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Via Electronic Delivery

Board of Governors of the Federal Reserve System
20th Street & Constitution Avenue NW
Washington, DC 20551

Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Re: Resolution-Related Resource Requirements for Large Banking Organizations (FRB Docket No. R-1786 and RIN 7100-AG44; FDIC RIN 3065-AF86)

Ladies and Gentlemen:

The Charles Schwab Corporation ("CSC")[1] appreciates the opportunity to provide comments on the Advance Notice of Proposed Rulemaking on Resolution-Related Requirements for Certain Large Banking Organizations (the "ANPR") published in the Federal Register on October 24, 2022 by the Board of Governors of the Federal Reserve System ("FRB") and the Federal Deposit Insurance Corporation ("FDIC" and, together with the FRB, the "agencies").[2] The ANPR indicates that the agencies are considering proposing resolution-related standards currently applied to global systemically important bank holding companies ("GSIBs") on other large banking organizations that are not GSIBs ("non-GSIB LBOs"), including CSC. The requirements under consideration include total loss-absorbing capacity ("TLAC"), long-term debt ("LTD") and other resolution requirements or expectations currently imposed on GSIBs (collectively, "GSIB resolution requirements").

CSC appreciates the agencies' acknowledgement that there are material differences between appropriate resolution requirements for GSIBs and non-GSIB LBOs. Nowhere are these differences greater or clearer than with respect to CSC. Any version of the additional requirements and expectations contemplated in the ANPR are simply inappropriate for CSC—as a matter of policy and in terms of the agencies' statutory authority. We explain these points below.

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[1] The Charles Schwab Corporation (NYSE: SCHW) is a leading provider of financial services. Through its operating subsidiaries, the company provides a full range of wealth management, securities brokerage, banking, asset management, custody and financial advisory services to individual investors and independent investment advisors.

[2] Resolution-Related Resource Requirements for Large Banking Organizations, 87 Fed. Reg. 64170 (proposed Oct. 24, 2022).

We further request that if the agencies propose GSIB resolution requirements for CSC, the proposal be considered separately from any similar proposal for bank holding companies ("BHCs") after a holistic study of the retail broker-dealer business model and the upcoming revisions to the regulatory capital rules. Any proposal also should include a robust cost-benefit analysis.

CSC also agrees with comment letters on the ANPR by the American Bankers Association, the Bank Policy Institute, the Securities Industry and Financial Markets Association and the joint comment letter by CSC and four other non-GSIB LBOs.[3]

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[3] The joint comment letter was submitted by Capital One Financial Corporation, PNC Financial Services Group, Inc , Truist Financial Corporation and U S Bancorp, in addition to CSC.

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I. Executive summary.

Insufficient legal authority. Congress granted the agencies authority to impose GSIB resolution requirements or other resolution-related requirements (also referred to as gone-concern requirements) on savings and loan holding companies ("SLHCs") only through authorities the agencies were provided for nonbank financial companies supervised by the FRB ("nonbank SIFIs"). General rulemaking or other general authorities over SLHCs do not provide resolution-related authority. As explained below, this is true based on a plain reading of the relevant statutory provisions and their legislative history, which make clear that Congress's decision to limit the agencies' resolution-related authority over SLHCs to those that were nonbank SIFIs was intentional and a product of significant deliberation and careful consideration.

Moreover, ordinary principles of statutory interpretation confirm this conclusion and that a contrary conclusion would be an incorrect legal interpretation. Further, this conclusion is supported by the application of the "major questions" doctrine, which was recently articulated by the Supreme Court in *West Virginia v. Environmental Protection Agency*.[4] In short, Congress's express and clear intent cannot be overridden by the agencies through references to general or vague authorities combined with arguments regarding the appropriate policy outcome. As the Supreme Court has instructed, the FRB "has no power to correct flaws that it perceives in the statute it is empowered to administer".[5]

Insufficient policy justification. Fortunately, good policy also does not argue for imposing GSIB resolution requirements on CSC at either the holding company or insured depository institution ("IDI") level. Good policy does not favor such requirements because, relative to GSIBs and non-GSIB LBOs, CSC's retail broker-dealer business model ensures that it is simple and easy to resolve. For example:

- CSC's activities are mostly limited to brokerage and advisory services offered to retail customers, as well as traditional banking products to facilitate such services. As a result, CSC is exposed to little credit risk; its primary sources of revenue are likewise low risk; CSC engages in a *de minimis* amount of complex and cross-border transactions; and CSC's "method 1" GSIB surcharge score is low.

- As evidenced by the IDI resolution plan of CSC's primary IDI, Charles Schwab Bank, SSB ("CSB"), the FDIC would be able to resolve CSB under a range of scenarios and circumstances without risk to the Deposit Insurance Fund ("DIF") or U.S. financial stability. The resolution plan demonstrates CSB's simplicity and does not involve the transfer of assets or liabilities to a GSIB. The resolution plan includes strategies that would allow CSB to be quickly separated into various components and sold in

[4] 597 U S. ___ (2022).

[5] Bd of Governors of the Fed Rsrv. Sys. v Dimension Fin Corp , 474 U S. 361, 374 (1986)

pieces of less than $50 billion in assets soon thereafter. Moreover, CSB would be significantly smaller in resolution, providing meaningful optionality to the FDIC as receiver for the IDI.

- CSC's retail broker-dealer subsidiaries could be sold to banking or nonbank organizations separately from its state savings banks (or otherwise separately resolved) without material impact on U.S. financial stability, including through the regime explicitly designed to do so: the Securities Investor Protection Act ("SIPA"). This ability is due in large part to CSC's limited, U.S.-centric and retail-based activities and the resultant lack of contagion risk or similar potential knock-on effects from resolution.

- TLAC, LTD and other GSIB resolution requirements also are unnecessary for a variety of other reasons. For example:

  - GSIB resolution requirements are not necessary for CSC because it currently does not have—or need—a single-point-of-entry ("SPOE") resolution plan, and implementation of requirements to facilitate an SPOE resolution would be costly while yielding no material benefit to U.S. financial stability.

  - Requirements based on risk-weighted assets ("RWAs") are unlikely to be binding on either CSC or CSB due to their low amount of RWAs and resultant high risk-based capital ratios (tier 1 risk-based capital ratio of 28.3 percent and 29.4 percent, respectively, as of September 30, 2022).

  - Separate LTD requirements are not necessary to impose on CSB because its primary regulators would be able to ensure the institution enters receivership at the appropriate time and with the appropriate amount of loss-absorbing capacity (as regulators have broad authority to place the institution into FDIC receivership) and because the cost-benefit analysis for CSB—unlike for GSIBs—clearly weighs against separate LTD requirements.

Procedural requests for any future GSIB resolution requirements. However, if the agencies propose TLAC, LTD or other GSIB resolution requirements for non-GSIB LBOs, the requirements should not be proposed until the FRB completes its holistic review of the FRB's capital framework and the federal banking agencies finalize their "Basel III endgame" reforms, as well as any revisions to leverage ratios.[6] In

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[6] *See Oversight of Financial Regulators A Strong Banking and Credit Union Sys for Main Street Hearing Before the S Comm on Banking, Hous , & Urb Affs* , 117th Cong (2022) (statement of Michael S. Barr, Vice Chair for Supervision, FRB), Press Release, FRB, FDIC, OCC, Agencies reaffirm commitment to Basel III standards (Sept 9, 2022), https //www federalreserve gov/newsevents/pressreleases/bcreg20220909a htm

particular, proposing TLAC or LTD prior to the revisions to leverage ratios could risk doubling down on flaws in leverage ratio requirements and mean that TLAC or LTD leverage ratio requirements become a binding constraint and not a backstop to risk-based requirements.[7] To propose TLAC or LTD calibrations prior to such reforms would limit the ability of the public and the agencies to understand the true effects of any TLAC or LTD proposals because the underlying capital requirements on which such proposals would be based are likely to change (*i.e.*, to increase) in the near future.

Moreover, because of the unique characteristics of CSC and other SLHCs, any further consideration of application of resolution-related requirements to CSC should be distinct from any consideration of resolution-related requirements for other non-GSIB LBOs. CSC's, like other large SLHCs', business and operations are distinct from large BHCs. Treating CSC as equivalent to BHCs already has resulted, and would continue to result, in requirements for CSC that are not only punitive but also at odds with the governing statutory framework. For example, CSC's "method 2" score is primarily driven by its simple, stable, retail affiliate bank sweep deposit activities, which exclusively involve CSC's retail investor client base and which are insured deposits—evidencing the inappropriateness of the application of BHC standards to the retail broker-dealer business model.[8] Due to these differences in business models, we also request that the FRB engage in a holistic study of the retail broker-dealer business model and how consolidated supervision should be designed for firms predominantly engaged in this business before proposing any future GSIB resolution requirements.

Finally, any consideration of resolution-related requirements applicable to SLHCs should take into account the potential costs and benefits of such requirements. This analysis should acknowledge and carefully consider the marginal benefit (if any) to financial stability of such requirements as well as the potentially significant costs to the SLHCs and detrimental effect on safety and soundness.

II. Congress did not grant the agencies resolution-related authority over SLHCs that are not nonbank SIFIs.

Congress did not intend or permit the agencies to impose resolution planning requirements or similar gone-concern requirements on SLHCs except through a designation by the Financial Stability Oversight Council ("FSOC") and the resultant imposition of requirements under section 165 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). The ANPR recognizes that SLHCs "are

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[7] Regulatory Capital Rules Regulatory Capital, Enhanced Supplementary Leverage Ratio Standards for U.S GSIBs and Certain of Their Subsidiary IDIs; TLAC Requirements for U S. GSIBs, 83 Fed. Reg 17317 (proposed Apr 19, 2018), Press Release, FRB, OCC, Rule proposed to tailor "enhanced supplementary leverage ratio" requirements (Apr 11, 2018), https://www.federalreserve.gov/newsevents/pressreleases/bcreg20180411a htm

[8] The agencies have acknowledged that such deposits are highly stable in implementing the net stable funding ratio. NSFR: Liquidity Risk Measurement Standards and Disclosure Requirements, 86 Fed. Reg 9120, 9145 (Feb. 11, 2021) ("[S]table retail deposits and certain fully insured retail affiliate sweep deposits, regardless of tenor, have the highest stability characteristics for deposits under the final rule. . ")

not subject to resolution planning requirements".[9] As explained below, this statement is true not only as a matter of current practice of the agencies but also as an acknowledgment of the agencies' limited authority.

A. *Congress determined to not provide the agencies with resolution-related authority over SLHCs.*

Section 165 of the Dodd-Frank Act does not provide agencies with legal authority to require resolution plans, TLAC, LTD or other resolution-related or gone-concern requirements ("resolution-related authority") for SLHCs.

First, section 165 is clear by its terms that the agencies only have resolution-related authority over BHCs and nonbank SIFIs. Specifically, section 165(b)(1)(A) requires the FRB to establish resolution planning requirements, and section 165(d)(1) defines the scope of the resolution planning requirements; both provisions only provide legal authority with respect to nonbank SIFIs and BHCs.[10]

Nonbank SIFIs may clearly include SLHCs. A nonbank SIFI is defined as a company that is "predominantly engaged in financial activities" and determined by the FSOC that its material financial distress, or its nature, scope, size, scale, concentration, interconnectedness or its mix of activities, could pose a threat to the financial stability of the United States.[11] Moreover, Congress was well aware that the definition of a nonbank SIFI was "broad" and that nonbank SIFIs could include SLHCs, noting that the "FSOC systemic designation and follow-on Fed regulation could apply to . . . [SLHCs]".[12] Thus, Congress provided a clear mechanism to require resolution plans for SLHCs or impose other resolution-related requirements—the FSOC may designate them as nonbank SIFIs. Correspondingly, it is clear that, absent an FSOC designation, SLHCs are not within the scope of resolution planning or other resolution-related requirements.

Second, the Dodd-Frank Act's legislative history confirms that Congress considered applying enhanced prudential standards ("EPS") to SLHCs but ultimately decided not to do so. The minority views to an earlier version of the bill[13] explain that

> the reported bill also contains significant regulatory gap because it does not automatically apply heightened regulatory standards to large [SLHCs]

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[9] Resolution-Related Resource Requirements for Large Banking Organizations, 87 Fed Reg. at 64174

[10] *See* 12 U.S.C. §§ 5365(b)(1)(A), 5365(d)(1).

[11] 12 U S.C §§ 5311(4); 5323.

[12] S. REP. NO. 111-176, at 232 (2010)

[13] The section 165 of the bill under consideration in the Senate Report is substantially the same as the current version of section 165 of the Dodd-Frank Act for purposes of the present discussion. *See* Restoring American Financial Stability Act of 2010, S 3217, 111th Cong (2010) (amended and passed by Congress as the Dodd-Frank Act on July 21, 2010).

> in section 165 as it does for large [BHCs]. The majority claims heightened regulatory standards are needed for our largest financial institutions. Yet their reported bill exempts [SLHCs] from Section 165. . . . A superior approach [to application of EPS by designation of SLHCs as nonbank SIFIs] would be to apply heightened regulatory standards to all holding companies with an [IDI].[14]

Thus, Congress clearly considered whether, and determined that, SLHCs should not be subject to EPS requirements, unless designated by the FSOC.[15]

Moreover, Congress made this determination having considered a range of factors, including that the largest failures of organizations with IDIs during the financial crisis were savings associations and SLHCs: AIG, Washington Mutual and GE Capital Corporation. The legislative history for the Dodd-Frank Act is replete with references to the failures of those SLHCs and the fact that they were SLHCs. Thus, Congress's choice to not provide resolution-related authority for SLHCs was not only clear but also considered at length.

B. *TLAC and LTD cannot be imposed on CSC or its subsidiaries as going-concern requirements*

For the avoidance of doubt, we note that TLAC, LTD and "clean holding company" requirements only would be gone-concern requirements for CSC and its subsidiaries. The FRB made clear in its final rule imposing such requirements on certain GSIBs that the rule is a gone-concern requirement, noting, for example, that "[w]hile regulatory capital requirements are intended to ensure that a banking organization has sufficient capital to remain a going concern, the objective of the TLAC and LTD requirements in the final rule is to reduce the financial stability impact of a failure" and that a "company's gone-concern loss-absorbing capacity is different from the company's going concern capacity in a few fundamental respects".[16] Moreover, FRB Vice Chair for

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[14] S REP. NO 111-176, at 236 (2010).

[15] By not acquiescing to the minority's views on the matter, the legislative history shows that Congress deliberately chose to not permit the agencies to impose EPS on SLHCs unless they were designated by the FSOC as nonbank SIFIs Even if the agencies agree with the minority's view, the Supreme Court has made clear that if a statute "falls short of providing the safeguards desirable or necessary to protect the public interest, that is a problem for Congress, and not the [FRB] or the courts, to address". Bd. of Governors of the Fed. Rsrv Sys. v Dimension Fin Corp., 474 U S 361, 374 (1986)

[16] *See* 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, 8267 (Jan. 24, 2017) (codified at 12 CFR part 252) [hereinafter "FRB TLAC Final Rule"] ("In particular, the final rule would improve the resolvability of a covered BHC under either the U.S. Bankruptcy Code or Title II of the Dodd-Frank Act and improve their resiliency [¶] Similarly, the final rule would improve the resiliency of covered IHCs and their subsidiaries, and thereby increase the likelihood that a failed foreign bank with significant U.S operations could be successfully resolved without the failure of the U S subsidiaries or, failing that, that the U S. operations could be separately resolved in an orderly manner ")

Supervision Michael S. Barr recently confirmed that LTD is only a gone-concern requirement: "*Unlike regulatory capital—which helps a firm absorb losses as it continues operations through times of stress*—[LTD] becomes especially relevant once a firm has already entered bankruptcy or resolution."[17]

Moreover, any TLAC or LTD requirement based exclusively on going-concern authority, like any other agency action, would need to be adopted with adequate support (*i.e* , one based exclusively on going-concern objectives), and the agency would need to consider reasonable alternatives to accomplishing such going-concern objectives.[18] As it is difficult to discern any material going-concern benefits of TLAC and LTD with respect to the resolution of CSC, as discussed in section III below, it appears that any purported going-concern objective could be accomplished more effectively through less onerous and more traditional going-concern methods—such as supervision and capital and liquidity requirements[19] appropriately calibrated for going-concern objectives—rather than TLAC and LTD requirements.

C. *The plain language of section 10 of the Home Owners' Loan Act does not include resolution-related authority.*

Under a plain reading of the text, section 10 of the Home Owners' Loan Act ("HOLA") does not include resolution-related authority.[20] There is no explicit

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The FRB also made occasional, passing references to resiliency in the final rule, which were in the context of an SPOE resolution. *Id.* at 8268 To the extent those statements were supportable for GSIBs, they are not supportable for CSC because there is no need to impose an SPOE resolution requirement on CSC, as discussed in section III below, and imposing such requirements would be to address resolvability concerns.

[17] Michael S. Barr, Vice Chair for Supervision, FRB, Why Bank Capital Matters, Address at the American Institute (Dec 1, 2022) (emphasis added) The speech also notes that LTD "complements the regulatory capital regime", further clarifying that LTD is not a part of the regulatory capital regime (much like complementary activities under section 4(k)(1) of the Bank Holding Company Act ("BHC Act") are not activities that are financial in nature or incidental thereto) *See id* Likewise, the FRB TLAC Final Rule notes that the "TLAC and LTD requirements in the final rule build on, and serve as a *complement* to, the regulatory capital requirements in Regulation Q" FRB TLAC Final Rule, *supra* note 16, at 8267 (emphasis added)

[18] *E g* , Motor Vehicle Mfrs Ass'n of the United States, Inc v State Farm Mutual Auto. Ins. Co , 463 U S. 29 (1983).

[19] In this respect, we would note that CSC is subject to full (100 percent) standardized liquidity requirements and has common equity tier 1 ratios of over 20 percent/tier 1 common equity ratios approaching 30 percent.

[20] The ANPR does not identify an authority to impose resolution-related requirements on CSC. This letter analyzes the authority the FRB identified to impose other EPS requirements on CSC because there are no other obvious authorities for which to impose such requirements (For example, as Vice Chair for Supervision Barr recently noted, LTD is not a regulatory capital requirement. *See* Michael S Barr, Vice Chair for Supervision, FRB, Why Bank Capital Matters, Address at the American Institute (Dec 1, 2022)) Considering the clear intent of Congress, this letter's analysis generally should apply to any other similar authority identified by the agencies. Nonetheless, CSC may supplement its analysis to address any other authority identified by the agencies to the extent necessary or appropriate

authority requiring resolution planning, other types of resolution-related authority or gone-concern requirements in section 10 of HOLA. Instead, the regulatory authority granted to the FRB in section 10(g) turns on what is "necessary or appropriate to enable the [FRB] to administer and carry out the purposes" of section 10 of HOLA.[21]

The purposes of section 10 of HOLA are made clear through the text of section 10 and its legislative history. Like the BHC Act on which it was modeled, the purposes of section 10 of HOLA are to ensure the "historic separation of banking from commerce"[22] and the safety and soundness[23] of thrift organizations.

Moreover, the legislative history of section 10 of HOLA shows that there was no discussion of a resolution-related regulatory purpose. In fact, it shows the opposite. As discussed above, the legislative history of the Dodd-Frank Act, which revised section 10 and other sections of HOLA, clearly shows that Congress did not intend to provide the FRB with resolution-related authority or other EPS authority over SLHCs except through FSOC designation as a nonbank SIFI. Congress could have amended section 10 of HOLA if it wished to provide resolution-related authority, but Congress did not do so.

In addition, the FRB has not characterized section 10(g) as providing resolution-related authority nor has it ever previously used it as a source of such authority. Even when the FRB appeared to assert (which assertion would be an incorrect legal interpretation) that section 10(g) included certain EPS authority, it only pointed to going-concern authorities and purposes.[24] Moreover, the FRB has not otherwise interpreted its general authorities with respect to SLHCs to include resolution-related authorities. When the FRB issued guidance regarding the supervision of SLHCs, for example, it emphasized the importance of holding companies that own and operate depository institutions to "appropriate standards of capitalization, liquidity, and risk

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[21] 12 U.S C § 1467a(g)(1) Section 10(g)(1) of HOLA also authorizes the FRB to "require compliance" with and "prevent evasions" of such regulations and orders issued under section 10. Both of these authorities raise the same question as the quoted language in the foregoing sentence What are the requirements and purposes of section 10 of HOLA?

[22] *E g*, JULIE E WILLIAMS, SAVINGS INSTITUTIONS MERGERS, ACQUISITIONS AND CONVERSIONS § 2 01 (KEVIN HANDLY ed, 2022) [hereinafter "SAVINGS INSTITUTIONS"]

[23] *E g*, Prudential Standards for Large BHCs, SLHCs, and FBOs, 84 Fed Reg 59032, 59054 (Dec 31, 2019) ("Section 10(g) of HOLA authorizes the [FRB] to issue such regulations and orders, including regulations relating to capital requirements, as the [FRB] deems necessary or appropriate to administer and carry out the purposes of section 10 of HOLA As the primary federal regulator and supervisor of [SLHCs], one of the [FRB's] objectives is to ensure that [SLHCs] operate in a safe-and-sound manner and in compliance with applicable law Like [BHCs], [SLHCs] must serve as a source of strength to their subsidiary savings associations and may not conduct operations in an unsafe and unsound manner.")

[24] *Id* at 59054 ("As the primary federal regulator and supervisor of [SLHCs], one of the [FRB's] objectives is to ensure that [SLHCs] operate in a safe-and-sound manner and in compliance with applicable law Like [BHCs], [SLHCs] must serve as a source of strength to their subsidiary savings associations and may not conduct operations in an unsafe and unsound manner.")

management consistent with the principles of safety and soundness [and] such companies be held to appropriate standards consistent with principles of consumer compliance risk management, including where nondepository subsidiaries are engaged in activities involving consumer financial products or services".[25]

D. *Section 10 of HOLA cannot be interpreted to include resolution-related authority.*

Nonetheless, assuming *arguendo* that HOLA—on its face—could be read to include resolution-related authority, such an interpretation would not be permissible when subjected to principles of statutory interpretation. Principles of statutory interpretation require an analysis of the context surrounding the provision rather than just the language of the provision itself. As the Supreme Court has explained, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme".[26]

As shown below, the Supreme Court requires that consideration be given to relevant provisions in the Dodd-Frank Act and other comparable acts, the statutory framework established by Congress and relevant legislative history when interpreting section 10(g) of HOLA (or any other provision of law). It is not consistent with statutory interpretation to merely conclude, as the FRB has done in the past with respect to the application of EPS on SLHCs, that "[s]ection 165 does not prohibit the application of standards to [SLHCs] and [BHCs] pursuant to other statutory authorities".[27] In other words, the correct legal interpretation does not ask merely whether one statute expressly limits another.[28]

For example, it is a well settled principle of statutory interpretation that if Congress has expressed a concept clearly and directly in one instance and chooses not to use that precise language in another instance, then Congress intended a different result. For example, the Supreme Court in *Franklin National Bank v New York* found "no indication that Congress intended to make this phase of national banking subject to local

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[25] FRB, SR Letter 11-11, Supervision of SLHCs (July 21, 2011)

[26] Davis v. Michigan Dep't of Treasury, 489 U S 803, 809 (1989)

[27] Prudential Standards for Large BHCs, SLHCs and FBOs, 84 Fed. Reg. at 59054

[28] *See also* Goodyear Atomic Corp v Miller, 486 U S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts "); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM L REV. 527, 539 (1947) ("Statutes cannot be read intelligently if the eye is closed to consideration evidenced in affiliated statutes "), 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 433 (1828) ("Several acts *in pari materia*, and relating to the same subject, are to be taken together, and compared in the construction of them, because they are considered as having an object in view, and as acting upon one system "). *See generally* Sullivan v. Stroop, 496 U.S 478, 484 (1990) (holding that the same term used in related laws should be interpreted to have the same meaning), SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 51 (Shambie Singer ed , 8th ed. 2022)

restrictions, as it has done by express language in several other instances".[29] A comparison of the text of section 165 of the Dodd-Frank Act to that of section 10 of HOLA, both of which Congress created or amended, as applicable, by the Dodd-Frank Act, along with the legislative history discussed above, make clear that resolution-related authority was not included in section 10 of HOLA. Congress has demonstrated where it intends to provide agencies with resolution-related authority clearly and expressly—for BHCs in section 165 of the Dodd-Frank Act. In contrast, the language in section 10 of HOLA does not indicate, in any clear or express terms, Congress's intent to provide such resolution-related authority.

In fact, the FRB and Federal Reserve Bank of Kansas City recently took great care to note the different uses of "may" and "shall" in the Federal Reserve Act, arguing that Congress's choice between the two words was intentional and should be given different effect.[30] The differences in wording of authorities between section 165 of the Dodd-Frank Act and section 10 of HOLA are even starker and should, likewise, be given different effect.

Similar to the principle above, the even more well-known negative implication canon (*expressio unius est exclusio alterius*) yields the same conclusion. This canon "instructs that, where a statute designates a form of conduct, the manner of its performance and operation, and the persons and things to which it refers, courts should infer that all omissions were intentional exclusions".[31] More relevant to the present circumstances, the Supreme Court explains that "[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode".[32] Here, Congress has made clear the method for imposing resolution-related requirements on SLHCs—imposition of resolution planning and other requirements under section 165 of the Dodd-Frank Act after designation of the SLHC as a nonbank SIFI; it did not intend to provide the same authority through general authorities extant prior to the Dodd-Frank Act.

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[29] Franklin Nat'l Bank v. New York, 347 U.S. 373, 378 (1954) *See also* Meghrig v. KFC Western, Inc., 516 U S. 479, 485 (1996) ("Congress .demonstrated in CERCLA that it knew how to provide for the recovery of cleanup costs, and . .the language used to define the remedies under RCRA does not provide that remedy "), FCC v. NextWave Personal Commc'ns, Inc., 537 U S 293, 302 (2003) (stating that when Congress has intended to create exceptions to bankruptcy law requirements, "it has done so clearly and expressly"), Dole Food Co v Patrickson, 538 U.S. 468, 476 (2003) (stating that Congress knows how to refer to an indirect owner of a corporation, as distinct from a direct owner of shares in the "formal sense", and did not do so in the Foreign Sovereign Immunities Act's definition of foreign state "instrumentality").

[30] *See* Defendant Bd Of Governors of the Fed Rsrv. Sys 's Memorandum of Points & Authorities in Support of Motion to Dismiss, Custodia Bank, Inc. v. Bd of Governors of the Fed. Rsrv Sys., No 1 22-cv-00125-SWS (Aug. 16, 2022); Defendant Fed. Rsrv Bank of Kansas City's Memorandum of Points & Authorities in Support of Motion to Dismiss, Custodia Bank, Inc. v Fed. Rsrv Bd of Governors, No 1.22-cv-00125-SWS (Aug. 16, 2022)

[31] SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION, *supra* note 28, § 47 23.

[32] Botany Worsted Mills v United States, 278 U S 282 (1929) (holding that, by explicitly providing a method by which taxes could be compromised, it prescribed the exclusive method for the government doing so)

Two other well settled principles of statutory interpretation are also instructive. One provides that the same language in the same or similar statutes should be read to have the same meaning[33] and another provides that statutes should be construed so as to avoid rendering superfluous any statutory language.[34] Section 10(g) of HOLA has substantially the same language as section 5(b)(1) of the BHC Act, which provides the FRB with its general rulemaking authority.[35] Moreover, as explained above, the purposes of the two acts are substantially the same; both are intended to ensure the separation of banking and commerce and the safety and soundness of depository organizations. Thus, the two should be read to provide the FRB with substantially the same authority with respect to the BHCs and SLHCs. However, section 5(b) of the BHC Act cannot be read to include resolution-related or other EPS authorities for BHCs because that would render section 165 of the Dodd-Frank Act superfluous. As reading section 10(g) of HOLA to include resolution-related authorities would be tantamount to reading section 5(b) to include resolution-related authorities, these principles of statutory interpretation also evidence that section 10(g) cannot be read to include resolution-related authorities.

Moreover, the Supreme Court has often found that implicit delegation of broad authorities to not be sustainable and that such an interpretation would fail the major questions doctrine. Under the major questions doctrine, courts "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance".[36] Relying on the major questions doctrine, the Supreme Court in *West Virginia v. Environmental Protection Agency* found that a clear statement from Congress is necessary in order for a court to conclude that Congress intended to delegate authority to the Environmental Protection Agency ("EPA") to establish carbon emissions caps that would force a transition away from the use of coal to generate electricity.[37]

Applying the major questions doctrine to an interpretation of section 10 of HOLA would result in the similar conclusion—providing the agencies with resolution-related authority under section 10 of HOLA would result in an unintended and "transformative expansion" of the agencies' regulatory authority. First, resolution-related authority is different in type than any other regulatory or supervisory authority and extremely significant in terms of its impact to firms, financial stability and the economy. The concept of resolution plans was developed during the consideration of the Dodd-Frank Act, and the legislative history makes clear that this was a new concept and

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[33] LARRY M. EIG, CONG RSCH SERV , STATUTORY INTERPRETATION· GENERAL PRINCIPLES & RECENT TRENDS 15 (2014)

[34] *See* Corley v. United States, 556 U S. 303, 314 (2009) (quoting Hibbs v Winn, 542 U S. 88, 101 (2004)).

[35] 12 U.S C. § 1844(b)(1)

[36] West Virginia v. EPA, 597 U.S ___, 11 (2022)

[37] *Id* at 31.

authority granted to regulators.[38] The agencies thereafter confirmed that the Dodd-Frank Act's resolution planning authority was an "important *new tool* to enhance the resolvability of large financial institutions".[39] Moreover, the agencies' resolution planning rule makes clear the intended significance of the requirement to the United States: resolution plans are required to evidence that the plan would substantively mitigate the risk that the failure of the company "would have serious adverse effects on financial stability in the United States".[40]

Second, the Supreme Court often finds new discoveries of significant authorities in existing, vague statutory language implausible. In considering the EPA's proposed interpretation, the Court explained

> EPA "claim[ed] to discover in a long-extant statute an unheralded power" representing a "transformative expansion in [its] regulatory authority." Utility Air, 573 U.S., at 324. It located that newfound power in the vague language of an "ancillary provision[]" of the Act, Whitman, 531 U.S., at 468, one that was designed to function as a gap filler and had rarely been used in the preceding decades. And the Agency's discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself. Brown & Williamson, 529 U.S., at 159–160; Gonzales, 546 U.S., at 267–268; Alabama Assn., 594 U.S., at ___, ___ (slip op., at 2, 8). Given these circumstances, there is every reason to "hesitate before concluding that Congress" meant to confer on EPA the authority it claims under Section 111(d). Brown & Williamson, 529 U.S., at 159–160.

Like the EPA, in requiring TLAC, LTD or other resolution-related requirements, the agencies would appear to need to discover resolution-related authorities through existing statutory authorities after decades of not finding such authority. Moreover, section 10(g) is terse and can easily be characterized as an ancillary provision of section 10, much less of HOLA generally.

Finally, there is no clear congressional authorization for resolution-related authorities, and Congress did not intend for HOLA to provide such authorities. In *West Virginia*, consistent with earlier Supreme Court precedent regarding the major questions doctrine, the Court explained that Congress considered and rejected proposals to create the type of program the EPA had implemented. Likewise, as explained above, Congress considered whether to provide one or more of the agencies with resolution-related

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[38] *See, e.g , Unregulated Markets How Regulatory Reform Will Shine a Light in the Financial Sector Hearing Before the Joint Econ Comm.*, 111th Cong. (2009) (presenting and discussing with lawmakers the bipartisan Financial Reform Task Force's individual recommendations, including "living wills")

[39] *Oversight of Financial Stability and Data Security Hearing Before the S Comm On Banking, Hous , & Urb Affs* , 113th Cong (2014) (statement of Martin J Gruenberg, Chairman, FDIC) (emphasis added)

[40] 12 CFR 243 2 (defining "rapid and orderly resolution").

authorities for all SLHCs and concluded that it would not (outside the context of a nonbank SIFI designation).[41]

In addition, as discussed in section IV below, SLHCs'—in large part because their authorities and regulation historically have been, and continue to be, distinct from BHCs—activities and structures are significantly different and more varied than those of BHCs. Therefore, as a policy matter, it makes sense for Congress to have decided that EPS requirements should be imposed on SLHCs on a case-by-case basis (*i e.*, through nonbank SIFI designation) to account for these differences.

Even if the agencies believe that this choice to provide a separate mechanism to impose EPS on SLHCs is unwise, the agencies may not seek to remedy this decision. As the Supreme Court stated in *Board of Governors of the Federal Reserve System v. Dimension Financial Corporation*, if a statute "falls short of providing the safeguards desirable or necessary to protect the public interest, that is a problem for Congress, and not the [FRB] or the courts, to address".[42]

III. It is not necessary to impose TLAC, LTD or other GSIB resolution requirements on CSC.

As explained in this section, it is not necessary or appropriate to impose TLAC, LTD or other GSIB resolution requirements on CSC at either the holding company or IDI level. This is primarily because, relative to GSIBs and other non-GSIB LBOs, CSC is a simple organization that would be easy to resolve.

A. *CSC is a simple, retail-oriented organization that is exposed to relatively little risk*

As explained below, CSC's business is based on the retail broker-dealer business model. CSC largely offers brokerage and advisory services to retail customers and traditional banking products to facilitate such services. As a result, CSC is exposed to little credit risk, and its primary sources of revenue are likewise low risk (*e g* , interest

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[41] Developing case law also may be relevant to the agencies' ability to impose TLAC or other resolution-related requirements on CSC. For example, a recent opinion in the U S. Court of Appeals for the Fifth Circuit found that a funding mechanism similar to—although distinguished from—those of the agencies violated the Appropriations Clause of the Constitution and the Constitution's underlying separation of powers and that, because the agency lacked the means to promulgate the challenged rule without such funding, the challenged rule should be vacated *See* Cmty Fin Srvs Ass'n of Am Ltd v. CFPB, 51 F.4th 616, 635–44 (5th Cir 2022)

[42] 474 U S. 361, 374 (1986) In *Dimension*, the Supreme Court found that the "FRB's definition of 'demand deposit['] is not an accurate or reasonable interpretation of 2(c) [of the BHC Act]". *Id* at 368 The Court explained that application of the FRB's interpretation did not "require extended analysis" because a "legal right to withdraw on demand" means just that, and "no amount of agency expertise" could make the phrase "mean a right to do something 'as a matter of practice'" *Id* The decision had little to do with the FRB's policy concerns with NOW accounts, which the Court seemed to believe were quite reasonable. It explained that the "statute may be imperfect, but the [FRB] has no power to correct flaws that it perceives in the statute it is empowered to administer" *Id* at 374

income and fee revenue from asset management and related services). Further, CSC engages in a *de minimis* amount of complex and cross-border transactions.[43]

Simple business. CSC's business operations are simple and primarily consist of retail investor services and financial advisory services as well as simple banking products intended to facilitate and enhance those services (*e g* , retail affiliate bank sweep deposit products). CSC's bank-affiliated retail broker-dealer subsidiaries are regulated by the U.S. Securities and Exchange Commission ("SEC") and primarily provide retail customers with brokerage accounts where the customers can buy and sell stocks, mutual funds, exchange-traded funds ("ETFs") and other securities.[44]

CSC also provides financial advice for its individual clients, referral services to a network of independent registered investment advisers ("RIAs") and investment management. CSC provides RIAs and their clients with custodial, trading and support services. CSC maintains custodial accounts to hold RIAs' clients' assets, provides a technological platform for RIAs to open accounts, move money, transfer assets and check the status of their business activities and educational materials to help RIAs grow and establish their independent practices. Moreover, the trading services yield only a small amount of assets on CSC's consolidated balance sheet and primarily are short-term Treasury securities held in the reserve portfolio as "qualified securities" for purposes of complying with the SEC's Customer Protection Rule, Rule 15c3-3 under the Securities Exchange Act of 1934.[45]

CSC also provides limited banking services, including limited trust services[46], which are regulated by the Federal Reserve and state banking regulators.[47]

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[43] If CSC's business model or risks were to change materially, the agencies would have appropriate tools to identify and address any changes that could increase risks relating to resolvability. In particular, as noted above, the FSOC retains its designation authority and, more generally, the FRB supervises CSC and its subsidiary state savings banks Likewise, the FDIC requires CSB to submit an IDI resolution plan, which confirms CSB's simplicity and ability to be resolved without sale(s) to a GSIB, and the FDIC may monitor changes to CSC's business model through future CSB IDI resolution plan filings. Furthermore, the tailoring framework established by the agencies would apply more stringent standards to firms that meet certain size and risk-based thresholds

[44] The SEC also regulates CSC's RIA, Charles Schwab Investment Management, Inc., which is the investment adviser for proprietary mutual funds and ETFs.

[45] 17 CFR 240 15c3-3 Pursuant to Rule 15c3-3, CSC's retail broker-dealer subsidiary, Charles Schwab & Co , Inc. ("CS&Co "), is required to maintain a certain amount of cash or qualified securities in a segregated special reserve account for the exclusive benefit of its customers These securities serve to protect customers against the retail broker-dealer exceeding the amount owed to customers

[46] Trust services include trust custody, personal trust reporting services and administrative trustee services

[47] CSC's banking services are provided by its largest bank, CSB, a state savings bank regulated primarily by the Federal Reserve and the Texas Department of Savings and Mortgage Lending ("TDSML"). CSC also controls Charles Schwab Premier Bank, SSB, also regulated primarily by the Federal Reserve and TDSML, and Charles Schwab Trust Bank, regulated primarily by the Federal Reserve and Nevada Financial Institutions Division, both of which are also state savings banks CSC is an SLHC subject to HOLA because its state-chartered savings bank subsidiaries have successfully elected to be

CSC's subsidiary savings banks offer retail affiliate bank sweep deposit products for retail customers' uninvested cash generated through the customers' activities at CSC's retail broker-dealer subsidiaries; retail affiliate bank sweeps allow customers a safe and operationally simple way to hold uninvested cash. CSC's subsidiary savings banks also offer checking and savings accounts and certain secured lending products[48]—primarily in the form of overcollateralized pledged asset lines.

Low risk business—revenue sources. CSC's business operations also are low risk. For example, one of the largest components of CSC's net revenue is interest income, a majority of which is generated from sweeping cash from its affiliated retail broker-dealers to its banks; the banks then invest in low-risk U.S. government, agency and mortgage-backed securities. Funds not invested in low-risk securities are either invested in other securities that are not complex, as evidenced by the fact that CSC had no level 3 assets as of September 30, 2022, or are used to fund loans that are highly collateralized by either client securities (as in the case of margin loans and pledged asset lines) or real estate (as in the case of mortgages and home equity lines of credit).

Fees from asset management and administration and investment advisory services are the second-largest component of CSC's revenues. These businesses are also low risk because they do not utilize CSC's balance sheet to any significant degree, and the fees generated are a stable source of income based primarily on the value of client assets or funds' net asset value. There is no principal risk to CSC if these values decline. CSC only engages in limited fund seeding (*i e* , making principal investments in funds) as an activity that is mostly ancillary to its business of advising registered investment companies and unit investment trusts.

CSC's trading activities, which are largely limited to acting on behalf of its customers, are its third-largest source of revenues and consist almost entirely of commissions and markups on client-driven securities transactions as well as payment for order flows (*i e* , payments that a brokerage firm receives for directing orders for trade execution).[49] CSC's securities brokerage business utilizes CSC's balance sheet only to a very limited extent. Less than 5 percent of its total assets are represented by trading assets, and those generally consist of U.S. government, state and government agency obligations that are held as required by SEC Rule 15c3-3 against customer cash on the broker-dealer's balance sheet as of September 30, 2022. Over 90 percent of CSC's fixed income securities receive a zero or 20 percent risk weight as of September 30, 2022. The bulk of CSC's securities brokerage activities are conducted for its customers as agent or riskless principal.

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deemed "savings associations" solely for the purpose of determining the status of the electing banks' parent holding company as an SLHC under section 10 of HOLA. *See* 12 U.S C § 1467a(l)

[48] Only CSB offers checking and savings accounts Additionally, Charles Schwab Trust Bank does not offer loan products

[49] These trading activities include a small amount of fixed-income securities market-making and fixed-income securities, equity securities and certificate of deposit distribution activities

Low risk business—balance sheet. CSC's low-risk business model is reflected in its balance sheet and regulatory capital. For example, CSC's percentage of RWAs to total consolidated assets ("TCAs") is 25 percent, significantly lower than that of U.S. GSIBs.

Holding Company	Ttl. Consol. Assets ($B)[50]	Standardized RWAs ($B)[51]	Stnd. RWAs / TCA Ratio
GSIB 1	1,877.7	1,255.6	66.9%
GSIB 2	3,072.9	1,599.3	52.0%
GSIB 3	2,381.1	1,176.7	49.4%
GSIB 4	3,773.9	1,678.5	44.5%
GSIB 5	1,555.9	688.6	44.3%
GSIB 6	1,160.0	457.9	39.5%
GSIB 7	427.9	165.9	38.8%
GSIB 8	303.6	114.7	37.8%
CSC	577.6	145.4	25.2%

The simplicity of CSC's retail broker-dealer assets is apparent from the composition of its assets and liabilities. For example, over 40 percent of CSC's nonbank assets are comprised of overcollateralized eligible margin loans that generally are subject to Regulation T with a 0 percent risk weight as of September 30, 2022. In addition, most of the liabilities are client cash held on the balance sheet of the affiliated retail broker-dealer (instead of in sweep money funds or swept to an affiliated or nonaffiliated bank). The difference between the assets and liabilities, as required for purposes of meeting the SEC's Customer Protection Rule, Rule 15c3-3, is held in a portfolio that invests only in segregated cash and government guaranteed securities. Moreover, the vast majority of CSC's nonbank assets (over 65 percent) receive less than a 1 percent risk-weight as of September 30, 2022.[52]

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[50] As calculated based on the standardized approaches and as reported by each holding company in Schedule HC of its Form FR Y-9C filed for the quarter ended September 30, 2022.

[51] Schedule HC-R of Form FR Y-9C (quarter ended Sept. 30, 2022).

[52] The remaining composition of nonbank assets includes cash and cash equivalents (11 percent), equipment, facilities and property (2 percent), goodwill (7 percent), acquired intangibles (5 percent), and other assets (5 percent), based on September 2022 data

Low risk business—loss rates and stress tests. The net loss rate on CSC's eligible margin loans as defined by the FRB's capital rules, which comprise nearly half (over 40 percent) of CSC's nonbank assets as of September 30, 2022, is extremely low even during volatile periods in markets. During the most recent periods of extreme volatility, including April 2009 and March 2018, those loss rates were approximately 11 basis points and nine basis points, respectively. In the most recent stress period, CSC's loss experience stemming from the pandemic for this portfolio averaged 3.5 basis points.[53]

Moreover, as evidenced by the FRB's stress testing models, the loss rates on CSC's margin loans would be extremely low. The FRB projected a 0.8 percent loss rate for CSC's margin loans in the 2022 supervisory severely adverse scenario, as shown in the "Other loans" category.[54] Furthermore, the average eligible margin loan losses for 2022 will be less than 1 basis point. In fact, CSC was actually viewed as likely to accrete capital in the FRB's hypothetical stress scenario during Comprehensive Capital Analysis and Review ("CCAR") in 2022. Specifically, in the supervisory adverse scenario, losses generated were less than income and, as a result, CSC's capital increased during the stress scenario.

Low risk business—other metrics CSC's low-risk profile and simple business model are also reflected in a number of other metrics. For example, CSC has no level 3 assets and a relatively low amount of off-balance sheet ("OBS") exposures. CSC also has a low "method 1" GSIB surcharge score, and its larger "method 2" score primarily is due to the incongruent treatment under the prudential framework of simple, retail affiliate bank sweep deposit activities; these activities are penalized under the method 2 calculation despite them being recognized as highly stable funding in the net stable funding ratio ("NSFR") rule.[55]

Moreover, CSC's cross-jurisdictional activity and amount of over-the-counter ("OTC") derivatives, all of which are centrally cleared, are *de minimis.* As shown below, the amount of OTC derivative contracts settled bilaterally and the total

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[53] This amount includes only data from CS&Co Recent acquisitions are being conformed to CSC's margin lending and risk practices

[54] *2022 Federal Reserve Stress Test Results*, FRB (June 2022), https://www.federalreserve.gov/publications/files/2022-dfast-results-20220623.pdf. Although the utility of a direct comparison of this rate to other firms' rates may be somewhat limited because there are other items in that category (including international real estate loans), CSC's loss rate is extremely low relative to other firms in this category.

[55] *See* NSFR Liquidity Risk Measurement Standards and Disclosure Requirements, 86 Fed Reg 9120, 9145 (Feb 11, 2021) ("[S]table retail deposits and certain fully insured retail affiliate sweep deposits, regardless of tenor, have the highest stability characteristics for deposits under the final rule. "). As discussed in section IV below, many aspects of the current EPS regime are not appropriate for CSC or other SLHCs, including the treatment of retail affiliate bank sweep deposits. The federal banking agencies also indicated in the NSFR final rule that, "[f]or the same reasons as the agencies described in connection with this final rule, the agencies are considering making similar changes to the treatment of retail affiliate sweep deposits in the LCR in a separate rulemaking " *Id*

notional amount of OTC derivative contracts held by CSC are well below the amount held by the eight U.S. GSIBs. CSC only had $1.5 million of notional related to derivatives outstanding at the end of the third quarter of 2022 (cleared interest rate swaps). The remainder of the $9.2 billion reflected below represents client positions that CSC is required to report as an OBS exposure due to our relationship with futures commission merchants ("FCMs"). Moreover, none of CSC's banks engage in OTC derivative activities.[56]

Holding Company	OTC derivative contracts settled bilaterally ($B)[57]	Total notional amount of OTC derivative contracts ($B)[58]
GSIB 4	23,117.0	53,194.3
GSIB 3	16,156.9	41,933.1
GSIB 2	13,368.7	38,389.3
GSIB 5	18,633.2	37,255.3
GSIB 6	15,070.2	32,897.9
GSIB 1	4,237.7	11,343.3
GSIB 8	2,024.2	2,057.9
GSIB 7	846.5	1,010.7
CSC	0	9.3 (client future contracts)[59]

B. *The resolution of CSC under current circumstances would not put the DIF at risk or have significant adverse effects on financial stability.*

As indicated in CSB's IDI resolution plan, the FDIC would be able to resolve CSB under a range of scenarios and circumstances without risk to the DIF or U.S. financial stability. Moreover, such a resolution would not require CSB to be sold to

[56] CSB does have forward contracts associated with commitments to purchase first mortgages that show up as derivatives in CSB's call report ($114 million as of September 30, 2022). Any OTC derivative activity noted in the Form FR Y-9C is due to customer future contracts

[57] Schedule D of Form FR Y-15 (quarter ended September 30, 2022)

[58] Schedule D of Form FR Y-15 (quarter ended September 30, 2022).

[59] Reflects notional value of client future contracts cleared by third party FCMs

a GSIB or non-GSIB LBO. CSB's balance sheet and liquidity requirements likewise would decrease significantly in a receivership, allowing the FDIC to act as receiver for (and potentially sell) a significantly smaller institution. The resolution plan includes strategies that would allow CSB to be quickly separated into various components and sold in pieces of less than $50 billion in assets soon after the institution enters receivership.

Moreover, CSC's retail broker-dealer and RIA subsidiaries could be sold to banking organizations or nonbank firms (*e.g.*, another retail broker-dealer firm or one wishing to expand into the space) without also transferring CSB as part of the sale. As is clear from the current market, an affiliated IDI is not necessary for a retail broker-dealer business; retail affiliate bank sweep deposit and other banking relationships necessary for a retail broker-dealer could be established in another depository institution, which would further ensure that CSB (or its assets and liabilities) could exit FDIC receivership through one or more relatively small sales to other institutions.

CSC's retail broker-dealer subsidiaries could be sold or wound down under SIPA—which is designed to protect retail investors[60]—without adverse effects on financial stability.[61] This is due in large part to the limited and retail nature of CSC's activities. For example, CSC does not provide institutional broker-dealer services and engages in limited trading activities, as discussed in section III.A above, that could generate losses and deplete capital. Its interconnections with GSIBs, non-GSIB LBOs or other large financial companies are limited. Thus, contagion risk and other knock-on effects of the failure of CSC would be limited. The simplicity of CSC's retail broker-dealer business model is described further in section III.A above.

Moreover, additional expectations regarding governance mechanisms would not seem appropriate given the ability of both CSB and CSC's retail broker-dealers to be resolved under special resolution regimes without risk to the DIF or U.S. financial stability. Most material entities instead would enter resolution based on the real-time assessments of the entities' primary regulators. This feature of CSC's structure and how it supports resolvability are discussed further in section III.C below.

C. *It would be unnecessary, inappropriate and costly to impose TLAC, LTD or related SPOE resolution requirements on CSC or CSB.*

The purpose of imposing TLAC, LTD and clean holding company requirements on GSIBs primarily was to improve the resolvability of a GSIB holding company in Chapter 11 bankruptcy in the event of failure or material financial distress of

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[60] *See, e g*, 15 U.S C § 78fff(a)

[61] The main insolvency imperative would be to transfer customer accounts to another broker-dealer, and Securities Investor Protection Corporation ("SIPC") has a well-established and proven process for executing such a resolution. A similar bulk transfer could also occur before SIPC is appointed. *See, e g*, *Bulk Transfer Initiative Playbook*, Securities Industry and Financial Markets Association, PricewaterhouseCoopers LLP, Bulk Transfer Steering Committee (Apr 2019), https //www sifma org/wp-content/uploads/2019/04/SIFMA_Bulk_Transfer_Playbook_April_2019 pdf

a systemically significant firm with material cross-border operations and critical operations.[62] In fact, the indicators that the FRB (and FSB) developed to identify GSIBs largely evidence that an MPOE resolution of such an organization could cause material adverse effects to financial stability. For example, high scores in cross-jurisdictional activity or complexity can indicate the resolution is subject to high risks of ring fencing or other factors that can complicate an MPOE resolution process.[63] Similarly, high scores in substitutability and interconnectedness can indicate the systemic consequences of material operating subsidiaries entering resolution proceedings and ceasing to operate.[64]

The FRB imposed TLAC and LTD requirements so that GSIBs would have sufficient loss-absorbing capacity on a gone-concern basis. Moreover, the FRB intended the TLAC, LTD and clean holding company requirements to facilitate an SPOE resolution at the holding company of a GSIB, using Chapter 11, thus avoiding the financial stability risks discussed above. Instead of such risks, the FRB expected "that the holding company's equity holders and unsecured creditors would absorb the banking organization's losses in the event of its failure".[65]

The FRB has also explained that non-GSIB LBOs do not pose such risks,[66] and therefore, TLAC, LTD and clean holding company requirements are not appropriate for non-GSIB LBOs. Such requirements also would be unnecessary for CSC or its subsidiaries for a variety of additional reasons, as explained below.

First, TLAC, LTD and clean holding company requirements are unnecessary for CSC because it currently does not have—or need—an SPOE resolution plan. As explained in section III above, the resolution of CSC would not put the DIF at risk or have significant adverse effects on financial stability and, likewise, CSC would not need to be resolved under Title II of the Dodd-Frank Act due to such lack of systemic importance. Rather, CSC could be resolved outside of an SPOE resolution under the U.S. Bankruptcy Code because CSC's main operating subsidiaries could be separately

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[62] *See* FRB TLAC Final Rule, *supra* note 16, at 8266.

[63] *See, e.g*, Regulatory Capital Rules Implementation of Risk-Based Capital Surcharges for GSIBs, 80 Fed. Reg. 49092, 49096–97 (Aug. 14, 2015)

[64] We note that the FSB has recently discussed additional resolution planning requirements for non-GSIBs that "could be systemic in failure" 2022 Resolution Report "Completing the agenda and sustaining progress", FSB (Dec 8, 2022) As explained in this letter, CSC's failure does not pose material risks to U.S financial stability and therefore should not be considered such a "systemic non-G-SIB" Moreover, as the FSB continues to consider certain types of systemic non-G-SIBs, CSC believes that any TLAC or LTD requirements should follow, and be informed by, such international efforts.

[65] FRB TLAC Final Rule, *supra* note 16, at 8270 n 29.

[66] Regulatory Capital Rules. Implementation of Risk-Based Capital Surcharges for GSIBs, 80 Fed. Reg. at 49084 ("[T]here is a clear separation in systemic risk profiles between the eight U S top-tier [BHCs] that would be identified as GSIBs under the proposed methodology and other [BHCs]. Using the method 1 scores as a measure of systemic importance, there is a large drop-off between the eighth-highest score (146) and the ninth highest score (51) ")

resolved under special resolution regimes (under which regulators control the entry point to resolution) in a manner that would not have serious adverse effects on U.S. financial stability.

Second, LTD requirements would be costly to fund for CSC. Based on current internal cost estimates and assumptions, for every incremental $1 billion in an LTD requirement, CSC estimates LTD would cost in excess of $28 million per year, including the cost of capital on the larger balance sheet. Additionally, this cost does not incorporate any impact on wider spreads due to the additional supply in the market. Modifications required by clean holding company requirements would likewise be costly and affect CSC's cost of funding.

Third, given CSC's and its subsidiary banks' low amount of RWAs and resultant high capital ratios (as discussed above), TLAC requirements related to RWA thresholds are unlikely to be binding or otherwise provide a benefit in resolution. Thus, it is unnecessary to impose TLAC requirements based on RWAs on CSC or CSB.

Fourth, separate LTD requirements should not be imposed on CSB. Equity capital and debt instruments are both capable of absorbing losses in resolution.[67] The minimum LTD requirement is intended to ensure that there would be a "known and observable quantity of loss-absorbing capacity in excess of its going-concern equity capital" and that "loss-absorbing capacity would not be at substantial risk of volatility or depletion" before a GSIB fails or enters a resolution proceeding.[68] Thus, LTD is intended largely to address SPOE concerns related to a financial company inappropriately delaying bankruptcy proceedings until its capital is insufficient to facilitate a successful recapitalization.

However, these concerns are largely mitigated in an IDI resolution where its regulators have broad authority to place the institution into FDIC receivership while it still has adequate capital to provide sufficient optionality to the FDIC as receiver of the institution. IDI regulators have broad authority to place their supervised institutions into receivership before they are required to undergo corrective action.[69] For example, CSB may be placed into FDIC receivership if it is determined that there has been a substantial dissipation of CSB's assets or earnings,[70] there exist unsafe or unsound conditions to transact business in,[71] CSB is unlikely to be able to pay its obligations or meet its depositors' demands in the normal course of business,[72] CSB has incurred or is likely to

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[67] FRB TLAC Final Rule, *supra* note 16, at 8267.

[68] *Id* at 8274.

[69] *See* 12 U S.C § 1821(c)(5)

[70] *Id* § 1821(c)(5)(B)

[71] *Id* § 1821(c)(5)(C).

[72] *Id* § 1821(c)(5)(F)

incur losses that will deplete all or substantially all of its capital[73] or CSB consents to receivership.[74] In fact, a diminution in capital that risks the FDIC's ability to effectively resolve an IDI without risk to the U.S. financial system or DIF may be particularly relevant to the appointment of the FDIC as receiver.

Similarly, as capital is a lagging indicator of stress and the assets of CSC are relatively low risk, the failure of CSB is unlikely to be caused by a shortfall of capital at CSB; rather, as with most organizations, CSB's problems would be most likely to arise first in liquidity. CSB, like CSC, is subject to full standardized liquidity requirements (100 percent liquidity coverage ratio ("LCR") and NSFR) and liquidity risk management, including liquidity stress testing. Thus, regulators should be able to coordinate and institute proceedings while there is plenty of loss-absorbing capacity at the IDI.

In fact, the Financial Stability Board's ("FSB") TLAC principles and term sheet do not even require the imposition of separate LTD requirements for GSIBs. Thus, separate LTD requirements are clearly inappropriate for an organization that is not internationally active (*i e* , a Category I or II firm), much less one that is such a simple, U.S.-centric organization as CSC. The agencies should not impose conditions on U.S.-centric non-GSIB LBOs that the FSB has not even required for GSIBs.

The FRB also carefully considered whether to impose the TLAC requirement without the minimum LTD requirement on GSIBs.

> In the absence of an LTD requirement, a TLAC requirement would permit each covered firm to reduce its expected systemic impact by striking its own balance between reducing its probability of default (by issuing additional going-concern equity capital above regulatory capital minimum requirements) or by reducing the harm it would cause if it were to fail (by issuing additional gone-concern LTD above regulatory capital minimum requirements).[75]

In making its decision to impose an LTD requirement on GSIBs, the FRB found that the benefits of an orderly resolution of a GSIB outweighed the costs imposed on the firms from limiting their ability to manage their overall liability structure in a way that fits with their overall mix of business lines and funding needs.[76] However, considering CSB's high capital ratios, regulators' ability to place CSB into receivership at the appropriate time and the low risk of its resolution to U.S. financial stability, additional LTD requirements would impose a greater cost on CSB without the

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[73] *Id* § 1821(c)(5)(G)

[74] *Id* § 1821(c)(5)(I).

[75] FRB TLAC Final Rule, *supra* note 16, at 8273

[76] *Id.*

corresponding benefit. Therefore, no separate LTD requirement should be imposed on CSB.

Thus, for CSC, there is no resolution-related problem that needs to be addressed through the imposition of TLAC, LTD or any other GSIB resolution requirements. Indeed, the uniqueness of CSC's business model and the fact that imposing one-size-fits-all requirements on CSC is not necessary to advance resolution-related policy objectives are reflective of the apparent reasons why Congress did not authorize such requirements to be imposed on SLHCs that are not designated as nonbank SIFIs.

Moreover, the agencies should not propose TLAC or LTD calibrations until the FRB completes its holistic review of the FRB's capital framework and the federal bank agencies finalize their "Basel III endgame" reforms as well as revisions to the supplementary leverage ratio.[77] As TLAC and LTD requirements are based on such capital requirements, proposing calibrations based on capital requirements that will be changed in the near future would make it difficult to receive informed public comment or otherwise allow the agencies to understand the likely effects of the calibrations. In particular, the FRB indicated in the FRB TLAC final rule that "the [FRB] expects to consider updating the external LTD requirement in the event that the [FRB] updates bank capital requirements in a way that materially changes their precise structure or calibration."[78] Furthermore, such calibrations would also risk exacerbating existing flaws in leverage requirements. In particular, proposing TLAC or LTD prior to the revisions to leverage ratios could risk doubling down on flaws in leverage ratio requirements and mean that TLAC or LTD leverage ratio requirements become a binding constraint and not a backstop to risk-based requirements.[79]

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[77] *See Oversight of Financial Regulators A Strong Banking and Credit Union System for Main Street Hearing Before the S Comm on Banking, Hous , & Urb Affs* , 117th Cong (2022) (statement of Michael S. Barr, Vice Chair for Supervision, FRB).

[78] FRB TLAC Final Rule, *supra* note 16, at 8275

[79] Regulatory Capital Rules. Regulatory Capital, Enhanced Supplementary Leverage Ratio Standards for U S. GSIBs and Certain of Their Subsidiary IDIs, TLAC Requirements for U S. GSIBs, 83 Fed. Reg 17317 (proposed Apr 19, 2018), Press Release, FRB, OCC, Rule proposed to tailor "enhanced supplementary leverage ratio" requirements (Apr 11, 2018), https://www.federalreserve.gov/newsevents/pressreleases/bcreg20180411a htm, *see also* Press Release, FRB, Federal Reserve Board announces that the temporary change to its supplementary leverage ratio (SLR) for bank holding companies will expire as scheduled on March 31 (March 19, 2021), https //www.federalreserve gov/newsevents/pressreleases/bcreg20210319a htm ("To ensure that the SLR—which was established in 2014 as an additional capital requirement—remains effective in an environment of higher reserves, the [FRB] will soon be inviting public comment on several potential SLR modifications The proposal and comments will contribute to ongoing discussions with the Department of the Treasury and other regulators on future work to ensure the resiliency of the Treasury market.")

IV. Due to the unique characteristics of CSC and other large SLHCs, it is not appropriate to impose TLAC, LTD or other GSIB resolution requirements on CSC through a process designed to address resolution risks of large BHCs; rather, any requirements should be developed through a separate process designed to address the unique characteristics of large SLHCs.

As explained below, it is not appropriate to impose TLAC, LTD or other GSIB resolution requirements on CSC or its subsidiaries through a process designed to address resolution risks of large BHCs due to the unique characteristics of CSC and other large SLHCs. Imposing such requirements would likely penalize CSC relative to its BHC peers. Rather, any proposed requirements should be developed through a separate process designed to address the unique characteristics of SLHCs and be consistent with the separate regulatory authorities for SLHCs that are available to the agencies.

The structures and business models of SLHCs are more heterogenous among themselves and also differ significantly from those of BHCs. For example, SLHCs range from retail broker-dealer business models (like CSC), to large insurers, to farm equipment manufacturers. These differences are a product of not only history but also congressional design. For example, Congress has sought to ensure that savings associations are able to continue to serve their historical and primary function—mortgage lending to the community—while allowing the institutions to compete with commercial banks.[80] Over time, Congress also has given SLHCs authorities that generally match those of BHCs while deciding to also continue to provide important statutory exceptions for SLHCs.[81] The Dodd-Frank Act continued, as explained in section II above, the different treatment of BHCs and SLHCs by, among other things, requiring an SLHC to be designated by FSOC before the FRB may apply EPS to the SLHC.

Perhaps the most obvious result of these statutory differences is the number of large SLHCs that primarily engage in insurance activities, differences which extend to the basic structure and operations of the SLHCs. The FRB has acknowledged such differences for SLHCs engaged predominantly in insurance underwriting by issuing a separate supervisory framework and proposing separate capital requirements.[82] Another clear result of this distinct treatment was the designation of certain insurance SLHCs as nonbank SIFIs in 2013 and 2014.

However, the uniqueness of SLHCs' business operations—just like their distinct regulation under HOLA—extends beyond SLHCs that primarily engage in insurance or commercial activities. Treating all other SLHCs as equivalent to BHCs already has resulted, and would continue to result, in inappropriate and punitive

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[80] *See, e g*, SAVINGS INSTITUTIONS, *supra* note 22, § 1 02.

[81] *See, e g*, SAVINGS INSTITUTIONS, *supra* note 22, § 2.01

[82] FRB, SR Letter 22-8 Framework for the Supervision of Insurance Organizations (Sept 28, 2022), Regulatory Capital Rules: Risk-Based Capital Requirements for Depository Institution Holding Companies Significantly Engaged in Insurance Activities, 84 Fed Reg 57240 (proposed Oct 24, 2019) (to be codified at 12 CFR parts 217, 252)

consequences for other types of SLHCs with unique business models, such as CSC, which are contrary to the applicable statutory structure.

As described in section III above, CSC's business is different than any GSIB's and is unique among its non-GSIB LBO peers (*i.e* , those also in Category III). CSC's primary activities relate to retail brokerage services and bank products that support retail brokerage. For example, one result of CSC's business model is that its liquidity risks are different than that of other GSIBs and non-GSIB LBOs, and the failure to appropriately adapt standardized liquidity requirements for this business model has produced liquidity requirements that are punitive and could render the business model prohibitively expensive. The following analysis of the LCR framework provides an example of potential negative consequences of the agencies' failure to appropriately adapt requirements to the retail broker-dealer business model and also suggests fixes to the existing LCR regime that should be made in the near term.

Specifically, in the current LCR framework, a retail broker-dealer is inappropriately penalized by an assumption that outflows of transitional brokerage deposits will be far greater than core deposits at banks despite there being ample and clear evidence otherwise, as described further below. This penalty arises from the banking agencies requiring the use of standardized BHC approaches and ignoring the differences between those customer-driven liquidity concerns and liquidity-driven events that have occurred at CSC and other retail broker-dealer firms that are not regulated in the same manner.[83]

By way of background, it is important to recognize that there are two important types of liquidity a retail broker-dealer must maintain: (1) liquidity to support margin lending and (2) liquidity to support day-to-day activity. The first is met by client cash (*i e* , "free credits"), which is cash awaiting investment in retail clients' brokerage accounts and is the primary focus of LCR. But firms have limitations, due to the SEC's Rule 15c3-3, on using client cash to address the second risk. The second (liquidity to support day-to-day activity) is captured through liquidity stress testing ("LST") and CSC's other liquidity risk management measures.

Likewise, there are two scenarios that can create liquidity challenges for retail broker-dealers: customer-driven and firm-driven. The first scenario (*i e.*,

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[83] The LCR's treatment also appears contrary to the NSFR Unlike the LCR, the NSFR final rule recognized the stability of affiliate sweep deposits in assigning a 95 percent available stable funding ("ASF") factor to affiliate sweep deposits that are covered by deposit insurance. The rationale provided in the NSFR final rule was the priority relationship between affiliates resulting in stabilizing characteristics of these deposits reducing the likelihood that an affiliate sweep deposit would be withdrawn NSFR· Liquidity Risk Measurement Standards and Disclosure Requirements, 86 Fed. Reg. 9120, 9145 (Feb 11, 2021) ("Given [the] stabilizing characteristics, some affiliate sweep deposits from retail customers may provide similar funding stability across a range of market conditions as stable retail deposits, particularly if there are contractual features or costs that substantially reduce the likelihood that an affiliate sweep deposit will be withdrawn over a one-year time horizon In light of this possibility, the final rule assigns a 95 percent ASF factor to any fully insured affiliate sweep deposit from a retail customer or counterparty that the covered company demonstrates is highly unlikely to be withdrawn during a liquidity stress event.").

customer-driven) occurs when clients decide to engage in the markets on a particular day, increasing margin balances and decreasing client cash (*i e* , free credits). Although CSC can release money from a special reserve to cover this liquidity scenario, there can be a one-day delay in accessing this source of funds. This potential delay would need to be funded by firm working capital at the broker-dealer or parent overnight.

The second scenario (*i e* , firm-driven) is the one faced in the first quarter of 2021 by retail broker-dealers that are not affiliated with IDIs and do not adhere to as stringent a liquidity risk management framework as CSC. Clearing houses[84] require firms to pledge collateral to cover potential trade breakage between trade date and settlement date. The amount of collateral required depends on the level of trading and market volatility. Customer funds cannot be used to fund this requirement. If a firm does not size this need appropriately, which it appears from press reports that certain retail broker-dealers did not, it obviously could create liquidity stress at those firms.

This demonstrates the importance of distinguishing the firm-driven liquidity event that occurred from the customer-driven events prescribed in LCR. Relevant data suggest an influx of cash during market downturns and a self-funded model when customer engagement increases (*i e* , customers seek margin loans). Thus, the LCR's combination of a 40 percent runoff rate on retail free credits with a 0 percent inflow on retail margin loans can render the retail broker-dealer business model prohibitively expensive when addressed in addition to the more relevant liquidity risks facing retail broker-dealers. This significant, unnecessary expense can cause a firm to fund its margin lending through wholesale borrowing and/or to overcollateralize with free credit balances by directing funds out of the banking system and into its broker-dealers, which appears to be an adverse and unintended consequence.

As noted, firm-driven liquidity stresses described above exist independently from LCR and may not be addressed by being LCR compliant. It is the breadth and scope of CSC's liquidity risk management regime, which includes LST, that captures these retail broker-dealer specific risks and enables CSC to be successfully positioned to meet these liquidity stress events. CSC's liquidity stress testing and other liquidity risk management tools protect CSC such that CSC can weather extreme liquidity events in a manner that other nonbank broker-dealers generally cannot.

At a minimum, we believe that the retail margin loan inflow rate should align with the 50 percent inflow rate assigned to wholesale margin loans as well as the 50 percent required stable funding ("RSF") weighting assigned to retail and wholesale margin loans in the final NSFR rule. It creates inconsistent results between the two rules that retail margin loans are penalized in the LCR and are recognized to have a 50 percent liquidity value in the NSFR. Moreover, we cannot find any agency explanation regarding why the LCR would treat retail margin lending as riskier than wholesale margin lending; there is no rationale in the LCR rule text, the preamble to the final rule or any frequently

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[84] National Securities Clearing Corporation/Depository Trust & Clearing Corporation, Options Clearing Corporation

asked questions ("FAQs"). In fact, the NSFR preamble indicated an intent to treat retail customers at least as favorably as wholesale counterparties, which would be consistent with the targeted and technical changes we recommend.[85] The banking agencies could make this change through updating the guidance provided in LCR FAQ #6 to make clear that section 33(c) applies a 50 percent rate for all retail loans (as it appears to do) or through a technical amendment to the maturity provision in section 31(a)(4) (*i e* , by adding section 33(c) to the list of transactions in this provision), which would align with comparable wholesale loans and the retail treatment in the NSFR (*i e.*, section 31(a)(4) of the LCR and section 101(d) of the NSFR).

A similarly inappropriate result as the LCR results described above would almost certainly be obtained from imposing TLAC, LTD or other GSIB resolution requirements on CSC in a process designed to address resolvability concerns of BHCs. As explained in detail in section III above, CSC does not pose the same types (much less degree) of resolution risk as GSIBs or other non-GSIB LBOs. Therefore, any process that considers imposing resolution-related requirements on SLHCs should be approached separately from those of BHCs in order to ensure that SLHCs' distinct characteristics (*e g.*, business models, organizational structures, regulatory frameworks) are appropriately addressed.

The most appropriate manner to conduct such an inquiry would appear to be through the IDI resolution planning process. Not only would it obviate the legal concerns discussed in section II above, but it would also allow for an assessment based on any necessary resolvability improvements specific to CSB. However, if the agencies wished to include CSC and its other subsidiaries as part of this consideration, they could do so pursuant to the agencies' authorities over nonbank SIFIs after a careful consideration of financial stability risks posed by CSC, if any, and evaluation of whether CSC meets the FSOC's designation standards.

Moreover, any consideration of SLHC resolution requirements should take into account the potential costs and benefits of such requirements. This cost-benefit analysis should vary in important respects from the cost-benefit analysis performed by the FRB for the existing TLAC/LTD rule.[86] For example, this cost-benefit analysis should recognize the limited effect that the failure of CSC is likely to have on U.S. financial stability (that is, the requirement's benefit is relatively lower). Moreover, the analysis should also take into account the existing regulatory framework that applies to CSC and only measure the marginal additional benefit to financial stability of the

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[85] NSFR: Liquidity Risk Measurement Standards and Disclosure Requirements, 86 Fed. Reg 9120, 9150 (Feb. 11, 2021) ("As a general matter, the final rule considers the relationship characteristics of retail customers or counterparties at least as favorably as wholesale counterparties that are not financial sector entities, and takes into account whether funding is obtained in connection with a transactional account or as part of another relationship with the covered company ").

[86] FRB TLAC Final Rule, *supra* note 16, at 8284–87.

imposition of such new requirements. Given these differences and the existing resolvability of CSC, the benefits are unlikely to be high.

In contrast, CSC is likely to experience significant costs associated with the requirements. The costs of raising additional TLAC for CSC are likely to be at least equal to the costs of GSIBs, when measured as a proportion of the relative size of the organizations. Moreover, measured costs should include not only the price of additional debt or equity but also the potential deleterious effects on lending or the provision of other services to customers. Costs also should include potential risks to the safety and soundness of CSC. In addition, such an analysis should separately analyze any distinct LTD requirements, as such requirements can increase leverage and limit an organization's ability to manage its funding most effectively.

More generally, due to the differences between CSC's retail broker-dealer business model and typical BHC activities and the inappropriate requirements currently imposed on SLHCs, as discussed above, we also request that the FRB engage in a holistic study of the retail broker-dealer business model and how consolidated supervision should be designed for firms predominantly engaged in this business before proposing any future GSIB resolution requirements.

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CSC would be pleased to engage in continued dialogue with the agencies regarding resolution-related requirements. If you have any questions, please do not hesitate to contact the individuals listed in the Attachment to this letter.

Very truly yours,

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