ALERT MEMORANDUM

Agencies Seek Comment on Large Bank Resolution

October 26, 2022

On Monday, October 24, the Federal Reserve Board (the "FRB") and the Federal Deposit Insurance Corporation (the "FDIC") published an advance notice of proposed rulemaking ("ANPR") seeking comment on enhancements to the FDIC's ability to resolve large banking organizations ("LBOs") that are not global systemically important banks ("GSIBs").[1] The Agencies released the ANPR concurrently with the FRB and OCC's approvals of U.S. Bancorp's ("USB's") application to acquire MUFG Union Bank, which also addressed resolution-related issues.[2] The ANPR specifically identifies increased merger activity of LBOs as a rationale for considering the potential regulatory changes.

The ANPR solicits public comment regarding potential changes to the resolution-related standards applicable to LBOs, including whether to apply tailored versions of certain requirements currently applicable only to GSIBs such as loss-absorbing capacity requirements. The Agencies express concern that an increase in the size of LBOs and the amount of uninsured deposits at LBOs may limit resolution options in the event of a failure of an LBO. In particular, the ANPR seeks comment on whether an extra layer of long-term debt could improve optionality for the orderly resolution of an LBO.

Comments on the ANPR are due on or before December 23, 2022.

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[1] FRB and FDIC, Resolution-Related Resource Requirements for Large Banking Organizations (Oct. 24, 2022). The FDIC and FRB (the "Agencies") jointly developed the ANPR. The FRB approved the publication of the ANPR on October 14, 2022 and the FDIC approved the publication of the ANPR on October 18, 2022.

[2] Order Approving the Acquisition of a Bank, FRB Order No. 2022-22 (Oct. 14, 2022) (the "FRB Approval"); Application to merge MUFG Union Bank, National Association, San Francisco, California with and into U.S. Bank National Association, Cincinnati, Ohio OCC Control No. 2021-LB-Combination-323603 (Oct. 14, 2022) (the "OCC Approval" and, together with the FRB Approval, the "Merger Approvals").

Background

In the ANPR, the Agencies ask whether resolution-related standards currently applicable to GSIBs should be applied to LBOs to enhance financial stability. The Merger Approvals also bring considerations related to financial stability to the fore.

Financial Stability and Resolvability Post-2008 Financial Crisis

Since the global financial crisis in 2008, the U.S. federal financial regulators have sought to enhance the resolvability of the financial institutions that they regulate and supervise. The relevant requirements have continued to evolve.

As a result of a final rule adopted in 2017,[3] GSIBs are subject to a number of requirements that are designed to increase their resolvability if they were to become insolvent. In particular, U.S. GSIBs must maintain a minimum amount of total loss-absorbing capacity ("TLAC") that consists of long-term debt ("LTD") and tier 1 capital. The top-tier holding company of a U.S. GSIB also must be a so-called "clean holding company" that is prohibited from incurring certain liabilities or entering into certain arrangements. U.S. intermediate holding companies ("U.S. IHCs") of foreign banking organizations ("FBOs") that are GSIBs are subject to a version of these requirements as well.

A much broader group of bank holding companies ("BHCs") are subject to the regulatory requirement to periodically file a resolution plan with the Agencies demonstrating the BHC's strategy for an orderly resolution of the BHC under the U.S. Bankruptcy Code in the event of material financial distress or failure. The Agencies' resolution planning requirements for BHCs were first adopted in 2011 and later revised in 2019[4] (see our Alert Memorandum here) to tailor the content requirements and submission frequency of resolution plans to correspond to a BHC's risk profile. The FDIC also requires separate resolution plans for certain insured depository institutions ("IDIs").

Apart from the BHC resolution plan requirements prescribed by regulation, the Agencies have issued resolution planning guidance that applies to U.S. GSIBs[5] (the "U.S. GSIB Guidance") (see our Alert Memorandum here) and separately to certain large FBOs[6] (the "Large FBO Guidance") (see our Alert Memorandum here). The U.S. GSIB Guidance and Large FBO Guidance significantly increase resolution planning obligations, and, particularly in the case of the U.S. GSIB Guidance, implicitly expect institutions will use a single-point-of-entry ("SPOE") resolution strategy, under which only the top-tier holding company would enter proceedings under the U.S. Bankruptcy Code. (In contrast, under a multiple point of entry ("MPOE") strategy, separate resolution proceedings may simultaneously take place with respect to different entities within a holding company structure.) The U.S. GSIB Guidance also articulates separability expectations requiring that U.S. GSIBs be able to identify lines of business and/or large portfolios that can be sold quickly in stress or in receivership and take steps to ensure such options are actionable. The Large FBO Guidance does not include similar requirements, as the Agencies note that they expect they can obtain this information by collaborating with home country regulators.

In SR 14-1, the FRB also set out recovery planning guidance applicable to U.S. GSIBs, including, *e.g.*, the requirement to document all netting and re-

[3] *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*, 84 Fed. Reg. 8266 (Jan. 24, 2017).

[4] *Resolution Plans Required*, 84 FR 59194 (Nov. 1, 2019).

[5] *Final Guidance for the 2019 [and Subsequent Resolution Plan Submissions]*, 84 Fed. Reg. 1438 (Feb. 4, 2019).

[6] *Guidance for Resolution Plan Submissions of Certain Foreign-Based Covered Companies*, 84 Fed. Reg. 83557 (Dec. 22, 2020). This guidance applies to FBOs that are required to form a U.S. IHC and whose combined U.S. operations are subject to Category II standards under the FRB's "Tailoring Rule." *Prudential Standards for Large Bank Holding Companies, Savings and Loan Holding Companies, and Foreign Banking Organizations*, 84 Fed. Reg. 59032 (Nov. 1, 2019).

hypothecation arrangements with affiliates and external parties at the end of each business day.[7]

Finally, GSIBs, BHCs and FBOs are also required to adopt resolution-related stay provisions in certain qualified financial contracts.[8]

Recent Debate Over Large Bank Resolvability

Regulators have recently expressed doubt about the sufficiency of resolution-related standards for LBOs and suggested that heightened requirements may be warranted.

In an April 2022 speech, Acting Comptroller of the Currency Michael J. Hsu previewed a number of policy arguments that appear in the ANPR.[9] While acknowledging "the large regionals are not as big, complex, or interconnected as the GSIBs and thus do not need to be held to GSIB standards to be safe and sound," he raised the question of how the largest LBOs with total consolidated assets greater than $500 billion could be resolved. Acting Comptroller Hsu argued that only GSIBs can realistically acquire LBOs in the event of default, which would make GSIBs even larger, more concentrated and systemically important to the financial system, under conditions in which extensive diligence and integration plans are not possible. He expressed a view that adopting SPOE-based resolution strategies and separability expectations with respect to LBOs would provide regulators with more options and imposing loss-absorbing capacity requirements would ensure that private investors would absorb the losses, not U.S. taxpayers. Citing an article by former FRB Governor Daniel Tarullo, Acting Comptroller Hsu raised the concern that increased merger activity among the largest banks could result in new "too big to fail" firms and increase financial stability risk. He also indicated that bank merger approvals could be a means by which to require enhancements to resolvability.[10] Acting Comptroller Hsu and Vice Chair for Supervision of the FRB, Michael Barr, have raised similar themes in subsequent speeches.[11]

Industry commentators[12] have criticized the Acting Comptroller's assumptions and proposals, arguing that: (i) failing or distressed LBOs do not necessarily need to be sold to U.S. GSIBs, as many IDI resolution plans for LBOs already contemplate that business lines could be separated and sold to multiple buyers; (ii) SPOE-based strategies are unnecessary for LBOs, as most activities are concentrated in one IDI subsidiary and such approach would reject the resolution optionality provided by the Dodd Frank Act; (iii) LBOs contribute to overall financial system stability, as they operate more efficiently than small banks but offer products that are substitutes for and

[7] SR Letter 14-1, Heightened Supervisory Expectations for Recovery and Resolution Preparedness for Certain Large Bank Holding Companies – Supplemental Guidance on Consolidated Supervision Framework for Large Financial Institutions (SR Letter 12-17/CA Letter 12-14) (Jan. 24, 2014).

[8] *Restrictions on Qualified Financial Contracts of Systemically Important U.S. Banking Organizations and the U.S. Operations of Systemically Important Foreign Banking Organizations; Revisions to the Definition of Qualifying Master Netting Agreement and Related Definitions*, 82 Fed. Reg. 42882 (Sept. 12, 2017) (the FDIC and OCC have also adopted similar regulations).

[9] Acting Comptroller of the Currency Michael J. Hsu, Remarks Before the Wharton Financial Regulation Conference 2022 "Financial Stability and Large Bank Resolvability" (Apr. 1, 2022).

[10] Acting Comptroller of the Currency Michael J. Hsu, Remarks Before the Wharton Financial Regulation Conference 2022 "Financial Stability and Large Bank Resolvability" (Apr. 1, 2022) ("In the near term, one way to reconcile both of these challenges—of mitigating the risk of new TBTF and of promoting large bank competition—might be to condition approval of a large bank merger on actions and credible commitments to achieving SPOE, TLAC, and separability.").

[11] *See*, *e.g.*, Acting Comptroller of the Currency Michael J. Hsu Remarks at Brookings "Bank Mergers and Industry Resiliency" (May 9, 2022); Acting Comptroller of the Currency Michael J. Hsu Remarks at the TCH + BPI Annual Conference "Safeguarding Trust in Banking: An Update" (Sept. 7, 2022); Vice Chair for Supervision Michael S. Barr Remarks at the Brookings Institution, Washington, D.C. "Making the Financial System Safer and Fairer" (Sept. 7, 2022).

[12] *See, e.g.*, BPI, Imposition of SPOE and TLAC Requirements on Large Regional Banks is Unnecessary to Promote Financial Stability (June 30, 2022).

competitive with U.S. GSIBs; (iv) TLAC would be expensive for LBOs that rely mainly on deposits for funding, and may increase borrowing costs, drive more lending to less regulated nonbank providers, and reduce competition; and (v) the amount of loss-absorbing capital already is significantly higher than pre-crisis levels, such that adding more cushion is unnecessary.

Policy Arguments in the ANPR

The ANPR addresses similar policy arguments to Acting Comptroller Hsu in his April 2022 speech.

The Agencies state that LBOs have increased in size, prompting concern about the potential impact of a costly or disorderly resolution. The Agencies note that some LBOs have increased reliance on uninsured deposits to fund their operations, which may be less stable than insured deposits under stress conditions. In addition, the Agencies state that some LBOs have heightened cross-jurisdictional activity or significant non-bank operations that could make coordinating an orderly resolution among resolution authorities more difficult.

The Agencies' ultimate stated goals with the ANPR are to (i) limit the effects of an LBO's failure on financial stability and (ii) promote optionality in resolution. In his statement accompanying the FDIC's adoption of the ANPR, FDIC Acting Chairman Martin Gruenberg provided additional color on the optionality objective, noting the potential role of gone concern capital in increasing the FDIC's optionality in a resolution scenario. Under the FDIC's "least cost rule," gone concern capital may enable the FDIC to preserve the value of the IDI by transferring it to a bridge bank rather than liquidating it.[13]

The Agencies note that while LBOs in Categories II and III could have large or complex operations, the resolution-related standards differ noticeably from those applicable to GSIBs. Accordingly, the ANPR focuses on the question of which standards applicable to GSIBs could be applied to LBOs in Categories II and III.

Overview of ANPR and Merger Approvals

Overview of ANPR

— *Applicability*: The ANPR focuses on domestic LBOs that are characterized as Category II or III banking organizations under the Tailoring Rule.[14] However, the ANPR asks if scoping for the LTD requirement should be done along different lines, including with respect to, *e.g.*, "the presence of significant non-bank operations," "critical operations," "cross-border operations" or "extent of reliance on uninsured deposits."

- The ANPR also asks whether IHCs of FBOs – or the IDIs of these IHCs – that have similar risk profiles should be subject to any requirements that are ultimately imposed on domestic LBOs. The ANPR notes that the U.S. IHCs of foreign GSIBs are already subject to the LTD requirement.

— *Objective of the ANPR*: At its core, the ANPR solicits comment "on how appropriately-adapted elements of the GSIB resolution-related standards – including [an LTD] requirement potentially at the [IDI] and/or the holding company level, a clean holding company requirement, or recovery planning guidance – could be applied to [LBOs]." In the background section, the Agencies also list the biennial resolution plan, the rules on qualified financial contracts and the recovery planning guidance as other resolution-related measures that apply to U.S. GSIBs. However, the vast majority of the ANPR focuses on LTD and addresses only briefly the clean holding company and separability concepts. The ANPR does not address other

[13] Martin J. Gruenberg, Acting Chairman, FDIC Board of Directors, Statement on ANPR (Oct. 18, 2022) ("Gruenberg Statement").

[14] The ANPR describes the broader category of LBOs as banking organizations that have over $100 billion of total consolidated assets but that are not U.S. GSIBs, also adding that Category II and III banking organizations generally have over $250 billion total consolidated assets. Unless otherwise indicated, this Alert Memorandum's use of the term "LBO" refers to Category II and III banking organizations.

resolution-related requirements applicable to GSIBs.

— *LTD*: The ANPR is most heavily focused on LTD and asks a number of questions about how this requirement should be structured. Some of the key questions, as paraphrased, are as follows:

  - Which entity in a LBO's corporate structure would be the ideal issuer for LTD?
  - In setting the LTD requirement, to what extent should the LBO's choice of an SPOE strategy versus an MPOE strategy be considered? How should issuance of LTD by the IDI be treated relative to the issuance of LTD by the holding company?
  - Should IDIs that are not part of a BHC be subject to the LTD requirement?
  - What factors should the Agencies consider in calibrating the LTD requirement for LBOs? Should the requirement be the same as it is for the top-tier U.S. IHCs of FBOs? How should competitive equality factor into this determination?
  - Would an LTD requirement affect the cost and availability of credit?
  - What requirements should the LTD satisfy to be considered eligible LTD?
  - What investor disclosures should be required for LBO LTD relative to GSIB LTD?

— *Governance Mechanics*: The Agencies ask whether governance mechanics should be required to ensure that loss-absorbing capacity is at the appropriate legal entities and that entry into resolution will occur when LTD is still available to absorb losses.

— *Clean Holding Company*: The so-called "clean holding company" requirements for U.S. GSIBs and the IHCs of FBO GSIBs prohibit such entities from entering into certain financial contracts and arrangements, such as issuing short-term debt to the market, as this could create obstacles for resolvability. The ANPR asks whether similar limitations should apply to LBOs.

— *Separability*: The concept of "separability" refers to a banking organization's ability to separate its operations into discrete components that may be sold or otherwise wound down during resolution. As the ANPR notes, separability can "provide alternatives to a wholesale acquisition of a large banking organization's operations by a larger institution such as an existing GSIB." The ANPR asks whether the Agencies should "impose any separability requirements for recovery or resolution on all [LBOs], including GSIBs" and asks how these new requirements can be harmonized with existing requirements.

— *Comment Period:* Comments on the ANPR are due on or before December 23, 2022.

Overview of U.S. Bancorp Approvals

The Merger Approvals contain substantive requirements focused on financial stability and resolution planning.

In September 2021, USB entered into a definitive agreement to acquire MUFG Union Bank, National Association from Mitsubishi UFG Financial Group, which would create the seventh largest U.S. IDI.

The FRB's order approving the acquisition signals that it may impose in the future higher prudential standards on USB than otherwise would apply post-merger under the Tailoring Rule. Namely, the FRB Approval requires USB to "submit quarterly implementation plans for complying with the Category II requirements," notwithstanding that USB is a Category III banking organization.[15] The FRB specified that USB will be subject to Category II requirements the earlier of (i) the date it is subject to the requirements by regulation (*i.e.* it meets the requirements of a Category II institution under the Tailoring Rule), and (ii) December 31, 2024, provided

[15] FRB Approval at fn. 35.

that the FRB notifies USB of this requirement by January 1, 2024.

The FRB Approval also addresses resolution planning: USB has committed to provide the FRB and FDIC with an interim update to its resolution plan no later than six months after closing of the transaction. As a triennial full filer under the resolution plan rule, USB is scheduled to file its next full resolution plan in July 2024.[16] Under the resolution plan rule, the FRB and FDIC may jointly require that an institution submit an update to a resolution plan within a reasonable amount of time, as jointly determined by the FRB and FDIC.

In the OCC Approval, also on October 14, 2022, it noted, "[d]espite remaining substantially smaller than the [GSIBs], the Resulting Bank would be large enough on an absolute basis to implicate resolution concerns."[17] As a mitigant to financial stability concerns, the OCC Approval requires that USB (i) develop a list of business lines and portfolios that could be sold in stress and (ii) prepare a plan to effectuate separability including through establishment of a "data room" that could be quickly populated with information relevant to divesture. This is similar to the separability expectations in the U.S. GSIB Guidance.[18]

Observations

— *Merger Approval*

The ANPR was linked with the Merger Approvals, which themselves included resolvability-related commitments, reflecting the increased focus of the federal regulators on resolvability and the growth of large regional banks. However, while Acting Comptroller Hsu previously indicated a potential willingness to apply LTD requirements or require an SPOE resolution strategy through the merger approval process, the Merger Approvals did not go that far. Instead, the Agencies released the ANPR for public comment, a more deliberate and transparent approach than using the bank merger approval process. In fact, Governor Bowman's statement expressed her view that the Merger Approvals and ANPR should not be "expressly linked" at all.

— *Ambiguous Scope*

An ANPR, by design, is generally intended to be open-ended in order to solicit meaningful comments that will shape a future proposal. Comments are likely to address some ambiguities in the ANPR's most basic terms, including the intended scope of application for an expanded LTD requirement. The ANPR is framed to consider additional resolution-related requirements for LBOs. LBOs are defined as firms with $100 billion or more in total consolidated assets that are not GSIBs (which would include firms in Categories II through IV under the Agencies' Tailoring Rule). However, in footnote 5, the ANPR states that "the [A]gencies are focused on domestic large banking organizations in Categories II and III, which generally exceed a threshold of $250 billion in total consolidated assets." This approach to scoping any expanded LTD requirements would be consistent with the approach the Agencies have taken with aspects of the capital rules designed to increase loss absorption capacity on a going concern basis, including the supplementary leverage ratio and countercyclical buffer requirement, which are not applied to Category IV firms.

At the FDIC board meeting, Acting Chair Gruenberg and Consumer Financial Protection Bureau Director Chopra indicated they intend to consider a different, and potentially broader, scope of application beyond Category II and III firms—with Acting Chair Gruenberg specifically calling attention to the ANPR's "questions about alternative approaches to scope and whether any new requirement should be applied to U.S. subsidiaries of foreign banking organizations"[19] and Chopra focusing his comments on the

[16] FRB Approval at fn. 71.
[17] OCC Approval at 4 (fn. omitted).
[18] *Final Guidance for the 2019 [and Subsequent Resolution Plan Submissions]*, 84 Fed. Reg. 1438 (Feb. 4, 2019).
[19] Gruenberg Statement.

"substantial number of massive banks with over $100 billion in assets."[20] By contrast, Vice Chair Brainard's statement reiterated her view that "increases in banking concentration in the $250-700 billion asset size category raise concerns" and expressed support for considering long-term debt requirements "for banks in that range."[21] This suggests the Agencies may currently disagree on the scope of an expanded LTD requirement, with the FRB apparently favoring maintaining a tailored approach that would not apply to Category IV firms.

— *LBOs or DSIBs?*

Although the ANPR is framed to discuss new requirements for LBOs, at the FDIC board meeting, Acting Comptroller Hsu and Director Chopra specifically described the firms targeted in the release as "DSIBs" or "domestic systemically important banks" in reference to the Basel Committee on Banking Supervision's framework for enhanced prudential requirements for DSIBs (the "DSIB Framework"). Acting Comptroller Hsu stated that "[t]he ANPR also complements long-standing work by the Basel Committee on Bank Supervision with regard to domestic systemically important banks, or D-SIBs."

The DSIB Framework outlines an approach for home country regulators to identify and regulate firms that "are not significant from an international perspective, but nevertheless could have an important impact on their domestic financial system" if they fail.[22] However, the DSIB Framework is principles-based, rather than prescriptive, and does not contemplate a debt requirement for DSIBs. While the DSIB Framework includes a "higher loss absorbency" ("HLA") requirement for DSIBs commensurate with their systemic importance, it provides that such HLA requirements "should be met fully with common equity tier 1."[23] Arguably, the stress capital buffer ("SCB") which currently applies to all firms subject to the FRB's comprehensive capital analysis and review ("CCAR") (which includes all domestic BHCs and U.S. IHCs of FBOs included in Categories I through IV) achieves the HLA objective of the DSIB Framework by tailoring each CCAR firm's effective risk-based capital requirements to its actual risk profile and expected losses in a severely adverse economic downturn scenario.

— *Debt or Equity?*

The ANPR describes the need for "sufficient loss-absorbing resources" at an LBO in order to stabilize the firm and preserve optionality in resolution. Although holding equity capital in excess of minimum and buffer requirements would provide additional loss-absorbing resources for an LBO, the ANPR suggests the Agencies are united in the view that long-term debt is the appropriate instrument for stabilizing a failing firm. The ANPR notes that "a long-term debt requirement would address the fact that the firm's regulatory capital, especially its equity capital, is highly likely to have been significantly or completely depleted in the lead-up to resolution or bankruptcy." This view is consistent with the FRB's LTD rule for GSIBs, but is out of step with international views on TLAC. The FRB's TLAC rule deviated from the Financial Stability Board's TLAC standard by creating a minimum LTD requirement while the international TLAC standard incorporated only a supervisory expectation that some portion of the TLAC would be held in the form of debt (which could include subordinated debt qualifying as tier 2 capital).

Accordingly, excess tier 1 capital held to satisfy the SCB or leverage requirements could not be applied toward an LTD requirement as described

[20] Consumer Financial Protection Bureau Director Rohit Chopra, Member of FDIC Board of Directors, Statement on ANPR (Oct. 18, 2022).

[21] FRB Vice Chair Lael Brainard, Statement on ANPR (Oct. 14, 2022).

[22] DSIB Framework, Recital 3, SCO 50.3.

[23] DSIB Framework, Principle 12.

in the ANPR. This focus on debt could drive up costs for covered firms since they would be forced to maintain laddered issuances of LTD even if their capital levels substantially exceed minimum and buffer requirements. The ANPR specifically requests comment on the costs of debt issuance and the potential for such costs to constrain lending. Governor Bowman's statement also expressed concern that increased reliance on LTD funding could adversely affect the cost and availability of credit.[24]

— *No Discussion of a Separate TLAC Requirement or a TLAC Buffer*

The ANPR requests feedback on calibration of an LTD requirement but does not indicate that the Agencies are considering implementing a separate TLAC requirement. The U.S. GSIBs are currently subject to a TLAC minimum and buffer requirement in addition to an LTD requirement. The ANPR does not discuss or solicit comments on a TLAC minimum or buffer requirement for LBOs and focuses exclusively on an LTD requirement without discussion of an additional buffer requirement.

— *Debt Issuance at IDI Level*

Under the FRB's TLAC rule, the LTD requirement applies currently only to GSIB BHCs and U.S. IHCs of FBO GSIBs. The ANPR, by contrast, indicated the Agencies are considering whether debt issued externally at the IDI level could provide credible loss absorbency and thus count toward the parent's LTD requirement. The ANPR also requests comment on how an LTD requirement would be applied to an IDI that is not part of a group. Large banks organized without a holding company that are nearing or above the $100 billion threshold for categorization as an LBO are not subject to the FRB's CCAR process or the SCB. However, the ANPR suggests they could become subject to an LTD requirement if adopted for IDIs that are not part of a group.

IDI-level LTD issuance would be novel. Under the TLAC requirements applicable to U.S. GSIBs, TLAC can be issued only by the top-tier holding company. A U.S. IHC of an FBO GSIB may issue external TLAC only if its parent company has a MPOE strategy that would involve the IHC entering resolution proceedings in the United States; otherwise, the U.S. IHC must issue internal TLAC to its parent or affiliate. The ANPR's willingness to consider LTD issued at the IDI-level may indicate a recognition that an SPOE at the holding-company level would not be the preferred resolution strategy for all LBOs, and it is possible that an MPOE strategy with the IDI entering Federal Deposit Insurance Act proceedings may be the preferred resolution strategy for some LBOs.

— *Overlap with Tailoring Rule Categories*

The ANPR asks if scoping for the LTD requirement should be done along different lines, including with respect to, *e.g.*, "the presence of significant non-bank operations," "critical operations," "cross-border operations" or "extent of reliance on uninsured deposits." The Tailoring Rule categories already incorporate risk-based indicators such as nonbank assets, weighted short-term wholesale funding and cross-jurisdictional activity. It would appear that in order for the Agencies to be able to calibrate LTD in accordance with risk-based indicators that are *not* already embodied by the Tailoring Rule categories (*e.g.*, Category II and Category IV) – which were developed after extensive notice and comment – the Agencies may need to develop a distinct risk indicator framework.

— *Separability*

The ANPR asks whether the Agencies should "impose any separability requirements for

[24] FRB Governor Bowman, Statement on ANPR (Oct. 14, 2022).

recovery or resolution on all large banking organizations, including GSIBs" and asks how these new requirements can be harmonized with existing requirements. The thrust of this question is unclear because (i) the rest of the ANPR deals with the possibility of adapting U.S. GSIB requirements to LBOs, not creating new requirements for U.S. GSIBs, (ii) the U.S. GSIB Guidance already imposes separability expectations, and (iii) the Large FBO Guidance explicitly ruled out the inclusion of a separability expectation, stating that this concept is not as pertinent for FBOs.[25]

— *MPOE v. SPOE*

Unlike some of Acting Comptroller Hsu's earlier speeches, which emphasized the benefits of an SPOE resolution strategy, the ANPR does not appear to indicate a preference as to whether an LBO should pursue an SPOE or MPOE resolution strategy and seems to assume that there could be a diversity of strategies.

— *Guidance v. Rule*

The form in which requirements stemming from the ANPR will be issued is not yet clear. It is possible that at least some requirements touching on resolution planning will be issued in the form of resolution planning guidance, whereas any LTD requirements are more likely to be the subject of a rule. In fact, the Agencies already announced in September that they anticipate issuing guidance for LBOs in Category II and III to "help [them] further develop their resolution plans."[26] This guidance would itself go through a notice and comment process.

— *Timing*

The ANPR will be open for comment for 60 days following its publication in the Federal Register, with comments due on December 23, 2022. Given its open-ended questions and the wide range of potential stakeholders, the ANPR is likely to generate extensive comments, and the timing of any eventual rulemaking or guidance is not clear. The FRB's TLAC rule took approximately 18 months from proposal to final issuance and did not require formal cooperation with other agencies, which generally delays the rulemaking process.

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[25] *See* Large FBO Guidance at 83567 ("Given that the U.S. operations of the [FBOs to which the guidance is applicable] are a subcomponent of a larger FBO, for which the preferred resolution approach is a home-country SPOE resolution, the agencies have found that the separability options within the United States are few and that their inclusion in resolution plans has yielded limited new insights. Moreover, the agencies expect that such information is obtainable through international collaboration with home country regulators. As such, the agencies have eliminated these expectations from the final guidance.").

[26] Agencies, "Agencies announce forthcoming resolution plan guidance for large banks and deliver feedback on resolution plan of Truist Financial Corporation" (Sept. 30, 2022).