February 19, 2016

Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, D.C. 20551
Attention: Robert deV. Frierson, Secretary

Re: Federal Reserve's Notice of Proposed Rulemaking Concerning External TLAC, LTD and Related Requirements Applicable to U.S. G-SIBs – Docket No. R-1523; RIN 7100 AE-37

Ladies and Gentlemen:

Bank of America Corporation ("*BAC*") appreciates the opportunity to comment on the Board of Governors of the Federal Reserve System's (the "*Federal Reserve*") notice of proposed rulemaking (the "*Proposal*") that would impose total loss-absorbing capacity ("*TLAC*"), long-term debt ("*LTD*") and related requirements on the top-tier bank holding company ("*BHC*") parents ("*covered BHCs*") of U.S. global systemically important banking groups ("*U.S. G-SIBs*") as well as the U.S. intermediate holding companies of systemically important foreign banking organizations.[1] As a U.S. G-SIB and, accordingly, a covered BHC, our comments focus on the Proposal's requirements applicable to covered BHCs.

We have actively participated with the seven other covered BHCs in the preparation of the joint comment letter (the "*Associations' Letter*") of The Clearing House Association, the Securities Industry and Financial Markets Association, the American Bankers Association, the Financial Services Roundtable and the Financial Services Forum concerning the Proposal's requirements applicable to covered BHCs, and we support the views expressed and recommendations made in the Associations' Letter. However, we have chosen to supplement the Associations' Letter with this letter because we believe the Federal Reserve will benefit from hearing directly from affected banking organizations concerning the Proposal, both as a result of those organizations' practical understanding as to how the Proposal will individually impact them and because understanding their priorities will contribute to more sound regulatory policy.

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[1] Notice of Proposed Rulemaking, *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; Regulatory Capital Deduction for Investments in Certain Unsecured Debt of Systemically Important U.S. Bank Holding Companies*, 80 Fed. Reg. 74926 (Nov. 30, 2015). Unless otherwise specified, section references in this letter are to sections of Regulation YY, 12 C.F.R. Part 252, as it would be amended by the Proposal.

Our comments focus primarily on four aspects of the Proposal that are of particular concern to BAC:

- The broad exclusion from eligible debt securities ("*EDS*") status, and accordingly from their counting toward minimum LTD or TLAC requirements, of debt securities (regardless of their ranking in a BHC's capital structure) that contain any acceleration provisions other than upon (i) bankruptcy or receivership or (ii) failure to pay principal or interest when due. All of our – and we understand other covered BHCs' – outstanding "plain vanilla" senior debt securities, of which we have $138 billion principal amount outstanding as of December 31, 2015, and $2.5 billion of our junior subordinated debt securities ("*TruPS Junior Subordinated Debt Securities*") underlying trust preferred securities ("*TruPS*"), of which we have nearly $7 billion total principal amount outstanding as of December 31, 2015, include a variety of standard acceleration provisions[2] not permitted by the Proposal. The Proposal would exclude these securities from EDS notwithstanding that these standard acceleration provisions do not unduly impact the availability of those securities to bear losses or impede their usefulness in a resolution. In our view, standard acceleration provisions of the type included in plain vanilla senior debt securities and TruPS Junior Subordinated Debt Securities should not disqualify such securities from EDS status. Indeed, such provisions have the effect of discouraging BHCs from taking actions that would be inconsistent with orderly resolution.

- The ambiguity as to whether TruPS Junior Subordinated Debt Securities are disqualified from external LTD (and hence TLAC) status merely because of the interposition, as required by applicable capital rules at the time these instruments were issued,[3] of a statutory trust as a "wrapping vehicle" between investors and a covered BHC as issuer. In our view, TruPS Junior Subordinated Debt Securities should not be disqualified from external LTD (and hence TLAC) status merely because of the interposition of a statutory trust between investors and the issuing covered BHC.

- Three recommendations with respect to the final rule's clean holding company ("*Clean HC*") provisions that differ from the Proposal: (i) that they permit covered BHCs to enter into qualified financial contracts ("*QFCs*") with third parties if the QFCs are cleared through a central clearing counterparty ("*CCP*"); (ii) that the Federal Reserve address, either in the final rule or in supplementary information, how it will handle instances of non-compliance with the Clean HC requirements; and (iii) that they include an express "exceptions process" to allow for parent BHC guarantees with cross-defaults in limited circumstances. In our view, each of these matters should be addressed in the final rule or related supplementary information or other commentary.

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[2] By "*standard acceleration provisions*", we mean acceleration provisions of the type included in BAC's outstanding plain vanilla senior debt securities and TruPS Junior Subordinated Debt Securities as identified in Annex 1 hereto as well as those of other covered BHCs addressed in the Associations' Letter and summarized in Annex 7 to that letter.

[3] Section II.A.c.iv of Appendix A to Regulation Y, 12 C.F.R. Part 225, as in effect prior to the effectiveness of the Federal Reserve's Basel III-based new capital rules now appearing in its Regulation Q, 12 C.F.R. Part 217.

- The necessity in any event for broad grandfathering of (i) outstanding debt securities that do not contravene the objectives underlying TLAC, both as EDS for purposes of the minimum LTD and TLAC requirements and as instruments that are not unrelated liabilities for purposes of the Clean HC requirements, and (ii) outstanding guarantees and other liabilities that would otherwise be prohibited by the Clean HC requirements. BAC, and likely other covered BHCs, have outstanding debt securities, non-compliant guarantees and other liabilities that will remain outstanding as of the anticipated January 1, 2019 effective date. These debt securities, guarantees and other liabilities, simply stated, cannot as a practical matter be amended in their entirety to make them compliant, nor can they be removed or eliminated as direct or contingent liabilities (whether through issuer call redemptions, tender or exchange offers or some other means of cancellation).

I. Acceleration Provisions in Debt Securities – LTD With Standard Acceleration Provisions Should Qualify As EDS

The Proposal would exclude from EDS status (and, accordingly, from counting toward minimum external LTD and TLAC requirements), among others:

- LTD securities that give holders a contractual acceleration right other than in the event of (i) a bankruptcy or receivership or (ii) failure to pay principal or interest when due;
- LTD securities governed by foreign law;
- Long-term structured notes that are principal-protected at par; and
- LTD securities that have contractual provisions allowing them to be converted into or exchanged for equity of the covered BHC.

The Associations' Letter addresses in detail why each of these types of LTD securities should be included in EDS or, in the case of convertible or exchangeable debt securities, either included in EDS or treated as the equity securities into or for which they are convertible or exchangeable. We agree with the comments in the Associations' Letter on each of these types of LTD securities. The one that is the most concerning for BAC, however, is the Proposal's exclusion from EDS of LTD securities with standard acceleration clauses (both senior plain vanilla (including benchmark) LTD securities and TruPS Junior Subordinated Debt Securities). We will be happy to provide to you through the normal supervisory process the details of our LTD securities, including redemption provisions and maturity dates.

Attached as Annex 1 is a summary list of the acceleration clauses in BAC's outstanding LTD – presented separately for senior LTD and LTD consisting of TruPS Junior Subordinated Debt Securities – that would be impermissible and disqualifying under the Proposal. The impermissible and disqualifying provisions included in our senior LTD securities are listed in Part A of Annex 1 and have been uniformly included in our $138 billion principal amount of such securities outstanding as of December 31, 2015 – that is, for BAC they are (and have for many years been), along with permissible acceleration events, the standard default covenant and acceleration event package negotiated between BAC and its senior debt investors. Similarly, the impermissible and disqualifying provisions included in our TruPS Junior Subordinated Debt Securities are listed in Part B of Annex 1 and such provisions have

been included in $2.5 billion of our nearly $7 billion principal amount of total TruPS Junior Subordinated Debt Securities outstanding as of December 31, 2015.[4]

The principal reason given for the very narrow scope of permitted acceleration clauses is that an acceleration event might otherwise occur long before a bankruptcy or Title II proceeding and before an automatic stay could be imposed, resulting in the covered BHC's obligations under the LTD securities being paid before commencement of the bankruptcy or Title II proceeding and, accordingly, not being available to absorb losses and recapitalize the covered BHC at the point of failure.[5] The Federal Reserve appropriately justifies acceleration clauses based on payment defaults on the grounds that covered BHCs are unlikely to default on payment obligations unless and until they are on the brink of insolvency.[6]

Applying the Federal Reserve's reasoning and the other considerations discussed below, we do not believe the standard acceleration provisions of the type included in BAC's LTD listed on Annex 1 create uncertainty as to, or impair, the availability of senior LTD and TruPS Junior Subordinated Debt Securities to absorb losses in a resolution and, accordingly, disqualifying these securities as EDS does not produce a benefit that warrants the related costs and complexities. Such standard acceleration provisions should be permissible and not disqualifying for EDS status and, accordingly, for minimum external LTD and TLAC requirements. Our reasons for that view include the following.

First, we agree that acceleration provisions that are not likely to be triggered unless and until the covered BHC is on the brink of bankruptcy should not be disqualifying. We also agree that acceleration provisions that could reasonably be expected to give rise to acceleration before the covered BHC is on the brink of insolvency should be prohibited, for example, some types of financial covenants. BAC's covenant package and, we understand, the covenant packages of the other covered BHCs include no such financial covenants.

Second, under the standard referenced in the immediately preceding paragraph, just as covered BHCs are unlikely to default on their payment obligations unless they are on the brink of insolvency, they are also unlikely to breach (and fail to cure) any of the other covenants that could give rise to standard acceleration provisions of the type included in BAC's LTD as summarized in Annex 1 and the other covered BHCs' LTD as summarized in Annex 7 to the Associations' Letter. Indeed, 11 of the 16 potential breaches in our senior LTD that could give rise to a disqualifying acceleration provision (failure to maintain an office for payments and notices through no waiver of stay or extension laws) are purely administrative and are exceedingly unlikely ever to be breached or, even if they are breached, are just as unlikely to either (i) not be cured within the applicable cure period, thus avoiding possible acceleration rights by the trustee or investors, or (ii) be used by a trustee or investors as the basis for an acceleration notice. The remaining five – addressing versions of limitations on sales of stock of subsidiaries and business combination limitations relating to mergers and consolidations or sales of all or substantially all of BAC's assets – would, in any event, be subject to regulatory scrutiny because of the capital plan/Comprehensive Capital Analysis and Review (CCAR) process. Furthermore, the sole disqualifying acceleration

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[4] The limited differences among outstanding series of senior LTD (in Part A of Annex 1) and outstanding series of TruPS Junior Subordinated Debt Securities (in Part B of Annex 1) arise from the fact that, although the terms of BAC's directly issued legacy securities are uniform, BAC is also the obligor on some series of securities that it assumed in connection with acquisitions.

[5] 80 Fed. Reg. at 74936.

[6] *Id.*

event in our TruPS Junior Subordinated Debt Securities that is not a purely administrative provision of the type included in our senior LTD – a dissolution or termination of the statutory trust interposed between investors and BAC as issuer of the TruPS Junior Subordinated Debt Securities, except for certain liquidating distributions, redemptions or permitted mergers and consolidations – would only occur as a practical matter if BAC failed to make timely payments on the underlying TruPS Junior Subordinated Debt Securities. That failure is, of course, a permitted acceleration event.[7]

Third, because substantially the same acceleration provisions are included in all of BAC's senior LTD and TruPS Junior Subordinated Debt Securities, as applicable, if a covenant breach occurs as to one series of outstanding LTD it will simultaneously occur as to all series of senior LTD or TruPS Junior Subordinated Debt Securities at once, inevitably causing BAC to become insolvent before making any payments.

Fourth, the Federal Reserve, in the supplementary information accompanying the Proposal, identified the "primary attributes of eligible external LTD" as "including issuance directly from the covered BHC, remaining maturity of at least one year, and the absence of derivative-linked features." Impliedly, and in our view appropriately, the Proposal's narrow scope for permitted acceleration provisions is not a primary attribute.

Fifth, the historical record supports our view that treating standard default covenants as being permissible under the Federal Reserve's standard is the correct approach. We do not believe any of the covered BHCs has ever breached any of its standard default covenants contained in any of its senior or subordinated (including junior subordinated) indentures that was not cured during the applicable cure period, even during the 2008 financial crisis.

Sixth, we do not believe the appropriate response to our concerns and those of other covered BHCs with respect to the Proposal's treatment of acceleration provisions is merely to grandfather outstanding LTD. The standard default covenant packages tied to acceleration rights that we and other covered BHCs have negotiated with our investors, and have abided by over many years, are, we believe, important to investors in BHC LTD. This is particularly true of covenants that are designed to preserve the character of the issuer (for example, limitations on sale of stock of principal subsidiary banks or of all or substantially all of the assets of the issuer). Requiring that these covenants and related acceleration rights be deleted for new series of LTD issued after effectiveness of a final rule will almost certainly have some cost reflected in the pricing of newly-issued securities.[8]

Accordingly, we urge the Federal Reserve, in its final rule, to revise the scope of permitted acceleration provisions to include standard acceleration provisions.

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[7] The duplication and overlap among default covenants and related acceleration rights in our indentures, as reflected in Annex 1, largely results from the intermix of BAC legacy indentures (that is, indentures under which BAC itself is the issuer) and indentures assumed by BAC through acquisitions of, among others, Merrill Lynch and Countrywide (as referenced in note 4).

[8] Note that the LTD covenants set forth in the second and third bullets in Part A of Annex 1 apply to legacy debt and are not part of the covenant package applicable to LTD issued under our current indenture.

II. TruPS Junior Subordinated Debt Securities – TruPS Junior Subordinated Debt Securities Should Be Included As EDS

The status of junior subordinated debt securities issued by covered BHCs and underlying their TruPS – "*TruPS Junior Subordinated Debt Securities*" as defined above – under the Proposal is ambiguous. The ambiguity arises out of the interplay between (i) the adjective "external" in Section 252.62's LTD requirement and (ii) the requirement under the pre-Basel III capital rules that a statutory trust be interposed between a BHC as issuer of TruPS Junior Subordinated Debt Securities and investors in order to qualify such securities as Tier 1 capital.[9] TruPS Junior Subordinated Debt Securities issued by a covered BHC are as available to absorb losses in support of an SPOE resolution as other EDS as defined in the Proposal, and the persons who absorb the losses are third-party investors. Accordingly, we request that the Federal Reserve, either within the text of the final rule or in accompanying supplementary information, confirm that TruPS Junior Subordinated Debt Securities that qualify as EDS under Section 252.61 and as qualifying trust preferred securities under the Federal Reserve's pre-Basel III capital rules as in effect when the TruPS Junior Subordinated Debt Securities and related TruPS were issued also qualify as eligible external LTD under Section 252.62. This is an important issue for us in that at December 31, 2015, we had nearly $7 billion principal amount of TruPS Junior Subordinated Debt Securities outstanding, with maturities that extend to 2067. Although most of our currently outstanding TruPS Junior Subordinated Debt Securities are now redeemable at our discretion, financial considerations and other provisions may make redemption of these securities unattractive and, in some instances, complex.

Four considerations support our view (at least with respect to BAC's TruPS Junior Subordinated Debt Securities and, we believe, with respect to TruPS Junior Subordinated Debt Securities of all covered BHCs more generally), as follows:

First, TruPS Junior Subordinated Debt Securities literally meet the required elements of the definition of "*eligible debt security*" in Section 252.61, except in our case for the single impermissible acceleration event discussed in Part I of this letter. Most importantly, as relevant to the ambiguity between the label "external" and the interposition of the statutory trust, they are issued by the covered BHC directly, their cash proceeds were fully received by the covered BHC and available for deployment anywhere in its businesses, and investors who hold such securities through an interposed trust are as fully exposed to risk of loss as they would be if they held such securities directly and not through a trust. Indeed, due to the junior subordinated ranking of these securities in BAC's capital structure, their loss-bearing capacity is superior to BAC's senior and subordinated debt securities.

Second, TruPS Junior Subordinated Debt Securities are "external" as we understand the Federal Reserve to have used that term in the Proposal. Although Section 252.62 uses the word "external", it does not define that term. In the supplementary information included in the Proposal, the Federal Reserve commented on the meaning of the term "external", stating:

> The term "external" refers to the fact that the requirement would apply to loss-absorbing instruments issued by the covered BHC to third-party investors, and the instrument would be used to pass losses from the banking organization to those investors in case of failure. This is in contrast to "internal" loss-absorbing capacity, which could be used to transfer losses among legal entities within a banking organization (for

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[9] *See* note 3, *supra*.

instance, from the operating subsidiaries to the parent holding company).[10]

Under this standard, TruPS Junior Subordinated Debt Securities are "external". In the event of a covered BHC's failure, 100% of the losses arising from the TruPS Junior Subordinated Debt Securities (which are beneficially owned by investors in the related TruPS[11] issued by the trust that has been interposed between investors and the covered BHC) are passed through to such investors in the TruPS. As a result, 100% of the losses are absorbed by those investors.

Third, consistent with their economic substance described above, under U.S. generally accepted accounting principles, the TruPS Junior Subordinated Debt Securities, not the TruPS, are recorded as a liability on the issuing covered BHC's balance sheet. This was the consequence of the de-consolidation of the statutory trust "wrapping" vehicles from the issuing bank holding company required by the Financial Accounting Standard Board's Interpretation No. 46, *Consolidation of Variable Interest Entities* (originally referred to as "*FIN* 46" and now codified at ASC 810-10-05 et seq.), initially adopted in 2003.

Fourth, the Federal Reserve has previously noted that the substance of TruPS is in the underlying TruPS Junior Subordinated Debt Securities. In the Federal Reserve's commentary accompanying its final rule on *Risk-Based Capital Standards: Trust Preferred Securities and the Definition of Capital*, the Federal Reserve, in deciding that TruPS should continue to be included in Tier 1 capital following the FASB's adoption of FIN 46, explained that "there should be no substantive difference in the treatment of [TruPS] issued by [trusts], or the underlying junior subordinated debt, for purposes of regulatory reporting[.]"[12] The Federal Reserve noted in the same adopting release that "[TruPS] are available to absorb losses more broadly than most other minority interest in the consolidated banking organization because the issuing trust's sole asset is a deeply subordinated note of its parent BHC."[13]

The interposition of a statutory trust between investors, on the one hand, and a covered BHC as issuer of TruPS Junior Subordinated Debt Securities, on the other hand, has no substance or impact on loss-absorbing capacity or allocation of losses to investors and does not transfer losses among legal entities within its organization. Investors are effectively creditors of the issuing covered BHC and the performance of their investment, including in times of distress, depends solely on the covered BHC; the trust interposed between investors and the covered BHC has no operations and no material assets other than the TruPS Junior Subordinated Debt Securities. Accordingly, TruPS Junior Subordinated Debt Securities should be included as eligible external LTD for purposes of the LTD and TLAC requirements.

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[10] 80 Fed. Reg. at 74928. *See also* the Federal Reserve's comments at 80 Fed. Reg. 74933 ("[t]he requirement that regulatory capital be issued out of the covered BHC itself (rather than by its subsidiary) is intended to ensure that the total required amount of loss-absorbing capacity would be available to absorb losses incurred anywhere in the banking organization (through down streaming of resources from the BHC to the subsidiary that has incurred the losses, if necessary)."

[11] As required by the pre-Basel III capital rules in effect when the TruPS Junior Subordinated Debt Securities were issued, the parent BHC (BAC in this case) owns a nominal amount of trust common securities of the related trust, with an equal nominal amount of the TruPS Junior Subordinated Debt Securities corresponding to those common securities.

[12] Federal Reserve, *Risk-Based Capital Standards: Trust Preferred Securities and the Definition of Capital*, 70 Fed. Reg. 11828 (Mar. 10, 2005).

[13] *Id.* at 11829.

We urge the Federal Reserve to explicitly confirm in the final rule or accompanying supplementary information that the interposition of the issuing trust between investors and the covered BHC that issues TruPS Junior Subordinated Debt Securities does not disqualify such securities as "external" LTD for purposes of the minimum LTD and TLAC requirements.

III. Clean HC Requirements

The Associations' Letter addresses at length, in Section V of Annex 1 to that letter, the Proposal's Clean HC requirements. Although in principle we appreciate the need for the Clean HC requirements as an important feature to facilitate single point of entry ("*SPOE*") resolution, whether under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "*Dodd-Frank Act*") or under the U.S. Bankruptcy Code, it is critically important that the final rule's Clean HC requirements are sufficiently flexible to permit the Federal Reserve and covered BHCs, working together, to achieve the underlying policy objectives without putting covered BHCs in a position where either (i) they cannot enter into commercially sensible transactions that do not interfere with effective resolution or (ii) of even greater concern, they simply cannot comply. The non-compliance risk is of particular concern during the period following effectiveness of the final rule and the rolling-off or expiration of outstanding obligations (whether debt securities, guarantees or other contingent obligations) that are outstanding or in place on the date of the final rule's effectiveness.

We endorse the concerns expressed and recommendations made in the Associations' Letter with respect to the Clean HC requirements. We particularly wish to emphasize three items: (i) the appropriateness of permitting covered BHCs to enter into QFCs with third parties if the QFCs are cleared through a CCP; (ii) the importance of addressing how the Federal Reserve will handle instances of non-compliance with the Clean HC requirements; and (iii) the need for an express "exceptions process" to allow for parent BHC guarantees with cross-defaults in limited circumstances.

A. Covered BHCs should be permitted to enter into QFCs with third parties that are cleared through CCPs.

The Clean HC requirements, in Section 64(a)(3), preclude covered BHCs from entering into QFCs with non-subsidiaries. We believe the final rule should permit BHCs to enter into QFCs with third parties, provided these are cleared through CCPs, due to the nature of risk-minimizing requirements in place at CCPs. These include, most importantly, requirements to post initial and variation margin and the maintenance of a guaranty or default fund, which limit concerns over the termination of QFCs and related firesales and also any concern that the counterparty, the CCP, would itself become insolvent and contribute to contagion risk. Accordingly, we urge the Federal Reserve to permit such QFCs cleared through CCPs in the final rule.

Two considerations are at the core of this recommendation—one going to the Federal Reserve's policy considerations underlying Section 64(a)(3) and the other to practical considerations for BAC and other covered BHCs.

First, as to policy considerations, the Federal Reserve addresses its reasoning for Section 64(a)(3)'s prohibition in the supplementary information accompanying the Proposal.[14] The Federal Reserve notes two considerations supporting its proposal that covered BHCs implement QFC hedges using a back-to-back format through operating subsidiaries, with only those operating subsidiaries facing third parties. The first is that the operating subsidiaries "should remain solvent and not fail to meet any ordinary course payment or delivery obligations during a successful SPOE" resolution of the covered

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[14] 80 Fed. Reg. at 74945.

BHC, relying on the notion that the termination of the QFCs are "appropriately structured" by reference to the ISDA Protocol; the second is that the covered BHCs themselves "would have no QFCs with external counterparties, and so their entry into resolution proceedings would not result in QFC terminations and related firesales."[15]

The interposition of a CCP between a covered BHC and an external counterparty, which is what it means to clear through a CCP, achieves the same policy goals as the use of a subsidiary. First, it completely insulates operating subsidiaries, eliminating any concern that these arrangements could cause them to frustrate a successful SPOE resolution. Second, it substantially circumscribes, if not eliminates, any concern that the BHC's failure could result in cascading firesales. It is inherent in the function and operation of a CCP – standing between two parties – that it always has a matched book. The CCP minimizes the risk associated with the QFC by requiring the posting of initial and variation margin by both sides of a QFC. As further protection, CCPs also maintain default or guaranty funds, in which clearing members are required to contribute, to protect against the failure of members.

Second, as to practical considerations for BAC and other covered BHCs, permitting covered BHCs to enter into QFCs with third parties provided they are cleared through CCPs is supported by the very purpose that underlies the reason for favoring transactions cleared through CCPs—namely, the role of the CCP in serving as a risk management mechanism in case of the failure of a systemically important financial institution, both reducing systemic risk (because no single institution or counterparty has exposure to the risk of the covered BHC that enters into the QFC, with the risk instead being owned by the CCP and benefitting from its loss allocation mechanisms) and to create transparency. The ability to enter into QFCs with third parties cleared through CCPs, would add an important element of flexibility to covered BHCs' risk mitigation strategies.

B. The Federal Reserve should address its anticipated supervisory approach to incidents of non-compliance with the Clean HC requirements.

The Proposal does not address the consequences of, or the Federal Reserve's anticipated supervisory approach to addressing, incidents of non-compliance with the Clean HC requirements. We believe that the general supervisory authority of the Federal Reserve with respect to its rules is sufficient.[16] These include, for example, requiring non-complying institutions to prepare written plans addressing how they will restore compliance and over what period, and identifying instances of non-compliance as matters requiring attention in periodic exams.

Given that the Clean HC requirements are tied to implementation of minimum LTD and TLAC requirements, we are concerned that, absent clarification, there may be an expectation that the consequence or sanction for incidents of non-compliance with the Clean HC requirements may be the same as for non-compliance with the minimum LTD or TLAC requirements. They should not be the same. We think it is important that the Federal Reserve address its expectation that it will handle instances of non-compliance by applying those normal supervisory tools available to it, with the choice of remediation tool and its specific requirements depending upon the circumstances and in each case being proportionate to the risk raised by the instance of non-compliance. Most importantly, a failure to comply with the Clean HC requirement should not necessarily have the same consequences as a failure to comply with the minimum LTD or TLAC requirements.[17] Instances of non-compliance with the Clean HC

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[15] *Id.*

[16] *See* 12 U.S.C. §§1818(b)-(s), as provided in 12 U.S.C. §1818(b)(3).

[17] Because of the Proposal's "buffers on top" approach to the interplay between capital buffers and the minimum TLAC requirement, the consequences of breaching the minimum TLAC requirement are similar to the

requirements are more likely to occur, depending upon the Federal Reserve's decisions with respect to the scope of qualifying EDS and grandfathering, because it may simply not be possible for covered BHCs to fully comply with the Clean HC requirements in all circumstances, particularly during the early years and particularly if these requirements apply retroactively to outstanding securities, guarantees and other liabilities.

C. The final rule should provide an exceptions process to allow in limited circumstances for parent guarantees of subsidiary liabilities that would otherwise be prohibited by Section 252.64(a)(4).

The Proposal, in Section 252.64(a)(4), includes an absolute prohibition on guarantees by a covered BHC of any liability of a subsidiary "if such liability permits the exercise of a default right that is related, directly or indirectly," to the covered BHC's bankruptcy or receivership. In broad scope, we agree with the substance of this provision and appreciate that guarantees of the type it prohibits could trigger a bankruptcy or receivership of the subsidiary whose obligations are guaranteed, frustrating an SPOE resolution.

However, there will be instances, albeit we anticipate limited, where the benefits of allowing parent guarantees of subsidiary liabilities including cross-defaults outweigh the risks associated with the default on those liabilities.[18] This is particularly true for guarantees of obligations of smaller subsidiaries that rely on the covered BHC for funding and do not face or rely on the market for funding purposes (a "*non-market-facing subsidiary*") and, accordingly, generally do not prepare stand-alone financial statements and do not have demonstrable independent credit-worthiness because in the ordinary course there is no need for the covered BHC to provide substantial capital to the subsidiary (or, put another way, trap capital resources in the subsidiary). An example is in the context of an asset sale by a non-market-facing subsidiary. The purchaser may require the parent covered BHC to guarantee the representations and warranties of the subsidiary, depending on the particular circumstances, and the rights and remedies of the beneficiary/purchaser may change if the parent guarantor becomes subject to a bankruptcy or receivership proceeding. Although the terms of the documentation may not use the word "default" to define these events and consequences, they may be deemed to be a "default" for purposes of Section 252.64(a)(4) that is triggered by the guaranteeing covered BHC's bankruptcy or receivership. In that example, the guarantee might be essential to being able to complete a highly-beneficial transaction, while the risks associated might be minimal, given that the guarantee could be short in duration and to a liability that could not run.

The foregoing is just one example of a guarantee that Section 252.64(a)(4) would prohibit but that should be permissible. Although we anticipate that most circumstances where an exception would be appropriate will involve non-market-facing subsidiaries, it is not possible, in our view, to develop a sufficiently comprehensive list of appropriate exceptions – particularly given the fact-specific nature of any exceptions that the Federal Reserve and a covered BHC are likely to determine are appropriate – to itemize permitted exceptions within the four corners of the final rule. Accordingly, we

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consequences of breaching capital requirements. That is not the case, and for the reasons set forth above it should not be the case, with respect to incidents of non-compliance with the Clean HC requirements.

[18] The Associations' Letter addresses, in Section V.B.2 of Annex 1 of that letter, the apparent, and we expect unintended, application of the Clean HC requirements' guarantee prohibitions to guarantees subject to the ISDA 2015 Resolution Stay Protocol (the "*ISDA Protocol*") and the absence of necessity for the prohibitions as to guarantees of instruments covered by the ISDA Protocol if the guaranteed subsidiary's counterparty has agreed to adhere to the ISDA Protocol. This is a very important issue for us but we are not commenting further on it separately because we are assuming that the over-breadth of the prohibition was not intended in this case.

urge the Federal Reserve to qualify Section 252.64(a)(4)'s requirements as they appear in the final rule to provide that, notwithstanding the general prohibition in that section, the Federal Reserve may, upon request of a covered BHC, approve exceptions to the general prohibition if the Federal Reserve determines, based on the facts and circumstances involved, that the guarantee for which an exception is requested would not materially interfere with a potential resolution of the covered BHC if it were to become subject to a proceeding under Title II of the Dodd-Frank Act or under the U.S. Bankruptcy Code.

IV. Grandfathering

We strongly believe that (i) standard acceleration provisions in debt securities should not disqualify such securities from EDS status (as discussed in Part I), (ii) TruPS Junior Subordinated Debt Securities should be recognized as "external" LTD (as discussed in Part II), and (iii) the Clean HC requirements should not prohibit covered BHCs from entering into QFCs with CCPs and should accommodate exceptions on an on-going basis for guarantees of subsidiary obligations when a covered BHC's default could give rise to remedies against the subsidiary (as discussed in Part III). However, to the extent the Federal Reserve does not agree with our views on these issues, the final rule should provide for grandfathering. The Proposal does not provide for any grandfathering of outstanding debt securities and is ambiguous as to whether debt and other instruments, qualified financial contracts, guarantees and other liabilities within the scope of Section 252.64 and entered into before the publication or effectiveness of the final rule are grandfathered.[19] However, the Federal Reserve, in Question 72 included in the supplementary information accompanying the Proposal, does ask for comment on whether a grandfather provision is necessary or appropriate.[20] We believe that a broad and reasonable grandfathering provision is both necessary and appropriate and must be included in the final rule. This is among the most important and concerning aspects of the Proposal for us. The final rule should grandfather:

- As EDS for purposes of the minimum LTD and TLAC requirements, if ultimately not permitted as eligible LTD, all outstanding LTD (including both senior LTD and TruPS Junior Subordinated Debt Securities) as of a date reasonably after the publication date of the final rule[21] that includes standard acceleration provisions of the type described in Part I of this letter, as well as LTD outstanding as of the same date that is disqualified because it (i) is governed by foreign law, (ii) consists of structured notes that are principal protected at par but that are disqualified simply because they are structured notes, or (iii) has contractual provisions providing for conversion into or exchange for equity of the covered BHC;

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19 The ambiguity arises out of the introductory words – "issue", "enter into" and "guarantee" – in each of the sub-paragraphs in Section 252.64. Read literally, each contemplates an affirmative act or incurrence to fall within § 252.64's prohibitions and would not encompass the maintenance of otherwise prohibited securities, guarantees or other liabilities incurred before the final rule is published or becomes effective. However, the supplementary information accompanying the Proposal implies that a literal reading may not be the Federal Reserve's intent, particularly Question 45, 80 Fed. Reg. at 74945, inviting comment on the appropriate treatment of pre-existing third-party qualified financial contracts.

20 80 Fed. Reg. at 74952. Question 72 reads as follows:

The Board invites comment with respect to whether a grandfather provision is necessary or appropriate for any existing instruments. What types and volumes of outstanding long-term debt instruments of covered BHCs would fail to meet the proposed requirements for eligible external or internal LTD? How burdensome would it be for covered holding companies to modify the terms of such instruments to align with the proposed requirements?

21 The Associations' Letter proposes that that date be 180 days after publication of the final rule. We believe that proposal allows a reasonable amount of time for covered BHCs to interface with rating agencies, investors, counterparties and other interested parties to address expectations and establish parameters for future issuances.

- If the Federal Reserve ultimately disagrees with our view (addressed in Part II) that TruPS Junior Subordinated Debt Securities are "external" LTD as that term is used in Sections 252.62 and 252.63, as EDS TruPS Junior Subordinated Debt Securities that are outstanding when the final rule becomes effective;

- As liabilities that are not unrelated liabilities for purposes of the Clean HC requirements (and hence that will not count against the 5% cap on unrelated liabilities), all debt securities covered by the preceding bullet points and all structured notes, whether or not principal protected at par;

- As debt instruments that are not subject to the prohibition in Section 252.64(a)(1) covering debt instruments with an original maturity of less than one year, any instrument outstanding when the final rule becomes effective that, although it has a contractual maturity date more than one year after initial issuance, might be construed at original issuance to have an original maturity of less than one year because of a market-based redemption or put feature (for example, an "auto-callable" security or a security with a survivor put provision);

- As guarantees that are not subject to the Clean HC requirements' prohibition in Section 252.64(a)(4), any guarantee outstanding as of a date reasonably after the publication date of the final rule; and

- If the Federal Reserve ultimately disagrees with our view (discussed in Part V.A) that a "survivor put" provision in a debt security should not disqualify such security as an EDS or cause it to be treated as an unrelated liability, any such securities outstanding when the final rule becomes effective that, apart from the survivor put provision, would qualify as EDS and not be treated as a prohibited or unrelated liability.

The Associations' Letter comments at length on the grandfathering issues in Section VII of Annex 1 of that letter. Let us emphasize several considerations that are particularly important and compelling in our view.

First, with respect to senior LTD and TruPS Junior Subordinated Debt Securities having standard acceleration provisions of the type discussed in Part I of this letter, for the reasons set forth in that discussion we firmly believe that such securities should simply be recognized as qualifying EDS for purposes of the minimum LTD and TLAC requirements. If the final rule does not so recognize them, at the least they should be grandfathered. There is simply no compelling reason to think they are not available to absorb losses in a resolution or would somehow frustrate an SPOE or other successful resolution.

Second, during the period shortly after initial release of the Proposal, covered BHCs discussed with the staff of the Federal Reserve the quandary presented by the Proposal for each of us with respect to our ongoing issuances of LTD as an ordinary funding matter. We and others ultimately took the view that the Federal Reserve should, and could reasonably be expected to, treat new issuances for grandfathering purposes in the same manner as it treats LTD outstanding as of the date of initial release of the Proposal. Taking any other view would have forced covered BHCs to incur potential increased costs for new issues, or even to delay ordinary course funding activities necessary to maintain a responsible debt maturity profile, that may not be necessary after thoughtful consideration by the Federal Reserve of comments submitted, including in response to Question 72. Moreover, as noted above, the Federal Reserve, in estimating covered BHCs' aggregate eligible LTD shortfall as $90 billion and explaining its

view as to the primary attributes of eligible external LTD,[22] could not have incorporated into its thinking securities excluded by the Proposal's EDS definition that would have amounted to substantially more than the Federal Reserve's estimate. Accordingly, we believe these securities should either be permitted or at least grandfathered and do anticipate some reasonable grandfathering.

Third, and going specifically to the question of whether a covered BHC that hopes to fully comply can in fact do so or how burdensome it would be to modify the terms of outstanding instruments to align with the Proposal's requirements, modifications to achieve complete alignment in some cases would simply be impossible and, where modifications can be made, the cost and complexities to do so could be substantial. Further, the simultaneous action on the part of covered BHCs to make these adjustments, even if possible, would be confusing for investors and market disruptive. These considerations are most pressing in connection with disqualified and prohibited LTD and certain liabilities with impermissible covered BHC guarantees.

Consider first, outstanding LTD that is not EDS under the Proposal and that by its terms is not redeemable without payment of a premium or penalty until a date after the proposed January 1, 2019 effective date or not redeemable at all at the covered BHC's discretion. At December 31, 2015, BAC had over $125 billion principal amount of such LTD outstanding. As a practical matter, that LTD could be made qualifying only by BAC either (i) undertaking a consent solicitation seeking amendments to the offending provisions or (ii) undertaking cash tender or exchange offers to eliminate and/or replace such outstanding LTD, assuming the beneficial owners can be identified. If BAC went the consent solicitation route, history and market practice with investor expectations leave no doubt that holders will require a consent fee as a condition to giving consent. In addition, amending BAC's LTD would require the consent of a specified percentage of the holders of LTD (in most cases two-thirds) for a substantial number of separate "voting buckets" (recognizing that it is impractical to achieve 100% consent), which history shows may prove difficult.[23] If BAC went the cash tender or exchange offer route, our experience shows it is unrealistic to expect 100% tenders by holders into the offers; some disqualified LTD will remain outstanding.[24] Furthermore the financial costs of any such offers will be substantial, driven by the same investor demands that apply in the case of consent solicitations and consent fees, especially when conducted simultaneously and because of a regulatory constraint that investors will understand, substantially weakening the covered BHC's negotiating position.

As to outstanding debt that is redeemable without payment of a premium or penalty before the proposed January 1, 2019 effective date, for BAC this represents only a small percentage of BAC's total LTD outstanding. Although BAC could technically redeem that small amount of debt, there are transactional and other complexities that would make it difficult to actually redeem.

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22 *See* the discussion in Part I of this letter.

23 For example, in 2011, BAC solicited consents to amend certain terms of 10 series of TruPS. 3 of the 10 consent solicitations failed to obtain the requisite votes.

24 During 2012 and 2013, BAC undertook 6 substantial liability management transactions, each structured as a cash tender offer and, in the aggregate, involving over $60B (by principal amount) of securities. 3 related to senior debt, 2 to subordinated debt, and 1 to TruPS. BAC's success rates (meaning the proportion of the individual securities on a series-by-series basis tendered by holders) ranged from 0% to 93%, with most notes tendering less than 50%.

V. Other Concerns

A. The final rule should not treat debt securities with "survivor puts" as having an impermissible contractual right to accelerate payment of principal or interest for EDS purposes or as unrelated liabilities for purposes of the Clean HC requirements.

BAC and, we understand, other covered BHCs issue to retail investors from time-to-time debt securities with a "survivor put" provision—that is, a provision that says that, on the death of the named holder, the named holder's representative may require the issuer to repay the security within a designated period after the primary holder's death. These securities are attractive to retail investors because they facilitate estate tax planning and coverage of unexpected expenses (most importantly medical expenses) by providing a cash source to the estate or a beneficiary on the named holder's death.

The Proposal's treatment of debt securities with survivor puts is uncertain in two respects: (i) is the uncertain and contingent right of the named holder's estate or beneficiary a "contractual right to accelerate payment" that disqualifies the securities as EDS under Section 252.61's definition of the term "*eligible debt security*"; and (ii) once the survivor put becomes exercisable, because the named holder has died, does the security become an unrelated liability for purposes of Section 252.64(b)(2)(iii) because the estate or beneficiary has a "currently exercisable right to require immediate payment." We believe a survivor put – even one that is already exercisable when the final rule becomes effective because the named holder has died – should not disqualify a debt security as an EDS and that, if the debt security otherwise qualifies at issuance as a security that is not an unrelated liability, it should not become an unrelated liability upon the death of the named holder.

As a preliminary matter, with respect to the potential amounts that BAC could be required to pay under securities with survivor puts, it is important to note that many BHCs, including BAC, include within the terms of securities having survivor puts caps on the redeemable amounts. BAC, for example has an annual cap on redemptions of survivor puts in an amount for each relevant security equal to the greater of (i) $2 million and (ii) 2% of the aggregate outstanding amount of such securities. To the extent a debt security with a "survivor put" provision is excluded from EDS or treated as an unrelated liability, the excluded amount or amount treated as an unrelated liability in any event should only be the amount that could potentially be redeemed under the survivor put (that is, the amount up to any cap that is in place on the redemption of such security).

First, with respect to the EDS status of such securities, when and whether a survivor put becomes exercisable is entirely unrelated to the circumstances of the issuing covered BHC, depends solely upon whether the named holder dies and, accordingly, presents no realistic concern that substantial amounts of otherwise eligible LTD will not be available at the time of a resolution. This is very different from an unrestricted put right that investors may be expected to exercise if they perceive the issuer's credit quality to be declining. The Federal Reserve, along with other U.S. federal banking agencies, has clarified a similar position before. In the final rule on the Liquidity Coverage Ratio, the regulators confirmed that debt, in that case deposits, that could only be withdrawn on death would be treated for purposes of its maturity as if no such right to withdraw on death existed.[25]

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[25] "The agencies are clarifying that, for purposes of the final rule, deposits that can only be withdrawn in the event of death or incompetence are assumed to mature on the applicable maturity date . . . . Though not resulting in a change in the final rule, the agencies are clarifying that remote contingencies in funding contracts that allow acceleration, such as withdrawal rights arising solely upon death or incompetence or material adverse condition clauses, are not considered options for determining maturity." Office of the Comptroller of the Currency, Department of the Treasury; Board of Governors of the Federal Reserve System; and Federal

Second, with respect to potential unrelated liability status of such securities, when and whether survivor puts become exercisable is not knowable with certainty, and issuing covered BHCs can model and anticipate redemptions relating to survivor puts only on an actuarial basis taking into account existing caps on such puts that are in place at covered BHCs. In our view, it is inappropriate to treat as unrelated liabilities subject to the 5% cap securities with survivor puts where, although the issuer cannot calculate precisely at the time of issuance when and whether the put right will become exercisable, the withdrawal profile for the securities is unrelated to the issuer's financial condition or affairs and there is no reason to expect substantial exercises (or "exercisability") of the puts in any period.

Third, and relating to both the EDS and unrelated/related liability status of such securities, at least for BAC (and, we believe, for other covered BHCs) the amounts of these securities outstanding at any point in time, and the amounts actually withdrawn in any year, have been relatively small. We will be happy to provide to you through the normal supervisory process, if helpful, details of our own experience with these securities.

B. It is important that the Federal Reserve establish a timely and efficient process for responding to requests for guidance concerning and exceptions from these requirements.

The Proposal's requirements fundamentally change covered BHCs' operations. It is particularly important that the Federal Reserve establish a timely and efficient process for responding to requests for guidance concerning and exceptions from these requirements.

The TLAC, LTD and Clean HC requirements, with their required levels of debt and/or equity to be held at the holding company level and their absolute prohibitions and 5% exceptions cap for unrelated liabilities, fundamentally change the role U.S. G-SIBs historically have contemplated for the holding companies of their operating subsidiaries. BAC believes that the burdens imposed by these requirements will be warranted if properly and reasonably defined final rules achieve the objective of facilitating SPOE resolution of covered BHCs and addressing the reality (and not just perception) of ending "too-big-to fail".

With that said, it is very important that the Federal Reserve facilitate compliance with the Proposal's requirements by establishing a timely and efficient process for responding to covered BHCs' requests for guidance as to the application of these requirements and, where available, requests for exceptions. We appreciate, of course, that the large volume of new regulations applicable to financial institutions since the financial crisis place substantial burdens and demands on regulators as well as on the institutions they regulate. The Proposal's requirements, however, are a core aspect of the new regulatory regime where, because they so fundamentally affect operating practices and decisions, they make prompt guidance and response from the Federal Reserve particularly crucial. Like many complex regulatory initiatives in recent years, it is inevitable that interpretation questions will need to be addressed after the final rule is adopted. We urge the Federal Reserve to consider and establish, contemporaneously with adoption of a final rule, a "mail box" or other process for dealing with requests for guidance or exceptions, including expectations as to how promptly covered BHCs' can expect responses to their inquiries.

Deposit Insurance Corporation, Liquidity Coverage Ratio: Liquidity Risk Measurement Standards, 79 Fed. Reg. 61440, 61480 (Oct. 10, 2014).

* * *

We appreciate your consideration of our comments in this letter. Please direct any questions to Jonathan G. Blum (telephone number: (212) 449-3112; e-mail address: jonathan.blum@bankofamerica.com).

Very truly yours,

Paul M. Donofrio
Chief Financial Officer

cc's: Jonathan G. Blum
Gregory R. Hackworth
David G. Leitch

Annex 1

Part A – Senior LTD

Below is a list of covenants that, if breached (and after applicable cure periods), could give rise to acceleration under the indentures for BAC's outstanding LTD and that would be impermissible and disqualifying under the Proposal.

- Limitations on sales of stock of principal subsidiary banks
- Limitations on dispositions of stock of, and merger and sale of assets by, Merrill Lynch, Pierce, Fenner & Smith Incorporated (in indentures covering securities assumed by BAC when it acquired Merrill Lynch)
- Limitations on creation of liens on voting stock of certain subsidiaries (in indentures covering securities assumed by BAC when it acquired Merrill Lynch)
- Limitations on mergers and consolidations of the issuer
- Limitations on sales of all or substantially all the assets of the issuer
- Maintaining office for payments and notices
- Appointing a paying agent
- Maintaining corporate existence of the issuer
- Delivering copies of Exchange Act filings to the trustee
- Delivering notices of defaults to the trustee
- Obligations relating to the registration, transfer and exchange of notes
- Providing lists of notes holders
- Calculation of tax gross-up payments
- Requirements relating to holding money in trust (if the issuer acts as its own paying agent)
- Compensation and expenses of trustee and paying agent and indemnity in favor of trustee
- No waiver of stay or extension laws

Part B - TruPS Junior Subordinated Debt Securities

Below is the acceleration clause that is included in the indenture for BAC's legacy (as opposed to assumed through acquisition) outstanding TruPS Junior Subordinated Debt Securities that would be impermissible and disqualifying under the Proposal.

- Dissolution or termination of the statutory trust holding the TruPS Junior Subordinated Debt Securities and interposed between investors and BAC as issuer of the TruPS Junior Subordinated Debt Securities, except dissolution in connection with (i) the liquidating distribution of the TruPS Junior Subordinated Debt Securities to holders of the TruPS, (ii) redemption of all of the outstanding TruPS of such trust, or (iii) certain permitted mergers and consolidations.[1]

Certain of the indentures for TruPS Junior Subordinated Debt Securities underlying outstanding TruPS assumed by BAC in connection with acquisitions permit acceleration for a breach of a covenant (after applicable cure periods and notice). The relevant indentures include many of the same covenants included in the indentures listed above in Part A and also include covenants relating to subordination, maintaining ownership of the common securities of the related trusts, and restrictions on dividends.

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[1] Generally, the trusts could also be terminated before the expiration of their term in the event of bankruptcy of the sponsor (and in some cases, the trust), the dissolution of the sponsor and revocation of its charter, or upon the consent of a majority of the holders of the TruPS.