfo.gov/content/pkg/FR-2015-08-14/pdf/2015-18702.pdf.
[18] *See, e.g.,* Joint trade association letter dated May 31, 2022, *available at* https://www.fdic.gov/resources/regulations/federal-register-publications/2022/2022-rfi-rules-regulations-statements-of-policy-regarding-bank-merger-transactions-3064-za31-c-024.pdf.

unclear, but the Agencies should not ignore the cumulative effect if they also implement requirements for additional loss-absorbing capacity to facilitate resolution of a non-G-SIB LBO. If changes to the capital framework lower even further the potential for a non-G-SIB LBO to fail, a requirement for additional long-term debt to support a resolution becomes even harder to justify. Any such requirements must be thoughtfully calibrated in coordination with changes to the capital rules.

The Agencies' legal and policy authorities and responsibilities, particularly those directly related to resolutions, do not clearly support the potential actions raised in the ANPR.

Given the absence of systemic risk, the Agencies' primary mandate (and specifically that of FDIC) is to protect insured depositors at the lowest cost to the Deposit Insurance Fund. The traditional FDIC resolutions approach has favored acquisition of a failed institution's assets and deposits by a single acquirer, assuming the transaction can meet the "least cost" test required under the Federal Deposit Insurance Act.[19] In practice this approach often results in the protection of uninsured depositors and, in some cases, other non-deposit creditors. Without questioning the accuracy of FDIC's least-cost determinations, ABA nevertheless is concerned that imposition of additional burdens on non-G-SIB LBOs requires more than a simple desire to adhere to traditional resolution processes.

To the extent the Agencies' concerns are based on levels of uninsured deposits,[20] we note that uninsured deposits are not protected by law. Such deposits are often cited as a possible source of increased instability. For the reasons noted above, however, the lower level of related growth in risk assets in the period the Agencies cite (December 2019 to December 2021) makes this less a concern than had the additional deposits been invested in riskier, less liquid assets. Furthermore, though loan growth has increased during 2022, uninsured deposits are declining. In any case, there have historically been heated debates about the propriety of resolution procedures that protect deposits above the statutory insurance limit, and decisions that may result in such protection are better left to Congress than the Agencies, who lack a specific statutory mandate to address uninsured deposits.

Moreover, depending on the details of a specific proposal, the addition of resolution resources of uncertain incremental benefit raises legal uncertainties. Under the "major questions doctrine," a Federal agency must show a "clear statement" to conclude that Congress intended to delegate authority of the breadth the agency claims to regulate a fundamental sector of the economy.[21] The general provisions of Section 165 of the Dodd-Frank Act[22] do not contain such a statement, particular when considering non-G-SIB LBOs that, as discussed above, the Agencies themselves acknowledge do not implicate systemic risk. Given the importance of the non-G-SIB LBOs to the provision of credit and other financial services in the economy, imposition of measures of the type contemplated in the ANPR is exactly the sort of regulatory action the doctrine is intended to

[19] *See* 12 USC §1823(c)(4); ANPR at 64171.
[20] ANPR at 64171.
[21] *West Virginia v. EPA,* 597 U.S. __ (2022), slip opinion at 12.
[22] 12 U.S.C. §5365.

govern. Should the Agencies pursue any of the options outlined in the ANPR, the potential existence of this legal issue will do more than complicate the Agencies' policy implementation – it will also potentially extend the uncertainty that the non-G-SIB LBOs face maintaining resolution preparedness on a cost-effective basis. These costs and uncertainties are additional considerations of which the Agencies must take account in their rulemaking process.

Since the financial crisis, the Agencies already have new tools for both monitoring non-G-SIB LBOs and preparing them for possible resolution, and adding new, burdensome requirements demands caution.

As noted above, to the extent an institution maintains a relatively high level of deposits with a relatively high level of liquid assets, the level of complexity involved in its resolution will be reduced, compared to uninsured deposits supporting a more typical asset portfolio. Moreover, FDIC's deposit recordkeeping rules for large institutions with numerous deposit accounts[23] enhance the practicality of "insured deposit transfers" in which an acquirer assumes only insured deposits and, usually, a smaller subset of assets. Having required most non-G-SIB LBOs to undertake the considerable effort, expense, and customer relations challenges of putting these recordkeeping systems in place, the Agencies should not now advocate additional burdens unless FDIC can demonstrate that its prior enhancements are inadequate to meet its statutory responsibilities. Though historically a relatively rarely used resolution tool, the now more practical insured deposit transfer option would simplify the resolution of such institutions. Importantly, it could also broaden the universe of potential acquirers (since they would acquire a smaller incremental footprint) and also reduce the acquirer's resulting growth. Thus, resolution options that already exist could address two major concerns raised in the ANPR.

There have been occasional suggestions that resolution of a non-G-SIB LBO would be extremely difficult for FDIC, difficulties that could pose risks for markets more broadly.[24] The examples offered stem from the 2007-2008 financial crisis, and they fail to account for the significant market and regulatory changes since. The reduced likelihood, on account of stronger capital and liquidity positions and other enhanced prudential standards, that multiple institutions will experience simultaneous, dangerous levels of stress suggests that resolution of a non-G-SIB LBO today would have very different effects. The additional options for effective resolutions that already exist, including resolution plans and enhanced deposit recordkeeping, further respond to the lessons of the crisis. The Agencies must justify the costs and burdens of any additional regulatory measures by clearly documenting that serious gaps remain after all the progress of the last 10 years. ABA urges the Agencies to perform a rigorous analysis of the costs and benefits of any such additional measures. We believe the costs would be immediate and burdensome and the benefits, if any, would be long-term and speculative.

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[23] 12 CFR, Part 370, *available at* https://www.ecfr.gov/current/title-12/chapter-III/subchapter-B/part-370.

[24] *See* Gruenberg Speech, pp. 5-8.

ABA appreciates the Agencies' consideration of our concerns with the possible approaches outlined in the ANPR, and we urge you to weigh those against both the potential costs and burdens of implementation and the extensive protections already put in place to assure prevention of bank failures and successful resolution of those that occur. Should you have any further questions, please contact the undersigned at hbenton@aba.com.

Very truly yours,

/s/

Hu A. Benton

Senior Vice President and Policy Counsel

APPENDIX

Chart 1:

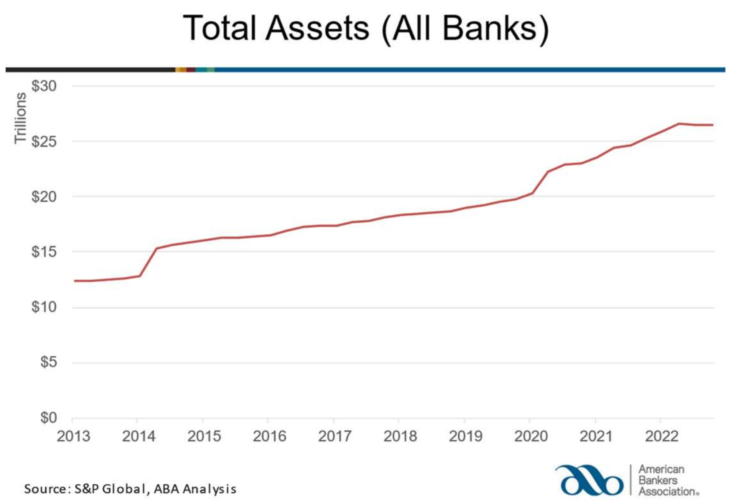

Chart 2: