**_Peter J. Morgan, III_**
Managing Director - General
Counsel & Corporate Secretary
211 Main St.
San Francisco, CA 94105

January 16, 2024

*Via Electronic Delivery*

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

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

Office of the Comptroller of the Currency
400 7th Street SW, Suite 3E-218
Washington, DC 20219
Attention: Chief Counsel's Office, Comment Processing

Re: Long-Term Debt Requirements for Large Bank Holding Companies, Certain Intermediate Holding Companies of Foreign Banking Organizations, and Large Insured Depository Institutions (Federal Reserve Docket No. R-1815, RIN 7100-AG66; FDIC RIN 3064-AF86; Docket ID OCC-2023-0011)

Ladies and Gentlemen:

The Charles Schwab Corporation ("CSC," and together with its affiliates "Schwab")[1] submits this letter with respect to the proposed rule *Long-Term Debt Requirements for Large*

[1] The Charles Schwab Corporation (NYSE: SCHW) is a leading provider of financial services, with 34.7 million active brokerage accounts, 5.2 million corporate retirement plan participants, 1.8 million banking accounts, and $8.18 trillion in client assets as of November 30, 2023. Through its operating subsidiaries, the company provides a full range of wealth management, securities brokerage, banking, asset management, custody, and financial advisory services to individuals and independent investment advisors. Its primary banking subsidiary, Charles Schwab Bank, SSB ("CSB", member FDIC and an Equal Housing Lender), provides banking and lending services and products. Its broker-dealer subsidiaries, Charles Schwab & Co., Inc., TD Ameritrade, Inc., and TD Ameritrade Clearing, Inc., (members SIPC, https://www.sipc.org), and their affiliates offer investment services and products;

*Bank Holding Companies, Certain Intermediate Holding Companies of Foreign Banking Organizations, and Large Insured Depository Institutions* (the "Proposal") published in the Federal Register on September 19, 2023 by the Board of Governors of the Federal Reserve System ("FRB" or "Board"), the Federal Deposit Insurance Corporation ("FDIC"), and the Office of the Comptroller of the Currency ("OCC," collectively the "agencies").[2] We appreciate the opportunity to comment on the Proposal's requirements for certain Category II, III, and IV bank holding companies ("BHCs") and savings and loan holding companies ("SLHCs" and, together with BHCs, "Covered Entities") to issue and maintain a minimum amount of long-term debt ("LTD" or "external LTD"). The Proposal also would require insured depository institutions ("IDIs") that are consolidated subsidiaries of Covered Entities ("Covered IDIs") to issue LTD internally to a company that consolidates the Covered IDI, which would in turn be required to purchase that LTD ("internal LTD"). The Proposal's stated goals are to "improve the resolvability of [covered] banking organizations in case of failure, … reduce costs to the Deposit Insurance Fund, and mitigate financial stability and contagion risks by reducing the risk of loss to uninsured depositors."[3]

**Executive Summary**

Although we endorse the goals of the Proposal, it imposes significant costs on organizations like Schwab for little discernible benefit. More importantly, the Proposal, as presently framed, exceeds the agencies' statutory authority vis-à-vis SLHCs. The agencies do not have the statutory authority to impose LTD requirements on SLHCs such as CSC, unless the SLHC has been specially designated by the Financial Stability Oversight Council ("FSOC") as a nonbank financial company supervised by the FRB (often referred to as a "nonbank systemically important financial institution" or "nonbank SIFI"). The statutes relied on by the agencies do not confer the authority the agencies wish to utilize, and the statutory scheme makes clear that Congress did not delegate decision-making to the agencies on major questions such as this regulation. Any final rule would be subject to legal challenge for exceeding the agencies' statutory authority, being arbitrary and capricious, and failing to consider reasonable alternatives.

Our comment proceeds as follows:

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financial planning and investment advice; retirement plan and equity compensation plan services; referrals to independent, fee-based investment advisors; and custodial, operational and trading support for independent, fee-based investment advisors through Schwab Advisor Services. More information is available at https://www.aboutschwab.com.

[2] Long-Term Debt Requirements for Large Bank Holding Companies, Certain Intermediate Holding Companies of Foreign Banking Organizations, and Large Insured Depository Institutions, 88 Fed. Reg. 64,524 (proposed Sept. 19, 2023).

[3] 88 Fed. Reg. 64,524.

- **Section I** explains why the agencies lack statutory authority to impose LTD requirements on CSC and why the Proposal infringes on Congress's obligation to clearly address "major questions."

- **Section II** explains that, if the agencies nonetheless go forward, they should eliminate the internal LTD requirement that in the case of Schwab effectively doubles the cost of the Proposal for no additional benefit.

- **Section III** explains that should the agencies go forward, they should consider the lack of tailoring in the existing Enhanced Prudential Standards ("EPS") regime and appropriately tailor the Proposal as required by statute.

- **Section IV** recommends revising the regulatory framework to mitigate the retail broker-dealer large banking organization ("LBO") regulatory penalty based on a holistic review of the retail broker-dealer LBO business model.

At a minimum, if the agencies go forward with the Proposal despite lacking clear statutory authority regarding SLHCs, we recommend that they eliminate the separate internal LTD requirement for Covered IDIs as explained in comment letters submitted by the American Bankers Association ("ABA"), Bank Policy Institute ("BPI"), and the Securities Industry and Financial Markets Association ("SIFMA"). Instead, the agencies should permit a Covered Entity like CSC to comply with any LTD requirement at either the holding company or IDI level. This approach generally would be consistent with the current exemption in the Proposal from the internal LTD requirement for U.S. global systemically important banks ("GSIBs").[4]

In addition, the agencies should differentiate LTD requirements for LBOs that are not GSIBs ("non-GSIB LBOs"). A modified approach should recognize the actual cost and benefits of an LTD requirement for a given category of banking organization and be consistent with the statutory tailoring framework. The agencies themselves recognize that it would be appropriate to calibrate LTD requirements to a banking organization's reliance on uninsured deposits; consistent with the Coalition Comment Letter on Uninsured Deposits, the agencies should calibrate any final rule to a banking organization's level of uninsured deposits and other risk factors so as to not impose unnecessarily harsh LTD standards on Category III and IV firms with low levels of uninsured deposits like Schwab.[5]

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[4] *See* 88 Fed. Reg. 64,526 n.2 ("IDIs that are consolidated subsidiaries of U.S. GSIBs would not be subject to the proposed LTD requirement…").

[5] Ally Financial, Inc., The Charles Schwab Corporation, Discover Financial Services & Synchrony Financial, Comment Letter Re: Treatment of Uninsured Deposits in Long-Term Debt Requirement Proposal (OCC Docket ID OCC–2023–0011; Federal Reserve Docket No. R–1815 and RIN 7100–AG66; FDIC RIN 3064–AF86) (Jan. 16, 2024).

## I. The Agencies Lack Statutory Authority to Impose LTD Requirements on CSC

Congress has granted the agencies different authority to regulate BHCs and SLHCs. When it comes to resolution-related requirements like LTD (also referred to as gone-concern requirements), the agencies may only impose enhanced standards on an SLHC that has been designated for FRB supervision as a nonbank SIFI by FSOC. As we explained at length in our comment letter on the Advanced Notice of Proposed Rulemaking ("ANPR"),[6] based on a plain reading of the relevant statutory provisions and confirmed by their legislative history, 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.

### a. Section 165 of the Dodd-Frank Act does not apply to SLHCs

The agencies primarily derive their statutory authority to apply LTD to Covered Entities from Section 165 of the Dodd-Frank Act. The agencies describe the statute as "direct[ing] the Board to establish specific enhanced prudential standards for large BHCs and companies designated by the Financial Stability Oversight Council to prevent or mitigate risks to the financial stability of the United States."[7] However, as set forth below, Section 165 does not apply to SLHCs that have not been designated by FSOC.

First, a plain reading of the statute makes clear that Congress explicitly limited the agencies' ability to impose EPS, including resolution-related authority like LTD, to BHCs and to nonbank SIFIs designated by FSOC. Specifically, the statute authorizes the FRB to "establish prudential standards for nonbank financial companies supervised by the Board of Governors and bank holding companies."[8] As an SLHC, CSC does not fall under either of these categories. "If

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[6] The Charles Schwab Corporation, Comment Letter Re: Resolution-Related Resource Requirements for Large Banking Organizations (FRB Docket No. R-1786 and RIN 7100-AG44; FDIC RIN 3065-AF86), at 7-8 (Jan. 23, 2023), https://www.fdic.gov/resources/regulations/federal-register-publications/2022/2022-resolution-resource-large-banking-3064-af86-c-022.pdf [hereinafter ANPR Comment Letter].

[7] 88 Fed. Reg. 64,529 (citing 12 U.S.C. § 5365(a)(1)); *see also* 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. 8,266, 8,267 (Jan. 24, 2017) [hereinafter GSIB TLAC Rule] ("The Board is issuing the final rule under section 165 of the Dodd-Frank Act. **Section 165 authorizes the Board to impose enhanced prudential standards on bank holding companies** with total consolidated assets of $50 billion or more '[i]n order to prevent or mitigate risks to the financial stability of the United States that could arise from the material financial distress or failure, or ongoing activities, of large, interconnected financial institutions.'" (emphasis added)).

[8] 12 U.S.C. § 5365(a)(1).

the statute is clear and unambiguous," then the agency "must give effect to the unambiguously expressed intent of Congress."[9]

Second, the Dodd-Frank Act's legislative history confirms that Congress considered, and rejected, EPS for SLHCs.[10] The legislative history states:

> The reported bill also contains a significant regulatory gap **because it does not automatically apply heightened regulatory standards to large savings and loan holding companies in Section 165 as it does for large bank holding companies**. The majority claims heightened regulatory standards are needed for our largest financial institutions. Yet **their reported bill exempts savings and loan holding companies from Section 165.** In fact, **it is possible to read Section 165 as a prohibition on applying heightened standards developed for large bank holding companies to savings and loan holding companies.**[11]

This legislative history reinforces that Congress recognized that SLHCs would not be subject to EPS requirements unless designated by FSOC and proceeded to enact the Dodd-Frank Act legislation without changing this construct.

Third, the agencies' conduct to date has been consistent with the recognition that Section 165(d) only covers BHCs and nonbank SIFIs, as quoted above. Until now, the FRB and FDIC have not applied the resolution-related requirements of Section 165(d) to SLHCs. Indeed, the FRB and FDIC recognized as recently as last year that SLHCs "are not subject to resolution planning requirements."[12] And when another SLHC was designated a nonbank SIFI, FSOC cited as support the fact that the designation would subject it to Section 165(d).[13]

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[9] *Bd. of Governors of the Fed. Rsrv Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986) (internal quotations omitted).

[10] *See* S. Rep. No. 111-176, at 232, 236 (2010); ANPR Comment Letter at 7-8.

[11] S. Rep. No 111-176, at 236 (emphasis added).

[12] Resolution-Related Resource Requirements for Large Banking Organizations, 87 Fed. Reg. 64,170, 64,174 (proposed Oct. 24, 2022).

[13] FSOC, Basis of the Financial Stability Oversight Council's Final Determination Regarding General Electric Capital Corporation, Inc. (July 8, 2013), https://home.treasury.gov/system/files/261/General%20Electric%20Capital%20Corporation%2C%20Inc.pdf ("A final determination by the Council under section 113 of the Dodd-Frank Act will allow the Board of Governors to apply a number of new requirements to GECC. These include enhanced prudential standards required by sections 165 and 166 of the Dodd-Frank Act, which, among other things, will require the company to … **submit a resolution plan providing for its rapid and orderly resolution in the event of its material financial distress or failure** …. The enhanced prudential standards required by

Thus, the agencies lack statutory authority to impose LTD requirements on SLHCs such as CSC under Section 165.

### b. Section 10(g) of the Home Owners' Loan Act ("HOLA") does not provide authority for the agencies to impose resolution-related requirements, including LTD requirements, on SLHCs

Section 10(g) of HOLA does not grant authority for the agencies to impose EPS, including resolution-related requirements such as LTD, on SLHCs. The agencies state: "Section 10(g) of the Home Owners' Loan Act (HOLA) authorizes the Board to issue such regulations and orders regarding SLHCs, including regulations relating to capital requirements, as the Board deems necessary or appropriate to administer and carry out the purposes of Section 10 of HOLA."[14] That "necessary or appropriate" language does not support imposition of the LTD requirements of the Proposal, nor does the FRB even attempt to explain why LTD would meet this statutory standard.

The purposes of Section 10 of HOLA are made clear through the text of Section 10 and its legislative history. Like the Bank Holding Company Act on which it was modeled, the purposes of Section 10 of HOLA are to ensure the historic separation of banking from commerce and the safety and soundness of SLHCs.[15] There is no explicit authority requiring resolution planning, other types of resolution-related authority, or gone-concern requirements in Section 10(g) of HOLA. The FRB has never before interpreted Section 10(g) of HOLA to cover resolution-related measures.

Although the FRB contends that the omission of SLHCs from "Section 165 does not prohibit the application of standards to SLHCs and BHCs **pursuant to other statutory authorities**,"[16] Congress revised Section 10 of HOLA, which authorizes the FRB to regulate SLHCs, at the same time it enacted Section 165 of the Dodd-Frank Act.[17] Congress's action in creating separate regulatory regimes for BHCs and SLHCs in the same legislative action—and expressly carving out resolution planning from the agencies' authority over SLHCs—makes clear that the FRB cannot choose to impose resolution-related requirements like LTD under

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section 165 of the Dodd-Frank Act **are in addition to** the authority that the Board of Governors now has to supervise and regulate SLHCs under the Home Owners' Loan Act…." (emphasis added)).

[14] 88 Fed. Reg. 64,529; *see also* 12 U.S.C. § 1467a(g).

[15] *See* ANPR Comment Letter at 10.

[16] 88 Fed. Reg. 64,529 (emphasis added) (citing Section 401(b) of the Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. 115–174, 132 Stat. 1356 (2018)). The agencies' citation to Section 401(b) merely provides that nothing in Section 401(a) limits other authority of the agencies. It does not grant authority.

[17] Pub. L. 111–203, 124 Stat. 1376 (2010), codified at 12 U.S.C. § 5365.

either Section 165 of the Dodd-Frank Act (which does not include SLHCs), nor under Section 10(g) of HOLA, which does not include EPS.

Any differences between the scope of Section 165 authority and HOLA was a result of Congress's direct and deliberate action at that time when both statutes were considered by Congress. Moreover, interpreting Section 10(g) in this fashion circumvents the Congressionally created process required by Section 165, whereby FSOC is charged with designating non-bank SIFIs by a two-thirds vote in order for EPS to apply to SLHCs, as is clear from the legislative history.[18] This scenario calls to mind the Supreme Court's observation that "the history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority."[19]

**c. The "Collins Amendment" does not provide authority for the agencies to impose LTD requirements, and the agencies have not met the statutory requirements to attempt to do so**

The FDIC Staff Memorandum accompanying the Proposal[20] additionally grounds its authority on Section 171 of the Dodd-Frank Act, also known as the "Collins Amendment."[21] The FDIC staff explain: "The proposed rule would be adopted under the authority that allows the Agencies to issue capital rules. In particular, 12 U.S.C. § 5371(b)(7) compels the Agencies to 'develop capital requirements applicable to insured depository institutions … that address the risks that the activities of such institutions pose'" in the event of failure.[22] The Collins Amendment does not authorize the agencies to issue LTD requirements.

The agencies have long recognized that LTD requirements are not capital requirements. For example, in adopting the GSIB TLAC Rule, the FRB described how Total Loss Absorbing Capacity ("TLAC") and LTD requirements "build on, and **serve as a complement to, the**

[18] S. Rep. No. 111-176, at 232 ("The FSOC systemic designation and **follow-on Fed regulation** could apply to broker-dealers, hedge funds, pension funds, insurance companies, **and savings and loan holding companies** (Sections 113 and 165)." (emphasis added)).

[19] *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000) (internal quotation omitted)).

[20] Memorandum from James L. McGraw, Acting Director Division of Complex Institution Supervision & Resolution to FDIC Board of Directors, Publication of *Federal Register* Notice Regarding Long-Term Debt for Certain Insured Depository Institutions (Aug. 29, 2023), https://www.fdic.gov/news/board-matters/2023/2023-08-29-notice-dis-a-mem.pdf [hereinafter FDIC Staff Memorandum].

[21] 12 U.S.C. § 5371.

[22] FDIC Staff Memorandum at 10 (alteration in original).

**regulatory capital requirements**."[23] Similarly, FRB Vice Chair for Supervision Michael S. Barr recently explained that LTD is only a gone-concern resolution requirement and not a capital requirement: "**Unlike regulatory capital**—which helps a firm absorb losses as it continues operations through times of stress—long-term debt becomes especially relevant once a firm has already entered bankruptcy or resolution."[24] For these reasons, the authority for the agencies to "develop capital requirements" in the Collins Amendment does not authorize them to adopt LTD requirements.[25]

Even assuming the Collins Amendment provided the agencies with authority to adopt LTD requirements, the agencies have failed to meet the standard required in the statute to address risk factors. Specifically, the statute provides "[s]uch rules **shall address, at a minimum**," the risks arising from significant volumes of activity in certain assets like derivatives, securitized products, and securities borrowing and lending; concentrations in assets for which the values are not represented by deep and liquid two-way markets; and concentrations in market share that would substantially disrupt financial markets.[26] The agencies do not address any of these risks, even though "shall" makes clear it is mandatory, not optional, for the agencies to do so.

**d. None of the other statutes cited in the Proposal provide statutory authority for LTD requirements, and the Proposal invades Congress's obligation to clearly address "major questions"**

Instead of identifying a clear delegation of statutory authority, the agencies cite over a dozen other statutes, yet only elaborate on Section 165 of Dodd-Frank and Section 10(g) of HOLA in the Proposal. While many of the cited statutes delegate rulemaking authority to the agencies, none contemplates gone-concern or LTD requirements. Citing over a dozen statutory provisions does not resolve concerns regarding the agencies' lack of statutory authority.[27]

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[23] 82 Fed. Reg. at 8,267 ("The TLAC and LTD requirements in the final rule build on, **and serve as a complement to, the regulatory capital requirements in Regulation Q**. While 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 by requiring companies to have sufficient loss-absorbing capacity on both a going concern and a gone-concern basis." (emphasis added)).

[24] Michael S. Barr, Vice Chair for Supervision, FRB, Speech at the American Enterprise Institute: Why Bank Capital Matters (Dec. 1, 2022), https://www.federalreserve.gov/newsevents/speech/barr20221201a.htm (emphasis added). LTD also need not qualify as Tier 2 capital. *See, e.g.*, 88 Fed. Reg. 64,534 n.41.

[25] Additionally, Schwab is concerned that the FDIC Staff Memorandum cites additional statutory authority not discussed in the Proposal published in the Federal Register.

[26] 12 U.S.C. § 5371(b)(7)(B) (emphasis added).

[27] *See* 88 Fed. Reg. 64,560 (citing 12 U.S.C. §§ 93a, 161, 1462, 1462a, 1463, 1464, 1818, 1828(n), 1828 note, 1831n note, 1835, 3907, 3909, 5412(b)(2)(B), and Pub. L. 116–136, 134 Stat. 281); *id.* at 64,562

The Supreme Court has made it clear that courts must "presume that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'"[28] This Proposal certainly qualifies as a major policy: it imposes novel gone-concern requirements on non-GSIB LBOs, with at least $70 billion in compliance costs by the agencies' own estimate.[29] When the "major questions" canon applies, "something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to 'clear congressional authorization' for the power it claims."[30] As discussed in the foregoing sections, the agencies cannot do so for SLHCs.[31]

Especially with regard to major questions such as widespread regulation of the financial sector, agencies cannot expect to find "[e]xtraordinary grants of regulatory authority" in "modest words, vague terms, or subtle devices."[32] As it stands, this situation resembles a scenario, discussed by the Supreme Court in *West Virginia v. EPA*, where the Court struck down an

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(citing 12 U.S.C. §§ 248(a), 321–338a, 481–486, 1462a, 1467a, 1818, 1828, 1831n, 1831o, 1831p–1, 1831w, 1835, 1844(b), 1851, 3904, 3906–3909, 4808, 5365, 5368, 5371, 5371 note, and sec. 4012, Pub. L. 116–136, 134 Stat. 281); *id.* at 64,563 (citing 5 U.S.C. §§ 552, 559; 12 U.S.C. 1462, 1462a, 1463, 1464, 1467, 1467a, 1468, 5365; 1813, 1817, 1829e, 1831i, 1972; 15 U.S.C. 78l); *id.* at 64,565 (citing 12 U.S.C. §§ 321–338a, 481–486, 1467a, 1818, 1828, 1831n, 1831o, 1831p–1, 1831w, 1835, 1844(b), 1844(c), 3101 et seq., 3101 note, 3904, 3906–3909, 4808, 5361, 5362, 5365, 5366, 5367, 5368, 5371); *id.* at 64,577 (citing 12 U.S.C. §§ 1815(a), 1815(b), 1816, 1818(a), 1818(b), 1818(c), 1818(t), 1819(Tenth), 1828(c), 1828(d), 1828(i), 1828(n), 1828(o), 1831o, 1835, 3907, 3909, 4808; 5371; 5412; Pub. L. 102–233, 105 Stat. 1761, 1789, 1790 (12 U.S.C. § 1831n note); Pub. L. 102–242, 105 Stat. 2236, 2355, as amended by Pub. L. 103–325, 108 Stat. 2160, 2233 (12 U.S.C. § 1828 note); Pub. L. 102–242, 105 Stat. 2236, 2386, as amended by Pub. L. 102–550, 106 Stat. 3672, 4089 (12 U.S.C. § 1828 note); Pub. L. 111–203, 124 Stat. 1376, 1887 (15 U.S.C. § 78o–7 note), Pub. L. 115–174; Section 4014 § 201, Pub. L. 116–136, 134 Stat. 281 (15 U.S.C. § 9052)).

[28] *West Virginia*, 142 S. Ct. at 2609 (quoting *United States Telecom Assn. v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)).

[29] See Section II for a discussion of the agencies' underestimation of the true costs.

[30] *West Virginia,* 142 S. Ct. at 2609 (quoting *Util. Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)); *see also* Capital One Financial Corporation, The Charles Schwab Corporation, The PNC Financial Services Group, Inc., Truist Financial Corporation & U.S. Bancorp, Comment Letter Re: the Advance Notice of Proposed Rulemaking on Resolution-Related Resource Requirements for Large Banking Organizations 32 n.95 (Jan. 23, 2023), https://www.fdic.gov/resources/regulations/federal-register-publications/2022/2022-resolution-resource-large-banking-3064-af86-c-026.pdf (arguing that the sweep and impact of a proposed rule would significantly impact the competitiveness of the banking market in a manner contrary to the most recent expressions of Congressional intent relative to the appropriate tailoring of prudential regulatory standards and therefore trigger the major questions doctrine).

[31] Further, the agencies explain the Proposal would create a new requirement for Covered Entities who are "required to purchase that LTD," referring to internal LTD. 88 Fed. Reg. 64,526; *id.* at 64,565 (proposing in "§ 238.184 Requirement to purchase subsidiary long-term debt" that "covered compan[ies] … must purchase eligible internal debt securities"). Thus, internal LTD relies on the agencies' SLHC authority.

[32] *West Virginia*, 142 S. Ct. at 2609 (internal quotations omitted).

agency's attempts to use an "expansive construction of the statute" granting "authority over 'drugs' and 'devices'" to regulate tobacco products.[33] Using inapplicable or catch-all provisions to impose LTD on SLHCs merits a similar conclusion. "'Congress could not have intended to delegate' such a sweeping and consequential authority 'in so cryptic a fashion.'"[34]

Courts will not accept "agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[35] Even 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 Board or the courts, to address."[36]

## II. If the Agencies Insist on Proceeding, They Should Eliminate Internal LTD to Better Comply with Policy Goals and Legal Requirements

As discussed above, the agencies do not have statutory authority to impose LTD requirements on SLHCs. Even if they did, the Proposal in its current form suffers flaws under Section 165 of the Dodd-Frank Act, the Administrative Procedure Act ("APA"), and in achieving the agencies' stated policy goals. Should the agencies choose to proceed, Schwab recommends that the agencies eliminate the internal LTD requirement to reduce unnecessary costs and comply with additional statutory requirements imposed on the agencies.

### a. The agencies should eliminate internal LTD requirements that are costly, duplicative, and could actually create perverse incentives and increase risk

As currently drafted, the Proposal will adversely impact Covered Entities like Schwab and, in turn, their customers. Covered IDIs would be required to issue internal LTD and Covered Entities would be required to issue external LTD, each at considerable cost, particularly for internal LTD, which the agencies did not consider.[37] This is particularly true for Covered Entities that maintain liquidity at the parent to act as a source of strength for their subsidiaries or that have both bank and non-bank subsidiaries. Any consideration of LTD requirements applicable to SLHCs and their subsidiary IDIs should start with the potential costs and benefits of such requirements. This analysis should acknowledge and carefully consider the marginal benefit of such requirements (if any) to financial stability for SLHCs, compared to the significant costs and potential detrimental effects on safety and soundness, especially if SLHCs with a unique business model like that of Schwab are subject to the internal LTD requirement. The Proposal, unfortunately, does not do so.

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[33] *Id.* at 2608 (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 126-27, 160).

[34] *Id.* (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 160).

[35] *Id.* at 2609.

[36] *Dimension Fin. Corp.*, 474 U.S. at 374.

[37] 88 Fed. Reg. 64,552.

### i. Internal LTD requirements will be costly for Schwab, effectively doubling the cost of external LTD requirements due to the need to comply with the holding company Liquidity Coverage Ratio ("LCR")

We do not believe the agencies have accurately assessed the costs of internal LTD, particularly for firms like Schwab. As proposed, the LTD requirement would be much more costly than the agencies estimate, due to inappropriate assumptions made in consideration of the internal LTD requirements. The agencies should revise and recalibrate the LTD requirements to account for these higher expected costs by eliminating the internal LTD requirement.

The agencies' estimate is flawed in that it relies on the assumption that it "will be costless to substitute external holding company-issued debt for external IDI-issued debt, as well as to downstream resources from holding companies to IDIs through eligible internal debt securities, to fulfill the requirements of the [Proposal] and general funding needs."[38] While this may be true for some banks that can transfer liquidity from the parent to the banks, we believe the impact of LTD requirements on holding company liquidity requirements will significantly increase the costs for Schwab.[39]

As explained in the BPI Comment Letter, the agencies' cost estimate does not account for the actual effects of down-streaming resources from holding companies to IDI subsidiaries as an extension of credit in the form of eligible internal LTD, including the effect on the LCR at the holding company or the use of proceeds from holding company debt to fund the operations of broker-dealer or other non-bank subsidiaries.[40] Accounting for the need to restore the LCR at the holding company, Schwab would essentially have to fund its external LTD requirement twice: funding the internal LTD requirement represents an effective doubling of the external LTD requirement.[41] As BPI has explained, "[a]ccounting for the LCR effects at the holding-company level would significantly increase the overall shortfall because banks would need to issue double the LTD projected by the banking agencies. … [T]he need to restore the LCR remains the most

[38] 88 Fed. Reg. 64,551-52 ("It is assumed, in other words, that there are no additional costs for IDIs to maintain eligible internal debt securities to holding companies beyond those attributable to any external holding company LTD that may be passed through to IDIs.").

[39] *See* Haelim Anderson, Francisco Covas & Felipe Rosa, *The Long-Term Debt Shortfall and the Liquidity Coverage Ratio*, BPI (October 23, 2023), https://bpi.com/the-long-term-debt-shortfall-and-the-liquidity-coverage-ratio/.

[40] BPI, Comment Letter Re: Long-Term Debt Requirements for Large Bank Holding Companies, Certain Intermediate Holding Companies of Foreign Banking Organizations, and Large Insured Depository Institutions (Federal Reserve Docket No. R-1815, RIN 7100-AG66; FDIC RIN 3064-AF86; Docket ID OCC-2023-0011) (Jan. 16, 2024) [hereinafter BPI Comment Letter].

[41] Question 7 reflects that the agencies do not understand this double impact, as it seeks comment on: "What would be the advantages or disadvantages **of requiring the covered entity to issue an amount of LTD that is as large as the aggregate amount that its covered IDI subsidiaries are required to issue**?" 88 Fed. Reg. 64,531 (emphasis added). As we explain herein, the Proposal already effectively requires this for CSC through imposition of the internal LTD requirement.

significant contributor to the increase in overall banking funding costs and decrease in profitability."[42]

Currently, for purposes of the LCR, some banking organizations seek to minimize the amount of "trapped liquidity" (i.e., high quality liquid assets or "HQLA" held by a subsidiary that cannot be counted toward the parent's liquidity requirements) at their IDI subsidiaries arising from intercompany funding arrangements by having the holding company provide funding to the IDI through demand deposits.[43] Schwab, however, does not engage in this arrangement to improve its holding company LCR, so allowing overnight deposits to count as "internal gone loss absorbing capacity" instead of internal LTD, as proposed in various comment letters, would not address these issues for Schwab's structure.[44]

In finalizing any LTD requirement and related cost estimates, the agencies should account for the holding company LCR and its impact on internal LTD requirements for companies like Schwab. Designing and finalizing any LTD requirement on the basis of an inaccurate economic impact analysis—one that ignores the actual shortfall, costs of internal LTD, and market capacity for LTD issuances by Covered Entities—would not be consistent with the requirements of the APA that agencies must engage in reasoned decision-making.[45]

The agencies' failure to accurately quantify costs and benefits undermines the conclusion that the Proposal's benefits outweigh its costs, particularly with regard to entities like Schwab. The agencies often reference benefits such as "minimiz[ing] costs to the DIF" or "provid[ing] savings to the DIF" (the "DIF" referring to the Deposit Insurance Fund),[46] but these assertions are speculative and under- or unquantified.[47] When they do quantify costs, the agencies' analysis

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[42] Haelim Anderson, Francisco Covas & Felipe Rosa, *The Long-Term Debt Proposal and the Bank Profitability*, BPI (Dec. 7, 2023), https://bpi.com/the-long-term-debt-proposal-and-bank-profitability/.

[43] *See* BPI Comment Letter.

[44] The application of the clean holding company requirements also limits the types of transactions that CSC can have, including with third parties, further limiting the funding options of LBOs like CSC and imposing costs that have not been considered. CSC's subsidiary banks have made a 10(*l*) election under the HOLA to be deemed savings associations, solely for the purpose of determining CSC's status as an SLHC under Section 10 of HOLA. 12 U.S.C. § 1467a(*l*). As a result, CSC's subsidiary banks have additional limitations that other banks do not have as a result of Section 11(a) of HOLA. *See* 12 U.S.C. § 1468(a). We ask the agencies to consider the limited liquidity management funding options available to CSC as a result of the interaction of the proposed clean holding company requirements and HOLA.

[45] *See Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983).

[46] *See, e.g.*, 88 Fed. Reg. 64,526, 64,554. The agencies rely on this rationale over a dozen times throughout the Proposal.

[47] *See* Michelle W. Bowman, Governor, FRB, Statement by Governor Michelle W. Bowman on the Proposed Long-term Debt Requirements and Proposed Guidance for Resolution Plan Submissions of Domestic Triennial Full Filers (Aug. 29, 2023), https://www.federalreserve.gov/newsevents/pressreleases/bowman-statement-20230829.htm [hereinafter Bowman Statement] (stating that "higher costs will be passed on to consumers and businesses without materially enhancing financial stability, the safe and sound operation of these firms, or improving the

significantly underestimates the Proposal's ultimate cost. A BPI analysis reveals that the agencies' calculations underestimate the Proposal's shortfalls; the shortfalls are about 2.7 times higher than the agencies' estimate, or $186.6 billion according to BPI.[48] As BPI has explained in its comment letter: "Designing and finalizing any LTD requirement on the basis of an inaccurate economic impact analysis—including one that ignores the actual shortfall, costs, and the actual market capacity for LTD issuances by Covered Entities—would not be consistent with the requirements of the APA."[49] Schwab urges the agencies to revisit the Proposal and provide a fuller explanation of the agencies' calculation of the Proposal's purported costs and benefits should the agencies proceed with issuing a final rule.

Further, the Proposal creates anti-competitive disparities between non-GSIB LBOs and the U.S. GSIBs that the agencies have failed to consider.[50] BPI found that "regional banks may face increased funding costs in complying with LTD requirements" compared to the U.S. GSIBs and the agencies' analysis.[51] As FDIC Director Jonathan McKernan raised, disparities such as the internal LTD requirement and increased funding costs "could put covered banking organizations at a competitive disadvantage relative to the U.S. GSIBs."[52] The agencies have not considered these anticompetitive effects as potential costs of the Proposal.

To adjust for these costs, the agencies should fundamentally reconsider the structure of the proposed requirements, including the internal LTD requirement and the Proposal's calibration. As we explain below, issuing external LTD at the parent level would be just as effective as holding LTD at the IDI, making the additional imposition of the internal LTD requirement both costly and unnecessary.

#### ii. The proposed external LTD requirement for the holding company parent is just as effective as holding LTD at the IDI, making internal LTD duplicative

The purposes of LTD identified by the agencies in the Proposal can be met as well or better by external LTD issued by the parent holding company, which could be calibrated at the full capital refill level. The proposed external LTD requirement alone would provide banking

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resolvability of these firms beyond a potentially smaller impact on the deposit insurance fund should an institution fail").

[48] Anderson et al., *supra* note 42.

[49] BPI Comment Letter.

[50] *See* Jonathan McKernan, Director, FDIC, Statement by Jonathan McKernan, Director, FDIC Board of Directors, on the Proposed Long-term Debt Requirements for Certain Banking Organizations (Aug. 29, 2023), https://www.fdic.gov/news/speeches/2023/spaug2923e.html [hereinafter McKernan Statement] (expressing concern and specifically requested comments "to better understand the extent to which certain firms might face different costs in maintaining the required amounts of long-term debt").

[51] Anderson et al., *supra* note 42.

[52] McKernan Statement.

organizations and regulators, regardless of resolution strategy, with greater flexibility in responding to the failure of Covered Entities and their subsidiaries, including Covered IDIs. This effectiveness renders internal LTD unnecessary.

In fact, all of the goals of the Proposal can be met solely with external LTD. External LTD "would reduce potential costs to the DIF and may expand the range of options available to the FDIC as receiver."[53] In addition, an external LTD requirement would improve the resilience of Covered Entities and Covered IDIs by enhancing the stability of their funding profiles. "Investors in LTD could also exercise market discipline over issuers of LTD," another express goal of the Proposal.[54] This would, however, only be possible for external LTD; internal LTD cannot achieve the agencies' goal of heightened market discipline and transparency.

On that basis, external LTD would provide for "optionality" and "serve[] as an important buffer" so that debt holders are "bailed in" and taxpayers would not need to fund a bank failure.[55] While this has been recognized in the context of single point of entry ("SPOE") resolution, the same reasoning would support external LTD for LBOs like Schwab with a non-SPOE resolution strategy. As the agencies explain "for external issuers that are covered entities, issuance directly from the covered entity and not a subsidiary would provide flexibility to support a range of resolution strategies."[56] Specifically, one layer of LTD at the holding company would allow a firm like CSC to fully refill its capital through LTD without the need for internal LTD. The holders of external LTD would be available to absorb the firm's losses and be "bailed in." This would ensure that LBOs could be effectively recapitalized to be sufficiently capitalized in the event that all or most of its capital were depleted.[57] CSC would also be better positioned to contribute resources to its IDI subsidiaries, if needed. The agencies should recognize in any final rule that having rule-based external LTD at the holding company parent (regardless of resolution strategy) is just as effective as having LTD at the bank, and that internal LTD is unnecessary as a result.

Additionally, the agencies should consider giving Category II-IV firms the option to issue external LTD at the holding company or the IDI level, but not require LTD at both levels. This would be similar to the treatment of the Category I firms, the U.S. GSIBs, which currently are only subject to external LTD/TLAC rule-based requirements at the holding company level.[58] Moreover, we do not believe a confidential supervisory process that results in heightened

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[53] 88 Fed. Reg. 64,526.

[54] *Id.*

[55] Michael J. Hsu, Acting Comptroller of the Currency, Remarks Before the Wharton Financial Regulation Conference 2022: Financial Stability and Large Bank Resolvability 4, 5 (Apr. 1, 2022), https://www.occ.gov/news-issuances/speeches/2022/pub-speech-2022-33.pdf.

[56] 88 Fed. Reg. 64,534.

[57] 88 Fed. Reg. 64,530 (discussing the purpose of the capital refill framework).

[58] 88 Fed. Reg. 64,526 n.2.

liquidity at the IDI for the U.S. GSIBs is a good reason to apply internal LTD to the non-GSIB LBOs, and we certainly do not have enough information to comment on that alternative.[59]

When the GSIB TLAC Rule was adopted by the FRB in 2016, which only required external TLAC and LTD, FRB principals recognized the importance of having TLAC **at the holding company** to absorb losses and recapitalize firms with capital from private investors without the need for taxpayer support.[60] With respect to this external TLAC requirement (including only external LTD), then-Federal Reserve Chair Yellen explained: "[T]his requirement means taxpayers will be better protected because the largest banks will be required to pre-fund the costs of their own failure."[61] The same reasoning would apply in full to an external-only LTD requirement similarly calibrated; there is no reason to require internal LTD and force smaller and less systemically significant non-GSIB LBOs to fund LTD twice-over. In this sense, the internal LTD requirement in the Proposal appears to be an instance of "reverse tailoring."

Finally, an external LTD requirement also allows firms to deploy resources where needed in stress and would align with statutory source of strength requirements.[62] The agencies propose external LTD at the parent-company level precisely to create a resource that can be quickly down-streamed from a parent company to prevent losses to uninsured depositors in a least-cost FDIC resolution.[63] It is never explained why, given the external LTD requirement, IDIs must also issue internal LTD, nor does the Proposal's cost-benefit analysis address this in any way.[64]

For these reasons, the internal LTD requirements are unnecessary for Schwab. At a minimum, the agencies should eliminate the internal LTD requirements and allow firms the option to meet any LTD requirements by issuing external LTD at either the IDI or the holding

[59] Bill Nelson, Greg Baer & John Court, *Rethinking Living Will Liquidity Requirements*, BPI (May 3, 2018), https://bpi.com/rethinking-living-will-liquidity-requirements/ ("Several large banks have stated that it is the living will guidance, and not the LCR or other liquidity requirements, that currently is the binding determinant of the amount of liquidity transformation they produce. … The size of the liquidity requirements imposed by RLAP and RLEN are treated by the agencies as confidential supervisory information and thereby kept secret.").

[60] *See* Daniel K. Tarullo, Governor, FRB, Opening Statement on the Long-Term Debt and Total Loss-Absorbing Capacity Final Rule by Governor Daniel K. Tarullo (Dec. 15, 2016), https://www.federalreserve.gov/newsevents/pressreleases/tarullo-opening-statement-20161215.htm; Lael Brainard, Governor, FRB, Statement on the Long-Term Debt and Total Loss-Absorbing Capacity Final Rule By Governor Lael Brainard (Dec. 15, 2016), https://www.federalreserve.gov/newsevents/pressreleases/brainard-statement-20161215.htm.

[61] Janet L. Yellen, Chair, FRB, Opening Statement on the Long-Term Debt and Total Loss-Absorbing Capacity Final Rule by Chair Janet L. Yellen (Dec. 15, 2016), https://www.federalreserve.gov/newsevents/pressreleases/yellen-opening-statement-20161215.htm.

[62] *See* 12 U.S.C. § 1831o–1 (codifying source of strength).

[63] 88 Fed. Reg. 64,534.

[64] *See* 88 Fed. Reg. 64,551-54.

company level. While CSC would still have an external LTD requirement, it would also have the flexibility to deploy resources where needed, including to its IDI subsidiaries[65] .

### iii. Internal LTD could create perverse incentives and increase risk

Beyond this, the agencies have not considered that internal LTD could also create perverse incentives and increase risk, weakening banking organizations. As noted above, internal LTD requirements will require a significant increase in debt issuance at the parent, which the agencies have not considered, and which could impact rating agencies' evaluations. While firms will be forced to increase their leverage to meet the new requirements, it is not proven that LTD will work in practice.[66] The agencies themselves have recognized that market capacity may not exist to absorb LTD in certain market conditions, driving up yields and creating strains in debt markets.[67]

The agencies also have not considered impacts in different market environments. In a stressed market environment, when interest rates fall, Schwab has historically experienced a surge in deposits. At that time, we would have to be in the market issuing debt to support the increase in deposits driving higher LTD requirements (including internal LTD requirements)– even though we would be awash in liquidity and capital levels (inclusive of "accumulated other comprehensive income" or "AOCI") have increased. That makes no rational sense.

Mandating internal LTD for LBOs like Schwab is unnecessary to achieve the agencies' resolution objectives, and as expressed by Governor Bowman, diverts resources that could be deployed for lending and other essential activities if banks are to act as effective and profitable

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[65] For these reasons, we endorse the SIFMA and SIFMA AMG comment letter that argues for eliminating the internal LTD requirements for an LBO affiliated with a retail broker-dealer. SIFMA & SIFMA AMG, Comment Letter Re: Notice of Proposed Rulemaking: Long-Term Debt Requirements for Large Bank Holding Companies, Certain Intermediate Holding Companies of Foreign Banking Organizations, and Large Insured Depository Institutions (Jan. 11, 2024), https://www.sifma.org/wp-content/uploads/2024/01/SIFMA-SIFMA-AMG-Long-Term-Debt-Response-01-11-2024.pdf.

[66] Karen Petrou, Managing Partner, Federal Financial Analytics, Inc., Testimony Prepared for the Subcommittee on Financial Institutions and Monetary Policy, A Holistic Review of Regulators: Regulatory Overreach and Economic Consequences 7 (Sept. 19, 2023), https://fedfin.com/wp-content/uploads/2023/09/Testimony-Karen-Petrou-HFSC-A-Holistic-Review-of-Regulators_Regulatory-Overreach-and-Economic-Consequences-09192023.pdf ("This proposal adds an important buffer of private debt ahead of the public purse, but regulators have to have the will to pull the TLAC trigger for the buffer actually to serve its purpose and insulate taxpayers. Given that the FDIC and FRB have so far failed their duties under existing resolution rules, their ability to make good use of LTD and TLAC is very much uncertain."); *see also* Travis Hill, Vice Chairman, FDIC, Statement by Vice Chairman Travis Hill on the Proposed Long-term Debt Requirements for Large Banks (Aug. 29, 2023), https://www.fdic.gov/news/speeches/2023/spaug2923l.html [hereinafter Hill Statement] (calling "whether the agencies will be able and willing to impose losses on bondholders following a failure" the "existential issue hovering above the proposal").

[67] 88 Fed. Reg. 64,553.

financial intermediaries.[68] Forced down-streaming of resources in this manner actually can weaken parent firms. As previously recognized by FRB principals (albeit in the context of a cross-border resolution of a GSIB for which internal loss absorbing capacity was conceived): "Flexibility, or the ability to allocate capital and liquidity to different parts of the group on an as-needed basis, helps to meet unexpected demands on resources and reduces the risk of misallocation and inefficient use of resources."[69]

FDIC Director McKernan is clear in his statement accompanying the Proposal that the Proposal contemplates a "bank-centric business model" and would not be appropriate if their activities evolve outside the IDI in ways that "necessitate more flexibility in prepositioning to facilitate resolution planning."[70] Implicit in his statement is that such prepositioning would not be appropriate for a structure like Schwab's business model. He identifies several harmful impacts of this "more prescriptive" prepositioning expectation than that applicable to U.S. GSIBs, including (1) putting non-GSIB LBOs at a competitive disadvantage to the U.S. GSIBs; (2) impacting how businesses are structured at non-GSIB LBOs or deterring growth; (3) giving regulatory incentives to deter changes in business models to grow outside the IDI; and (4) critically, shielding the largest firms from competition.[71]

External LTD at the holding company complies with the source of strength doctrine and does not require IDI-level excess HQLAs that undermine LBOs' ability to perform essential lending, community development, and economic functions. The agencies provide no rationale for the conclusion that Category III firms like Schwab warrant internal LTD even though this is not required of the U.S. GSIBs. This asymmetry will surely contribute to concentrating still greater market power in the largest and most systemically significant entities, in a manner we hope the agencies did not intend.[72]

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[68] *See* Bowman Statement (expressing concern that "these higher costs will be passed on to consumers and businesses without materially enhancing financial stability, the safe and sound operation of these firms, or improving the resolvability of these firms beyond a potentially smaller impact on the deposit insurance fund should an institution fail").

[69] Randal K. Quarles, Vice Chairman for Supervision, FRB, Address at Harvard Law School Program on International Financial Systems Symposium Ring-Fencing the Global Banking System: The Shift towards Financial Regulatory Protectionism, Trust Everyone--But Brand Your Cattle: Finding the Right Balance in Cross-Border Resolution (May 16, 2018), https://www.federalreserve.gov/newsevents/speech/quarles20180516a.htm. This speech discussed internal TLAC in the cross-border context for GSIBs though the global rationale for internal TLAC does not apply to LBOs in the United States.

[70] McKernan Statement.

[71] *Id.*

[72] *See, e.g.*, Bowman Statement (expressing concern that that the erosion of the tailoring framework "could exacerbate the pressure on banks to grow larger through acquisition resulting in harmful effects on competition, the reduction of banking options in some geographic or product markets, and rendering some institutions competitively unviable").

### b. The agencies have failed to justify the requirements for internal LTD

Further, the agencies have failed to provide sufficient explanation for their decision to impose internal LTD requirements in accordance with the APA. Agencies must explain their reasoning when departing from prior policies.[73] The Proposal's discussion is insufficient to justify the agencies' decision to impose these requirements on Covered Entities, especially when they fail to consider any reasonable alternatives such as requiring only external LTD.

The internal LTD requirement is an unexplained about-face from the agencies' ongoing policies that subjected U.S. GSIBs to the most stringent prudential standards—and deemed one external layer of LTD sufficient to address potential gone-concerns of the largest and most interconnected financial institutions.[74] The Proposal does not explain why non-GSIB LBOs require an additional layer of LTD, simply discussing the qualities of internal LTD itself.[75]

The Supreme Court has held that "the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it **is** changing position."[76] The agencies have not done so here. The agencies must acknowledge and consider the implications of their decision to impose internal LTD requirements more stringent than those imposed on the U.S. GSIBs, including the implications on competition and Section 165's mandate to tailor.

Furthermore, the agencies did not consider the interaction between the internal LTD requirement and Congress's mandate that holding companies serve as a source of strength to their IDI subsidiaries. When Congress enacted the Dodd-Frank Act in 2010, it codified source of strength with the instruction that the agencies "**shall require** the bank holding company or savings and loan holding company to serve as a source of financial strength for any subsidiary … that is a depository institution."[77] Internal LTD would impose substantial costs on Schwab as

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[73] *See FCC v. Fox TV Stations, Inc.*, 556 U.S. 502 (2009).

[74] *See generally* GSIB TLAC Rule; 88 Fed. Reg. 64,526 n.2 ("IDIs that are consolidated subsidiaries of U.S. GSIBs would not be subject to the proposed LTD requirement because their parent holding companies are subject to the LTD requirement under the Board's total loss-absorbing capacity (TLAC) rule.").

[75] 88 Fed. Reg. 64,538. The FRB sought comment on an internal TLAC requirement in the GSIB TLAC Rule proposal in 2015 and ultimately determined not to adopt such a requirement in the GSIB TLAC Rule. *Compare* 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. 74,930 (proposed Nov. 30, 2015), *with* 82 Fed. Reg. 8,304.

[76] *Fox TV Stations*, 556 U.S. at 515 (emphasis in original).

[77] Dodd-Frank Act, Pub. L. 111–203, 124 Stat. 1616 (2010), codified at 12 U.S.C. § 1831o–1. (emphasis added).

described above, which we believe is inconsistent with CSC serving as a source of strength as Congress intended. The agencies should ensure that parent holding companies serve the purpose Congress intended, not impose a new set of internal LTD requirements that are costly and unnecessary.

As a final matter, the agencies are required to consider reasonable alternatives, but have not done so.[78] The agencies admit they "did not consider any significant alternatives to the proposed rule."[79] There are several reasonable alternatives the agencies should have considered, many of which are described throughout this letter, such as allowing flexibility to issue LTD only externally from the holding company, instead of the duplicative internal LTD requirement, or tailoring based on uninsured deposits. As outlined, each of the suggested alternatives described in this letter is supported by the Proposal, prior agency action, or agency officials' comments, making these significant alternatives obviously known to the agencies yet not considered in the Proposal. This failure to justify the agencies' selected methodology can make it arbitrary and capricious.[80]

## III. Should the agencies proceed, they must tailor the Proposal's requirements to align with statutory considerations

The Proposal imposes novel internal LTD requirements on non-GSIB LBOs, while exempting the U.S. GSIBs.[81] Beyond the fact that the agencies have failed to justify this distinction, the agencies have failed to consider the legal ramifications. As FDIC Director McKernan noted, the Proposal "is actually more prescriptive than the prepositioning expectations applicable to U.S. GSIBs."[82] This contravenes Section 165's requirement that EPS "increase in stringency" based on certain risk factors.[83]

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[78] *Farmers Union Cent. Exchange, Inc. v. FERC*, 734 F.2d 1486, 1511 (D.C. Cir. 1984) ("It is well established that an agency has a duty to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives." (citing *State Farm Mutual Auto Ins. Co.*, 463 U.S. at 47-53; *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 815 (D.C. Cir. 1983))).

[79] 88 Fed. Reg. 64,556.

[80] *See Farmers Union Cent. Exchange*, 734 F.2d at 1490.

[81] 88 Fed. Reg. 64,526 n.2.

[82] *See* McKernan Statement ("I have reservations that the proposal would deny the banking organizations that it would subject to a new long-term debt requirement … at least some degree of the flexibility that the U.S. GSIBs have to decide the extent to which resources are prepositioned at their insured depository institutions through the internal issuance of debt by that subsidiary. … [I]t seems to me a problem that this key aspect of the proposal **is actually more prescriptive** than the prepositioning expectations applicable to U.S. GSIBs." (emphasis added)).

[83] 12 U.S.C. § 5365(a).

In actuality, the non-GSIB LBOs, and Schwab in particular, are already subject to a vast array of EPS imposed by the agencies since the enactment of the Dodd-Frank Act, and beyond compliance with EPS engage in sound practices ensuring many of the benefits the agencies wish to achieve. The agencies have failed to distinguish among non-GSIB LBOs appropriately on the basis of risk, and in so doing have not taken into account CSC's business model or that the Proposal's costs vastly exceed any benefits.[84]

The agencies have adopted the entirety of the EPS regime since the enactment of the Dodd-Frank Act, including the LTD Proposal, without consideration of Schwab's unique business model as a retail broker-dealer LBO. In many cases, EPS requirements were applied to Schwab as an afterthought.[85] This is contrary to the express purpose of the very section of the Dodd-Frank Act upon which the agencies rely, which directly requires that the agencies increase stringency based on considerations of risk.[86] The Proposal violates that mandate by imposing new restrictive requirements on non-GSIB LBOs while exempting the largest and most systemic banks, the U.S. GSIBs. The agencies should reconsider the Proposal and tailor in light of these statutory requirements, and to better balance their policy goals with the costs to organizations like Schwab.

#### a. The current EPS regime is not tailored for Schwab, whose regulatory requirements generally are similar to the U.S. GSIBs

The Proposal does not distinguish among SLHCs appropriately on the basis of risk. A closer examination would reveal that CSC largely does not have many of the risk characteristics (e.g., credit cards) identified for SLHCs by the agencies in the Proposal and that other activities (such as margin lending and nonbank activities) are conducted in a highly regulated manner that is consistent with safety and soundness.[87] As described in Schwab's ANPR Comment Letter, CSC's activities are mostly limited to retail brokerage and advisory services offered to retail customers, as well as traditional banking products to facilitate such services (e.g., retail affiliate bank sweep deposit products).[88] 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—which measures size,

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[84] *See supra* Section II.

[85] *See* 88 Fed. Reg. 64,526 ("Covered entities today primarily operate a bank-centric business model…"); McKernan Statement ("While most domestic covered banking organizations generally have a bank-centric business model today, these firms could find that their activities outside the insured depository institution evolve in ways that necessitate more flexibility…"); *see also* Changes to Applicability Thresholds for Regulatory Capital and Liquidity Requirements, 84 Fed. Reg. 59,230 (Nov. 1, 2019); Capital Planning and Stress Testing Requirements for Large Bank Holding Companies, Intermediate Holding Companies and Savings and Loan Holding Companies, 86 Fed. Reg. 7,927 (Feb. 3, 2021).

[86] *See* 12 U.S.C. § 5365(a)(1)(B) (citing 12 U.S.C. § 5365(b)(3)); *see also* 12 U.S.C. § 5365(a)(2).

[87] *Cf.* 88 Fed. Reg. 64,529.

[88] ANPR Comment Letter.

interconnectedness, complexity, cross-jurisdictional activity, and substitutability—is low at 54 as of September 30, 2023 (less than half of the 130 GSIB threshold).

Schwab has policies and procedures to manage interest rate risk, including setting limits on net interest revenue risk and economic value of equity risk ("EVE"). In 2023, Schwab also began to utilize interest rate swap derivative instruments to assist with managing interest rate risk. Once the agencies' Basel III endgame proposal is finalized, it will require Category III firms like Schwab to recognize elements of AOCI in regulatory capital which the agencies state "would better reflect the point in time loss-absorbing capacity of banking organizations" and align with the treatment of Category I and II firms.[89] CSB met an adjusted Tier 1 leverage ratio requirement of 5% inclusive of AOCI by December 31, 2023, well before the Basel III endgame proposal is finalized and the regulatory transition period for inclusion of AOCI in regulatory capital even begins.

As a result of the Basel III endgame capital proposal, CSC will be subject to risk-based capital requirements that generally are as stringent as those applicable to the largest and most systemically significant banking organizations, the U.S. GSIBs, including recognition of AOCI in regulatory capital. The Basel III endgame proposal also penalizes some of CSC's business lines more sharply than those of traditional banks (e.g., through the services component of the operational risk charge that penalizes fee income). The agencies should consider the interaction between the Basel III endgame requirements and the LTD requirements before adopting the LTD requirements, as recommended by BPI and SIFMA.

CSC would also become bound by Tier 1 leverage ratio requirements for any LTD resulting from any final LTD rule. Tier 1 leverage requirements would be a binding constraint even under the agencies' revisions to the capital rules, which results in an almost 30% increase in risk-weighted assets ("RWAs"), demonstrating the low-risk of CSC's assets. The FRB has indicated that leverage ratio requirements should be a backstop and not a binding constraint to risk-weighted asset requirements, in recognition of the fact that low risk activities should not be penalized.[90] For this reason, we propose a fix below.[91]

In terms of standardized liquidity regulation, unlike other firms in Category III, CSC is also subject to full, daily 100% standardized LCR requirements as well as net stable funding

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[89] Regulatory Capital Rule: Large Banking Organizations and Banking Organizations with Significant Trading Activity, 88 Fed. Reg. 64,028, 64,036 (proposed Sept. 18, 2023).

[90] *See, e.g.*, Jerome H. Powell, Governor, FRB, Speech at the Federal Reserve Bank of Chicago Symposium on Central Clear: Central Clearing and Liquidity (June 23, 2017), https://www.federalreserve.gov/newsevents/speech/powell20170623a.htm ("A risk-insensitive leverage ratio can be a useful backstop to risk-based capital requirements. But such a ratio can have perverse incentives if it is the binding capital requirement because it treats relatively safe activities, such as central clearing, as equivalent to the most risky activities.").

[91] Any leverage-based LTD requirements would need to be revised commensurately, reflecting the fact that leverage capital requirements are intended to be a backstop and not a binding requirement. *See id.*

ratio ("NSFR") requirements due to its level of STWF, even though the agencies have recognized this affiliate funding as more stable in the NSFR as these types of deposits have "the highest stability characteristics for deposits under the final rule."[92] Finally, CSB's uninsured deposits are modest, accounting for $33.7 billion of its total $254.4 billion of deposits (approximately 13%) as of September 30, 2023.

Critically, Schwab is resolvable. This ability is due in large part to CSC's limited, U.S.-centric and retail-based activities. CSB's IDI resolution plan does not involve the transfer of assets or liabilities to a GSIB, which is a concern that motivated the Proposal.[93] The IDI 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 thereafter. Moreover, CSB would be significantly smaller in resolution, providing meaningful optionality to the FDIC as receiver. Likewise, CSC's retail broker-dealer subsidiaries could be sold to banking or nonbank organizations separately from its 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.[94]

#### b. The agencies have failed to tailor as required by Section 165

The considerations discussed above are key, as Section 165 requires the FRB to tailor prudential standards to ensure that requirements are appropriate on the basis of a firm's size and other appropriate risk-related factors.[95] Section 165(a)(2) provides: "In prescribing more stringent prudential standards under this section, the Board of Governors **shall** … differentiate among companies on an individual basis or by category, taking into consideration their capital structure, riskiness, complexity, financial activities (including the financial activities of their

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[92] NSFR: Liquidity Risk Measurement Standards and Disclosure Requirements, 86 Fed. Reg 9,120, 9,145 (Feb. 11, 2021). The agencies have acknowledged that such deposits are highly stable in implementing the net stable funding ratio. *See id.* ([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…"). In light of these considerations, the agencies committed to consider similar changes in the treatment of affiliated sweep deposits in the LCR, which we continue to believe would be appropriate. *Id.* at 9,145-47.

[93] Hsu, *supra* note 55, at 3.

[94] Securities Investor Protection Act, Pub. L. 91–598, 84 Stat. 1636 (1970), codified at 15 U.S.C. § 78aaa et seq. The main insolvency imperative would be to transfer customer accounts to another broker-dealer, and the 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.*, SIFMA, PricewaterhouseCoopers LLP, and Bulk Transfer Steering Committee, *Bulk Transfer Initiative Playbook* (Apr. 2019), https://www.sifma.org/wp-content/uploads/2019/04/SIFMA_Bulk_Transfer_Playbook_April_2019.pdf.

[95] Although the statutory mandate to tailor applies to the FRB, the FRB, OCC, and FDIC previously have tailored capital and liquidity rules. *See* 84 Fed. Reg. 59,230. Similarly, SLHCs have been made subject by the agencies' rules to the tailoring framework. *See* 12 CFR §§ 238.2(cc)-(ee); Prudential Standards for Large Bank Holding Companies, Savings and Loan Holding Companies, and Foreign Banking Organizations, 84 Fed. Reg. 59,032 (Nov. 1, 2019).

subsidiaries), size, and any other risk-related factors that the Board of Governors deems appropriate."[96]

These requirements are not optional. Congress directly acted in Section 401 of the Economic Growth, Regulatory Relief, and Consumer Protection Act to change the wording that the FRB "may" differentiate among companies on an individual basis or by category considering the listed risk factors to require instead that the FRB "shall" do so.[97] Not only is it the law, tailoring the Proposal is better policy.

The agencies, however, ignore these clear tailoring requirements and reach beyond the statute's explicit primary limitation—companies with assets of at least $250 billion—to sweep in all LBOs with at least $100 billion in assets no matter their business model.[98] Relying on a one-size-fits-all approach is the antithesis of tailoring, inconsistent with the statutory mandate to tailor, and contravenes statements by agency officials. As FRB Chairman Jerome Powell testified last year with respect to proposing LTD requirements: "Dodd-Frank actually required us, suggested that we should tailor, and then S. 2155 required it. And anything that we do will reflect appropriate tailoring."[99]

Schwab recommends that if the agencies proceed with finalizing this Proposal, the agencies adopt a tailored approach to LTD consistent with the statutory mandate and Chairman Powell's commitment in his testimony. We propose the agencies consider two alternatives: (1) tailoring LTD requirements to a banking organization's level of uninsured deposits; or (2) tailoring based on the 2019 tailoring framework such that Category III firms like Schwab receive a lower calibration relative to Category I (the U.S. GSIBs) and Category II firms.[100]

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[96] 12 U.S.C. § 5365(a)(2) (emphasis added); *see also* 12 U.S.C. § 5365(a)(1)(B); 12 U.S.C. § 5365(b)(3).

[97] Section 401(a)(1)(B)(i), codified at 12 U.S.C. § 5365(a)(2)(A).

[98] *Compare* 12 U.S.C. § 5365(a)(1), *with* 12 U.S.C. § 5365(a)(2)(C).

[99] *Federal Reserve's Semi-Annual Monetary Policy Report: Hearing Before the H. Comm. on Fin. Servs.*, 118th Cong. (Mar. 8, 2023). Chairman Powell's views have been echoed by a number of agency principals. *See* Hill Statement ("[W]e are required by law to tailor enhanced prudential standards for large firms." (citing 12 U.S.C. § 5365(a)(2)); Bowman Statement ("I am concerned that collapsing Categories II, III, and IV into a single prudential category may call into question whether the Federal Reserve is complying with the statutory requirements to tailor prudential requirements for large firms." (citing 12 U.S.C. § 5365(a)(1), (2)(C)); Christopher J. Waller, Governor, FRB, Statement by Governor Christopher J. Waller on the Long-Term Debt Requirement Proposal (Aug. 29, 2023), https://www.federalreserve.gov/newsevents/pressreleases/waller-statement-20230829.htm ("More importantly, I am concerned that our regulatory framework for large banks is moving in a direction that does not tailor requirements in a manner consistent with the spirit of the Dodd-Frank Act, as amended by Congress in 2018.").

[100] Schwab additionally notes that the agencies have included a reservation of authority provision that enables them to later require individual Covered Entities maintain more or less eligible LTD. 88 Fed. Reg. 64,549. This does not replace the tailoring requirement, but instead gives the agencies leeway to

### i. Calibrating LTD requirements to uninsured deposits

Calibrating LTD requirements to uninsured deposits is a targeted and tailored solution that would meet the agencies' stated goals, while not over-calibrating LTD in a punitive manner for firms that have a low-level of uninsured deposits. The agencies and their principals, most notably FDIC Chairman Martin Gruenberg, have already identified uninsured deposits as a primary risk factor motivating the Proposal.

In recent Congressional testimony, Chairman Gruenberg stated: "The long-term debt absorbs losses before the depositor class – uninsured depositors and the FDIC – take losses. This lowers the incentive for uninsured depositors to run" and pointed to the de-stabilizing contagion impacts of uninsured depositor runs for regional banks.[101] Chairman Gruenberg has also suggested that reducing rates of uninsured deposits is one of the policy goals of the LTD requirements following the bank failures of Spring 2023.[102]

Additionally, questions in the Proposal reflect the agencies' recognition that it would be appropriate to calibrate LTD requirements to a banking organization's reliance on uninsured deposits:

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adjust should a particularly covered entity need more LTD than a tailored framework imposes on their category. This supports the statutory goals that agencies should not impose the strongest requirements possible without consideration, but instead take informed steps and adjust as necessary.

[101] Martin J. Gruenberg, Chairman, FDIC, Remarks by Chairman Martin J. Gruenberg on Oversight of Financial Regulators: Protecting Main Street Not Wall Street Before the Committee on Banking, Housing, and Urban Affairs, United States Senate (Nov. 14, 2023), https://www.fdic.gov/news/speeches/2023/spnov1423.html; Martin J. Gruenberg, Chairman, FDIC, Remarks by Chairman Martin J. Gruenberg on Oversight of Prudential Regulators before the Committee on Financial Services, United States House of Representatives (Nov. 15, 2023), https://www.fdic.gov/news/speeches/2023/spnov1523.html [hereinafter Gruenberg Testimony]; *see also* Martin J. Gruenberg, , Chairman, FDIC, Remarks by Martin J. Gruenberg, Chairman, FDIC, on The Resolution of Large Regional Banks — Lessons Learned (Aug. 14, 2023), https://www.fdic.gov/news/speeches/2023/spaug1423.html ("[T]he heavy reliance of regional banks on uninsured deposits for funding … has the potential to create a destabilizing contagion effect on other banks if one regional bank were to fail and uninsured depositors took losses.").

[102] *See, e.g.*, *FDIC Finalizes Special Assessment*, Bank Reg. Blog (Nov. 16, 2023), https://bankregblog.substack.com/p/fdic-finalizes-special-assessment (reporting comments of FDIC Chairman Martin Gruenberg stating that "I think the expectation is — assuming we move forward on a long-term debt rule in the regional bank space — long-term debt will take the place of some of the uninsured deposits on the balance sheets of these institutions, which would have multiple benefits." (citing Martin Gruenberg, Chairman, FDIC, Panel Discussion: Banking Sector Turbulences: Lessons Learnt for Supervision and Regulation at the Seventh Annual Conference of the European Systemic Risk Board: Financial Stability Challenges Ahead: Emerging Risks and Regulation (Nov. 16, 2023), https://www.esrb.europa.eu/news/schedule/2023/html/20231116_7th_annual_conference.en.html)).

- Question 3: What additional characteristics of banking organizations should the Board consider in setting the scope of the proposed rule and why? Should consideration be given to additional characteristics such as reliance on uninsured deposits…?

- Question 6: Should the Board consider increasing or decreasing the calibration of the eligible external LTD requirement applicable to covered entities based on any other factors, such as the level of uninsured deposits at their IDI subsidiaries?

- Question 23: How should the calibration for the IDI LTD requirement relate, if at all, to the level of uninsured deposits outstanding at a covered IDI, either in absolute terms or relative to the IDI's liabilities? If such an approach were taken, at what level(s) of uninsured deposits should the agencies modify the calibration for the IDI LTD requirement?[103]

Numerous statements throughout the Proposal identify uninsured depositors and the associated risk of runs and contagion as a motivating factor for the Proposal.[104] The Proposal mentions "uninsured deposits" over 20 times in explaining its motivating rationale and benefits. In addition to reducing cost to the DIF and contagion from bank failures, the agencies explain that one of the benefits of the Proposal is that "the additional loss-absorbing capacity from LTD in resolution may increase the likelihood that some or all uninsured deposits are protected from losses…."[105] The Proposal and recent agency principal statements all acknowledge that recent failures in Spring 2023 were precipitated by "significant withdrawals of uninsured deposits."[106] In fact, the FDIC's recently finalized special assessment rulemaking used uninsured deposits as the base, in recognition of the fact that it was to recover loss to the DIF from the protection of uninsured depositors.[107]

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[103] 88 Fed. Reg. 64,529, 64,531, 64,534.

[104] *See, e.g.*, 88 Fed. Reg. 64,526-27.

[105] 88 Fed. Reg. 64,550.

[106] 88 Fed. Reg 64,525; *see also* Gruenberg Testimony ("As of June 30, 2023, the FDIC estimated the cost for the failures of SVB and Signature Bank to total $18.5 billion. Of that estimated total cost of $18.5 billion, the FDIC estimated that approximately $15.8 billion was attributable to the cost of covering uninsured deposits as a result of the systemic risk determination made on March 12, 2023, following the closures of SVB and Signature Bank." (internal citations omitted)); Michael S. Barr, Vice Chair for Supervision, FRB, Speech at the ECB Forum on Banking Supervision: The Importance of Effective Liquidity Risk Management (Dec. 1, 2023), https://www.federalreserve.gov/newsevents/speech/barr20231201a.htm ("A striking feature of recent U.S. experience with bank stress was that Silicon Valley Bank (SVB) and Signature Bank struggled to cope with unprecedented deposit outflows arising from a loss of confidence of their uninsured depositors.").

[107] Special Assessment Pursuant to Systemic Risk Determination, 88 Fed. Reg. 83,329 (Nov. 29, 2023).

BPI's Pat Parkinson, former Division Director of Supervision and Regulation at the FRB, likewise has pointed out: "Recent disorderly failures of certain regional banks, notably SVB and Signature Bank, were caused largely by very rapid runoffs of uninsured deposits," noting "[t]hose two banks were unusually dependent on such deposits," with SVB's uninsured deposits nearly 94% of its total deposits, while Signature Bank's was nearly 90%.[108] Parkinson calls for an approach whereby regulators "focus their attention on banks that heavily dependent on uninsured deposits," stating that "[s]uch a targeted approach could improve safety and soundness while avoiding potential adverse effects on credit availability from implementing unnecessarily broad measures based on limited information."[109]

Nationwide, uninsured deposits constitute about 45% of total deposits, and the agencies express concern about increased reliance on uninsured deposits in the LTD Proposal.[110] By comparison, CSB's uninsured deposit rate of 13% of total deposits as of September 30, 2023, for example, is one of the lowest observed.[111]

If LTD requirements are going to be imposed, Schwab believes they should be tailored based on uninsured deposits as suggested by the agencies. This would be a targeted and tailored solution consistent with the goals of the proposed LTD serving as a "stable source of funding … in contrast to other forms of funding like uninsured deposits,"[112] and ensure LTD is "available to absorb losses that otherwise might be imposed on uninsured depositors in resolution (e.g., if LTD helps to enable whole bank resolution) and to potentially facilitate other resolution options without invoking the systemic risk exception."[113] It is consistent with FDIC Chairman Gruenberg's goal of replacing uninsured deposit funding with more stable LTD funding.

#### ii. Calibrating LTD requirements to the agencies' 2019 tailoring framework

Another possible method of calibrating LTD requirements would be based on the agencies' existing tailoring framework. As is, the Proposal applies the same LTD requirements to Category II through IV banks without any differentiation, ignoring the statutory requirements to tailor the application of prudential standards.[114] Under the statutory framework, a Category III

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[108] Pat Parkinson, *What to do About Uninsured Deposits?*, BPI (Oct. 5, 2023), https://bpi.com/what-to-do-about-uninsured-deposits/ (citing call report data).

[109] *Id.*

[110] *Id.*; *see also* 88 Fed. Reg. 64,526 ("Following the 2008 financial crisis, the reliance of covered entities on uninsured deposits grew dramatically."); 88 Fed. Reg. 64,526 n.4 ("Data from Call Reports show that the proportion of uninsured deposits to total deposits at covered entities increased from about 31 percent to 43 percent from 2009 to 2022.").

[111] Based on Call Report Data as of September 30, 2023.

[112] 88 Fed. Reg. 64,527.

[113] 88 Fed. Reg. 64,550.

[114] *See* BPI Comment Letter.

firm like Schwab should have a lower calibration than a U.S. GSIB,[115] and certainly should not have more onerous requirements than a U.S. GSIB.

If the agencies move forward with adopting a final rule, they should revise the Proposal to tailor it to Covered Entities' levels of uninsured deposits or based on the tailoring framework. The agencies should move away from a one-size-fits-all approach to a more tailored framework, particularly when a business models result in minimal exposure to uninsured deposits. That is the essence of tailoring, and it is what is required by Section 165.

## IV. The Agencies Should Consider Revisions to the Regulatory Framework to Mitigate the Retail Broker-Dealer LBO Regulatory Penalty and Conduct a Holistic Study of the Retail Broker-Dealer LBO Business Model

Beyond that the points raised above, in reconsidering the Proposal, including the elimination of the internal LTD requirement, we also recommend the agencies take a more holistic approach and consider the following revisions to the overall regulatory framework to mitigate the "retail broker-dealer LBO regulatory penalty."

1. **Liquidity Coverage Ratio ("LCR")**: The agencies should modify aspects of its existing regime that creates a retail broker-dealer LBO penalty. For example, the agencies should adjust the retail margin loan inflow rate to 50%, which would align with the 50% inflow rate assigned to wholesale margin loans in the LCR, as well as the 50% required stable funding ("RSF") weighting assigned to retail and wholesale margin loans in the final NSFR rule. In fact, the NSFR preamble indicated an intent to treat retail customers at least as favorably as wholesale counterparties.[116] We hope the agencies consider such changes in any future revisions to the LCR.

2. **Leverage ratio reform**: Schwab believes that at the appropriate time the FRB and other banking agencies should consider leverage ratio reform for business models like ours, that includes removal of central bank reserves from the leverage ratio

[115] The Proposal's current calibration is based on the "capital refill" framework. The agencies offer no explanation of why the proposed calibration is necessary to achieve their stated objectives in the case of non GSIB-LBO. Vice Chairman Travis Hill even expressed concern that it is unclear "whether the capital refill framework is the right approach." *See* Hill Statement. As explained in BPI's comment letter, the stated objectives—protecting uninsured depositors from losses in the event of a banking organization's failure, providing the FDIC with more flexibility to transfer all deposits, meeting the least-cost resolution test without imposing losses on uninsured depositors, minimizing losses to the DIF, and enhancing market discipline—may all be served by an LTD requirement calibrated well below the capital refill level. *See* BPI Comment Letter.

[116] 86 Fed. Reg 9,150 ("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.").

denominator requirements to free up capacity for entities like Schwab to better serve its retail customers.[117]

We further request that if the agencies plan to move forward with GSIB resolution requirements like LTD for CSC that are more stringent than those applicable to the U.S. GSIBs, that SLHCs be considered separately from BHCs after a holistic study of the retail broker-dealer LBO business model and after considering the upcoming revisions to the regulatory capital rules. The agencies also should conduct a robust cost-benefit analysis for public comment after considering the costs of the upcoming revisions to the regulatory capital rules on LTD requirements that includes consideration of the cost of any internal LTD requirement if those requirements are not eliminated as described herein.

* * *

Schwab greatly appreciates the opportunity to submit this comment letter on the Proposal. If you have any questions or require additional information, please contact the undersigned at Peter.Morgan@schwab.com or (415) 667-0958.

Very truly yours,

Peter J. Morgan, III
Managing Director, General Counsel & Corporate Secretary

cc:
Peter Crawford
Bill Quinn
Ozette Keats
John Mason
Jeff Brown
Celeste Molleur
Anna Harrington

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[117] Governor Bowman recently recognized the Basel III endgame proposal represented a "missed opportunity to review leverage ratio requirements." *See* Michelle W. Bowman, Governor, FRB, Speech at New York Bankers Association's Financial Services Forum: Remarks on the Economy and Prioritization of Bank Supervision and Regulation (Nov. 9, 2023), https://www.federalreserve.gov/newsevents/speech/bowman20231109a.htm; *cf.* Press Release, FRB, Federal Reserve Board Announces that the Temporary Change to Its Supplement Leverage Ratio (SLR) for Bank Holding Companies Will Expire as Scheduled on March 31 (Mar. 19, 2021), https://www.federalreserve.gov/newsevents/pressreleases/bcreg20210319a.htm; Nellie Liang & Pat Parkinson, *Enhancing Liquidity of the U.S. Treasury Market Under Stress*, Brookings (Dec. 16, 2020), https://www.brookings.edu/articles/enhancing-liquidity-of-the-u-s-treasury-market-under-stress/ ("We propose that reserves at the central bank be permanently excluded from the supplementary leverage ratio (SLR) because they are riskless…").