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September 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] Westlake, Texas, submits this letter to supplement our January 16, 2024 comment letter[2] on the proposed rule regarding long-term debt requirements (the "Proposal") 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

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

[2] The Charles Schwab Corporation, 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), https://www.federalreserve.gov/SECRS/2024/February/20240220/R-1815/R-1815_011624_156752_500407041474_1.pdf [hereinafter NPRM Comment Letter].

Agencies").[3] Our prior comment letter explained why the Agencies lack statutory authority to require savings and loan holding companies ("SLHCs," and together with bank holding companies, or "BHCs," "Covered Entities") and insured depository institutions ("IDIs") that are consolidated subsidiaries of Covered Entities ("Covered IDIs") to issue and maintain a minimum amount of long-term debt ("LTD").[4] Afterwards, Schwab met individually with various representatives of the Agencies to discuss Schwab's concerns with the Proposal. During some of those meetings, certain representatives suggested for the first time that a different statute purportedly authorizes the Proposal: namely, the International Lending Supervision Act of 1983 ("ILSA"), 12 U.S.C. § 3901 et seq.

Schwab's NPRM Comment Letter focused primarily on the sources of statutory authority the Agencies referenced in the Proposal or related staff materials, such as Section 165 of the Dodd-Frank Act ("Dodd-Frank"), Section 10(g) of the Home Owners' Loan Act ("HOLA"), and Section 171 of Dodd-Frank (the "Collins Amendment"). Therefore, we are submitting this supplemental letter to comment on the Agencies' potential switch to ILSA as the statutory basis for the Proposal. Switching the statutory basis for a Proposal that would have a massive impact on the banking industry runs afoul of the Administrative Procedure Act ("APA"), and would at a minimum require re-issuing the Proposal so that the public has notice and an opportunity to comment on the purported statutory basis for this major rulemaking. Substantively, such a switch would not save the Proposal, because ILSA does not give the Agencies authority to mandate the issuance of LTD. Moreover, after the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*,[5] courts almost certainly would look askance if the Agencies substituted ILSA as the statutory basis for such a major regulatory action.

I. Promulgating a Final Rule Under ILSA Without an Additional Notice-and-Comment Period Would Violate the APA

Agencies do not have carte blanche to modify proposed rules without seeking additional public input. Under the APA, agencies are required to publish a notice of proposed rulemaking ("NPRM") that includes "reference to the legal authority under which the rule is proposed."[6] In order to satisfy the notice requirement, the final rule must be the "logical outgrowth" of the NPRM, such as to provide fair notice to commenters.[7] When agencies change positions between the NPRM and a final rule, the logical outgrowth standard permits such changes only when "interested parties 'should have anticipated' that the change was possible, and thus reasonably

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[3] 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).

[4] NPRM Comment Letter at 4–10.

[5] 144 S.Ct. 2244 (2024).

[6] 5 U.S.C. § 553(b)(2).

[7] *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007).

should have filed their comments on the subject during the notice-and-comment period."[8] But when agencies seek to change a final rule to such an extent that it would no longer be a logical outgrowth of the NPRM, they must issue a new NPRM that allows for further notice-and-comment. Changing the legal authority under which the rule is proposed violates the requirement of Section 553(b)(2) of the APA that the NPRM include "reference to the legal authority under which the rule is proposed,"[9] and prevents reasonable notice and opportunity to comment on the basis of the Proposal.

For example, in *Texas Association of Manufacturers v. U.S. Consumer Product Safety Commission*, the Fifth Circuit invalidated a rule and held that the agency "violated the APA's notice-and-comment procedures by not adequately allowing for comment after it changed its primary justification for the rule but before adopting a final rule."[10] The Fifth Circuit acknowledged the agency's argument that it "provided some notice that it was relying on new data and asked for comments" including receiving and responding to one comment objecting to the use of the new data, but found that "[i]n the notices to which the Commission refers, statements about [the old] data dominate, and any reference to [the new data] is not clearly communicated as a new justification to support the rule and supplant" the old analysis.[11] Likewise, the D.C. Circuit has taken a similar approach, "refus[ing] to allow Agencies to use the rulemaking process to pull a surprise switcheroo on regulated entities."[12] It has held that "an exercise in 'looking over a crowd and picking out your friends,' does not advise interested parties how to direct their comments and does not comprise adequate notice under [the] APA."[13]

In the Proposal, the Agencies appear to rely on Section 10(g) of HOLA and Section 165 of Dodd-Frank as the primary legal authorities to impose LTD requirements on Covered Entities.[14] As such, Schwab addressed the Agencies' statutory authority under Dodd-Frank and HOLA.[15] Schwab additionally commented on the Collin's Amendment discussed in the FDIC

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[8] *Am. Coke & Coal Chems. Inst. v. EPA*, 452 F.3d 930, 938–39 (D.C. Cir. 2006) (citing *City of Waukesha v. EPA*, 320 F.3d 228, 245 (D.C. Cir. 2003)).

[9] 5 U.S.C. § 553(b)(2).

[10] 989 F.3d 368, 383 (5th Cir. 2021).

[11] *Id.* at 382–83.

[12] *Env't Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) (granting APA challenge to EPA regulations where final monitoring rule was not a logical outgrowth of proposed rule).

[13] *Id.* at 998 (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005)).

[14] *See* 88 Fed. Reg. 64,529 ("Section 10(g) of the Home Owner's Loan Act (HOLA) authorizes the Board to issue such regulations…"); *id.* ("Section 165 of the Dodd-Frank Act directs the Board to establish specific enhanced prudential standards…"). Although the Agencies point to Section 165 of Dodd-Frank as a source of authority, they have not made the statutory determination required for Category IV financial institutions. *Id.*

[15] NPRM Comment Letter at 4–7.

staff memorandum supporting the Proposal, despite not being referenced in the Proposal itself.[16] But ILSA was never called out in any meaningful way. Far from being clearly communicated such that an interested party could reasonably have filed their comments on the subject during the notice-and-comment period, Schwab had no reason to anticipate ILSA would be relied on, either in the Proposal or in the staff memorandum accompanying the Proposal. Relying on ILSA now as a "primary justification for the rule" would fundamentally alter the basis for the Proposal's statutory authority.[17] Should the Agencies go forward with the Proposal in reliance on ILSA without an additional notice and comment period, they will fail to meet their rulemaking obligations under the APA.[18]

The fact that certain provisions of ILSA are included in a laundry list of statutes regarding the Agencies purported "authority"[19] does not provide sufficient notice to satisfy the APA and the logical outgrowth standard. There is no substantive discussion of ILSA as statutory authority for the Agencies' actions in the Proposal, and even where its provisions are mentioned it is in the middle of string-cites of dozens of statutes devoid of substance.[20] Courts will not endorse obfuscating tactics that "would allow an agency to reject innumerable alternatives in its Notice of Proposed Rulemaking only to justify any final rule it might be able to devise by whimsically picking and choosing within the four corners of a lengthy 'notice.'"[21] By not making it clear that they intended to rely on ILSA, the Agencies did not advise interested parties on how to direct their comments, and therefore did not provide adequate notice and opportunity for comment.

Finally, submission of this supplemental comment letter does not negate the fact that the Agencies did not provide adequate notice and an opportunity to comment. Circuit courts across the country repeatedly hold that "[p]ermitting the submission of views after the effective date is no substitute for the right of interested persons to make their views known to the agency in time to influence the rule making process in a meaningful way."[22] Other potential commenters have

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[16] *See id.* at 7–8 & n.25 ("Additionally, Schwab is concerned that the FDIC Staff Memorandum cites additional statutory authority not discussed in the Proposal published in the Federal Register.").

[17] *See Tex. Ass'n of Mfrs*, 989 F.3d at 383.

[18] *Id.*

[19] *See* 88 Fed. Reg. 64560, 64561, 64562, 64565, 64577, 64578.

[20] For a compilation of the citations and statutory provisions cited, *see* NPRM Comment Letter at 8–9 n.27.

[21] *Env't Integrity Project v. EPA*, 425 F.3d 992, 998 (D.C. Cir. 2005) (emphasis omitted).

[22] *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979) (quoting *City of New York v. Diamond*, 379 F.Supp. 503, 517 (S.D.N.Y. 1974)); *see also State of N.J., Dept. of Environmental Protection v. EPA*, 626 F.2d 1038, 1049 (D.C. Cir. 1980) (same); *State of Ohio Dept. of Human Services v. U.S. Dept. of Health & Human Services*, 862 F.2d 1228, 1236 (6th Cir. 1988) (same); *Levesque v. Block*, 723 F.2d 175, 187 (1st Cir. 1983) ("[N]otice and the opportunity for comment must come at a time when they can feasibly influence the final rule.").

been deprived of the opportunity to comment, and are likely unaware that the Agencies are planning to change the primary statutory authority for the Proposal. Additionally, Schwab is aware that this comment is being filed long after the notice and comment period has elapsed, decreasing the odds that the Agencies consider this supplement and harming Schwab's ability to meaningfully provide input into the Agencies' deliberation.[23] Even if this supplemental comment is addressed, the Fifth Circuit in *Texas Association of Manufacturers* found that "[t]he fact that one commenter" raised concerns with the final justification the agency wound up using "does not relieve the Commission of its burden to provide notice and an opportunity to comment on the clearly articulated justification" for promulgation of a rule.[24] Our comment does not heal the defect of not allowing a full notice and comment period to address the change in the primary statutory justification for the Proposal.

II. ILSA Does Not Provide Statutory Authority to Impose LTD Requirements

ILSA does not authorize the Agencies to impose LTD requirements on SLHCs or on any Covered Entities or Covered IDIs, any more than Section 10(g) of HOLA, Section 165 of Dodd-Frank (with respect to SLHCs), or the Collins Amendment do—all of which were addressed in Schwab's NPRM Comment Letter. Section 3907 of ILSA, entitled "Capital Adequacy," provides in relevant part:

> (1) Each appropriate Federal banking agency shall cause banking institutions to achieve and maintain capital by establishing minimum levels of capital for such banking institutions and by using such other methods as the appropriate Federal banking agency deems appropriate. . . .
>
> (2) Each appropriate Federal banking agency shall have the authority to establish such minimum level of capital for a banking institution as the appropriate Federal banking agency, in its discretion, deems to be necessary or appropriate in light of the particular circumstances of the banking institution.[25]

ILSA does not authorize the Proposal for at least three reasons: (i) LTD differs from capital; (ii) such an expansive reading of a decades-old statute governing international lending supervision runs afoul of the Major Questions doctrine; and (iii) the Proposal has no meaningful

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[23] *A Guide to the Rulemaking Process,* OFFICE OF THE FED. REG., https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf ("Commentors should be aware that Agencies generally are not legally required to consider late-filed comments.").

[24] *Tex. Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n*, 989 F.3d 368, at 383 (5th Cir. 2021).

[25] 12 U.S.C. § 3907(a); *see also* 12 U.S.C. § 3909 ("The appropriate Federal banking agency is authorized to apply the provisions of this chapter to any affiliate of an insured depository institution, but only to affiliates for which it is the appropriate Federal banking agency, in order to promote uniform application of this chapter or to prevent evasions thereof.").

nexus to international lending. Were it otherwise, much of the legislation subsequently enacted by Congress, and discussed by the Agencies as possible statutory authority for their actions in the Proposal, would be unnecessary.

A. LTD is not a form of capital.

ILSA does not authorize the Agencies to impose LTD requirements on Covered Entities nor Covered IDIs because debt is not capital. ILSA Section 3907 only authorizes the Agencies to "cause banking institutions to achieve and maintain adequate capital" and gives the Agencies "the authority to establish such minimum level of capital" as the Agency deems appropriate.[26] Black's Law Dictionary defines "capital" as "money or assets invested, or available for investment, in a business,"[27] while it defines "debt" as "[l]iability on a claim; a specific sum of money due by agreement or otherwise."[28] LTD is, practically speaking, the opposite of capital: The New Oxford American Dictionary defines "capital" secondly as "the excess of a company's assets over its liabilities"[29] and defines "liabilities" in the financial context as "a thing for which someone is responsible, esp. a debt or financial obligation: *valuing the company's liabilities and assets*" that directly positions debt as something to be subtracted from capital.[30] The Proposal's requirement that Covered Entities and Covered IDIs issue a minimum amount of LTD cannot be equated to ILSA's authorization to require banks to maintain a minimum level of capital.

Moreover, the Proposal makes clear that LTD does not meet the Agencies' own views or definitions of capital. Schwab's NPRM Comment Letter enumerated several statements by the Agencies and Agency officials differentiating LTD from regulatory capital.[31] In a recent speech, the Federal Reserve's Vice Chair for Supervision, Michael Barr, identified capital, liquidity, and resolution resources (i.e., LTD) as three separate components, calling them "three legs of the stool."[32] Additionally, the Proposal itself would amend the regulatory provision titled

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[26] 12 U.S.C. § 3907(a).

[27] *Capital,* BLACK'S LAW DICTIONARY (12th ed. 2024).

[28] *Debt,* BLACK'S LAW DICTIONARY (12th ed. 2024).

[29] *Capital,* NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010). The New Oxford American Dictionary's first definition of "capital" as "wealth in the form of money or other assets owned by a person or organization or available or contributed for a particular purpose such as starting a company or investing," similarly support Schwab's concern that capital is not debt. *Id.*

[30] *Liability,* NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010).

[31] NPRM Comment Letter at 7–8.

[32] Vice Chair Barr distinguished LTD from capital: "**Unlike capital**, which is likely to be depleted by the time a bank fails, long-term debt is available upon failure to absorb losses, providing better protection for depositors, and limiting the potential cost of the resolution to the Deposit Insurance Fund." Michael S. Barr, Vice Chair for Supervision, FRB, Speech at the 28th Annual Financial Markets Conference Central Banking in the Post-Pandemic Financial System: On Building a Resilient Regulatory Framework (May 20, 2024), https://www.federalreserve.gov/newsevents/speech/barr20240520a.htm (emphasis added).

"Definitions" in the Agencies' capital rules[33] so that a "covered debt instrument"—the term added to create LTD—"does not include a debt instrument that qualifies as tier 2 capital . . . or that is otherwise treated as regulatory capital."[34] In other words, the Proposal treats LTD as distinct from capital for these purposes.

Finally, any attempt to justify a LTD requirement on the portion of Section 3907(a)(1) that authorizes the Agencies to utilize "such other methods" to cause Covered Entities or Covered IDIs to achieve and maintain capital would be futile. There simply is no nexus between LTD and capital. Nowhere in the Proposal do the Agencies assert that issuing LTD will cause Covered Entities or Covered IDIs to increase or maintain capital. Instead, in responding to comments "suggest[ing] that increasing bank regulatory capital levels would be a more effective way to improve resiliency of covered entities and covered IDIs because additional capital would reduce their probability of default in the first place," the Agencies acknowledge that "eligible ***LTD would not help a troubled IDI remain adequately capitalized*** on a going-concern basis."[35] The Agencies' outright rejection of the notion that LTD counts as capital undermines any effort to rely on the "such other methods" clause.

The reversal required for the Agencies to go from the Proposal's treatment of LTD as not counting as capital, to relying on ILSA's capital adequacy authority is exactly the type of unacceptable rulemaking process that the D.C. Circuit struck down as "a surprise switcheroo on regulated entities."[36] A switch to a reliance on ILSA and its capital adequacy justification for LTD both fails to find statutory authority for the Proposal and constitutes a complete 180-degree turn from Proposal's definition of LTD and public statements by Agency officials. Such a rule would not survive legal challenge on any administrative record.

B. The Agencies' interpretation of ILSA, if advanced, would render superfluous requirements in Dodd-Frank and therefore poses a Major Question for Congress to decide.

In passing Dodd-Frank, Congress legislated when and under what circumstances the Agencies are authorized to impose enhanced prudential standards. Schwab addressed these statutory provisions in both its comment on the Advanced Notice of Proposed Rulemaking

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[33] 88 Fed. Reg. at 64560–61, 12 C.F.R. § 3.2 (proposing a definition of covered debt instrument noting "covered debt instrument does not include a debt instrument that qualifies as tier 2 capital pursuant to § 3.20(d) or that is otherwise treated as regulatory capital by the primary supervisor of the issuer"); 88 Fed. Reg. 64,562–63, 12 CFR § 217.2 (proposed); 88 Fed. Reg. 64,578, 12 CFR § 324.2 (proposed).

[34] 88 Fed. Reg. 64,561, 64,563, 64,578.

[35] *Id.* at 64,531 (emphasis added).

[36] *Env't Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005).

("ANPR")[37] and its NPRM Comment Letter.[38] Nothing provided in ILSA negates these requirements or demonstrates Congressional authorization for the Agencies to act outside the scope of these laws. Agencies may not use a strained interpretation of ILSA to try to avoid clear limitations from a more relevant, and recent, statute.

Statutes must be read so as not to render superfluous any language or requirements.[39] ILSA was enacted in 1983, over 25 years before Dodd-Frank was enacted in 2010. Had ILSA granted the Agencies broad authority to regulate financial institutions by imposing novel LTD requirements, including those that do not help entities remain capitalized on a going-concern basis, then there would have been no need for the authorization in Section 165 of Dodd-Frank to impose enhanced prudential standards "[i]n order to prevent or mitigate risks" from "material financial distress or failure, or ongoing activities" of large financial institutions.[40] Further, had ILSA authorized sweeping capital requirements beyond traditional minimum levels, Section 165 of Dodd-Frank would not have needed to enumerate these enhanced prudential standards to include "risk-based capital requirements,"[41] "a contingent capital requirement,"[42] or "regulations that require each [Covered Entity] to maintain a minimum amount of contingent capital that is convertible to equity in times of financial stress."[43] Fundamentally, LTD is far more attenuated than numerous capital regulations Congress needed to specifically authorize the Agencies to regulate under limited circumstances. Congress would not have spent months deliberating the reach of these new regulatory authorities and imposing tailoring requirements if the Agencies already were authorized to issue even broader regulations under ILSA.

Additionally, at the time of ILSA's enactment, Congress had separately regulated SLHCs and BHCs for over half a century and nearly 30 years, respectively.[44] As discussed in Schwab's

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[37] 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) (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].

[38] *See* ANPR Comment Letter at 7–8; NPRM Comment Letter at 4–5.

[39] *Corley v. U.S.*, 556 U.S. 303, 314 (2009) ("The Government's reading is thus at odds with one of the most basic interpretive canons, that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)) (alteration in original)).

[40] 12 U.S.C. § 5365(a)(1) (Section 165's opening subsection titled "In general: Purpose").

[41] 12 U.S.C. § 5365(b)(1)(A)(i).

[42] 12 U.S.C. § 5365(b)(1)(B)(i).

[43] 12 U.S.C. § 5365(c)(1). Note additionally that the full language of 12 U.S.C. § 5365does not include SLHCs.

[44] *See* Home Owners' Loan Act of 1933, 12 U.S.C. 1461 et seq.; Bank Holding Company Act of 1956, 12 U.S.C. 1841 et seq; ANPR Comment Letter at 10.

NPRM Comment Letter, Congress revised Section 10 of HOLA at the same time in 2010 as it enacted Section 165 of Dodd-Frank.[45] There simply would have been no need for significant Congressional debate and deliberation over whether Section 165 possibly serves "as a prohibition on applying heightened standards developed for large bank holding companies to savings and loan holding companies" if ILSA (or HOLA) had authorized heightened standards across SLHCs (or BHCs without Section 165 of Dodd-Frank).[46] The Supreme Court has struck down agency action when the agency "'claim[ed] to discover in a long-extant statute an unheralded power' representing a 'transformative expansion in [its] regulatory authority.'"[47] That would be the very case here, were the Agencies to advance an interpretation of ILSA that purports to authorize LTD requirements. The Agencies cannot claim over 40 years after the enactment of ILSA, and over a decade after Dodd-Frank, to have suddenly found the authority to avoid decades-long regulatory practices and exceptions or impose novel prudential requirements. That is the very definition of a Major Question that must await Congressional resolution.

In *West Virginia v. EPA*, the Supreme Court observed that "the history and the breadth of the authority that the agency has asserted" can "provide a reason to hesitate before concluding that Congress meant to confer such authority."[48] In cases where agencies seek to enact a novel and sweeping policy under older statutes with general authorization language, the Court has "rejected that expansive construction of the statute, concluding that Congress could not have intended to delegate such a sweeping and consequential authority in so cryptic a fashion."[49] The Agencies' attempt to apply decades-old ILSA outside its international lending supervision context to implement LTD as a form of minimum capital requirements, rather than Dodd-Frank's enhanced prudential standards, creates the exact type of extraordinary case where "both separation of powers principles and a practical understanding of legislative intent make [the Court] reluctant to read into ambiguous statutory text the delegation claimed to be lurking there."[50] The Agencies' decision to impose this regulation on all Covered Entities, including Covered IDIs, further cements it as a Major Question.

Basic principles of separation of powers caution against judicial acceptance of a reading of ILSA allowing imposition of LTD on all Covered Entities, including SLHCs as well as Covered IDIs. While the Agencies may claim that Section 3909 of ILSA stating "[t]he appropriate Federal banking agencies are authorized to interpret and define the terms used in this chapter"[51] allows the Agencies to define capital in a manner including LTD, the Supreme Court has recently demonstrated skepticism of agency interpretation of the scope of their own statutory

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[45] NPRM Comment Letter at 6.

[46] NPRM Comment Letter at 5 (quoting S. Rep. No. 111-176, at 236 (2010)).

[47] *West Virginia v. EPA*, 597 U.S. 697, 724 (2022) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)) (alterations in original).

[48] *Id.* at 721 (internal quotations omitted).

[49] *Id.* (internal quotations omitted).

[50] *Id.* (internal quotations omitted).

[51] 12 U.S.C. § 3909(a)(1).

authorization and articulated the view that "[t]he Framers also envisioned that the final 'interpretation of the laws' would be 'the proper and peculiar province of the courts.'"[52]

C. ILSA requires a nexus to international lending supervision that is absent here

The Supreme Court has long held that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[53] The Court has observed that "a statute's meaning does not always turn solely on the broadest imaginable definitions of its component words. Linguistic and statutory context also matter."[54] Even assuming that LTD amounts to capital, any pivot to ILSA to impose LTD requirements would fail because there is no nexus to international lending in the Proposal.[55]

ILSA's title—International Lending Supervision Act—and the fact that it was enacted during a significant foreign-debt crisis when countries were defaulting on debt held by U.S. banks at record levels, provide clear and unambiguous context for the statute. The Supreme Court "has long considered that the title of a statute and the heading of a section are tools available for the resolution of doubt about the meaning of a statute."[56] Yet, the Agencies provide no nexus between the Proposal and international lending practices. The Proposal cites as motivation the failures of Silicon Valley Bank, Signature Bank, and First Republic Bank,[57] all domestic banks known for domestic lending that failed due to bank runs as domestic depositors withdrew their funds. Nowhere does the Proposal mention international lending or differentiate

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[52] *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244, 2257 (2024) (quoting The Federalist No. 78 p. 525 (J. Cooke ed. 1961) (A. Hamilton)); *Loper*, 144 S.Ct. at 2266 ("The very point of the traditional tools of statutory construction—the tools courts use every day—is to resolve statutory ambiguities.").

[53] *West Virginia v. EPA*, 597 U.S. 697, 721 (2022) (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989)).

[54] *Epic Sys. Corp. v. Murphy Oil USA, Inc.*, 584 U.S. 497, 523 (2018) (internal quotations omitted).

[55] The Dodd-Frank Act also amended ILSA to require capital standards to be countercyclical. *See* Dodd-Frank Act, Pub. L. No. 111–203, § 616(c); 12 U.S.C. § 3907(a)(1); *see also* 12 U.S.C. § 1467a(g)(1); 12 U.S.C. § 1844(b). As Schwab noted in its NPRM Comment Letter, LTD is not countercyclical as Schwab would be forced to go to the market in a stressed environment to issue debt. *See* NPRM Comment Letter at 16. Congress's amending of Section 3907 of ILSA within Dodd-Frank further supports that Congress did not view ILSA as expansive enough to authorize the full scope of Dodd-Frank's enhanced prudential standards. *See supra* Section II.B.

[56] *Dubin v. United States*, 599 U.S. 110, 120-21 (2023) (internal quotations omitted). While the Court acknowledges that the "title will not, of course, override the plain words of a statute," it also agrees "a title is especially valuable where it reinforces what the text's nouns and verbs independently suggest." *Id.* at 121 (internal quotations omitted).

[57] 88 Fed. Reg. 64,527.

risk factors based on types of lending by Covered Entities or Covered IDIs. The closest the Proposal comes to grappling with these concerns is *precluding* any LTD subject to foreign law from counting towards its LTD requirements.[58] The Proposal's spurning of any supervision of international lending places its LTD requirements far outside the context of ILSA.

ILSA's grounding in international lending is undeniable. Section 3901(b) makes clear the Agencies should consult with other countries with the aim of "adoption of effective and consistent supervisory policies and practices **with respect to international lending**." Section 3903 covers the evaluation of "banking institution foreign country exposure and transfer risk" and requires this be "taken into account in evaluating the adequacy of the capital of banking institutions." Section 3904 authorizes agencies to "require a banking institution to establish and maintain a special reserve whenever . . . the quality of such banking institution's assets has been impaired by a protracted inability of public or private borrowers in a foreign country to make payments on their external indebtedness." Section 3904a requires agencies to review the risk of loans "to any highly indebted country." Section 3905 regulates fees charged "in connection with the restructuring of an international loan." Section 3906 covers disclosure "regarding material foreign country exposure in relation to assets and to capital." Section 3908 imposes an "economic feasibility evaluation of such foreign project[s]" defined as involving investments "located outside the United States or its territories and possessions." Section 3910 grants the Comptroller General audit authority that "may include a review or evaluation of the international regulation, supervision, and examination activities of the appropriate Federal banking agency" but may not include "transactions for, or with, a foreign central bank, government of a foreign country, or nonprivate international financing organization." Even Section 3907 has an international connection, as the final provision requires that "[t]he Chairman of the Board of Governors of the Federal Reserve System and the Secretary of the Treasury shall encourage governments, central banks, and regulatory authorities **of other major banking countries** to work toward maintaining and, where appropriate, **strengthening the capital bases of banking institutions involved in international lending**."

The legislative history of ILSA reinforces this clear statutory language. As stated in the House Report, "it is the intent of the Committee that the agencies will evaluate a bank's **capital** adequacy **in relation to the size and composition of the bank's international portfolio**."[59] Congress was clear that it investigated and legislated to ensure that the Agencies have the authority to properly supervise international lending, and granted authority to set minimum capital requirements in that context:

> In the Committee's view, there are few tools at the regulators [sic] disposal with which they can attempt to achieve renewed stability in financial markets while strengthening those individual commercial banks **which have loaned heavily abroad** that would not bring

[58] 88 Fed. Reg. 64,537.

[59] H.R. Rep. No. 98-175, at 40 (1983) (emphasis added).

> about a dramatic cutback in lending. One of the best options is to require banks to add to their capital base.[60]

Contemporaneous writings also interpreted ILSA's capital provisions as limited to international lending.[61] Neither Congress nor commenters equated ILSA to authorizing LTD or to actions beyond the scope of international lending supervision.

In short, the capital adequacy requirement in ILSA is best understood in the context of the Agencies' ability to supervise international lending, and not on domestically-focused LTD. Were the Agencies to advance a strained interpretation of ILSA to justify the Proposal, courts would strike it down as a clear APA violation.

III. The Supreme Court has instructed lower courts to police agency overreach

The Supreme Court in *Loper Bright Enterprises v. Raimondo* held that "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires."[62] *Loper* further held that "when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it."[63] As Schwab has raised, the Agencies have not acted within their statutory authority under ILSA nor the previously cited statutes. Should the Agencies find otherwise in promulgating a final rule, those interpretations will be entitled to no deference.

The Agencies' interpretation of ILSA allowing imposition of LTD will be met with skepticism by courts. *Loper* "makes clear that agency interpretations of statutes—like agency interpretations of the Constitution—are *not* entitled to deference. Under the APA, it thus 'remains the responsibility of the court to decide whether the law means what the agency says.'"[64] This is even more true when Agencies "change positions" regarding ambiguous terms in a statute: the Court overruled *Chevron* in part because it "allow[ed] agencies to change course even when Congress has given them no power to do so."[65] This concern only compounds "when the ambiguity is about the scope of an agency's own power—perhaps the occasion on which

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[60] *Id.* at 45–46 (emphasis added).

[61] *See* Ellen W. Smith, Note, *New Control on Global Debt: The International Lending Supervision Act of 1983*, 17 CORNELL INT'L L.J. 425, 433 (1984) ("Several provisions of the Act are designed to ensure adequate **capital** levels **for banks engaged in international lending**.") (emphasis added).

[62] 144 S.Ct. 2244, 2273 (2024).

[63] *Id.*

[64] *Id.* at 2261 (emphasis in original) (quoting *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 109 (2015) (Scalia, J., concurring in judgment)).

[65] *Id.* at 2272.

abdication in favor of the agency is *least* appropriate."[66] The Agencies' "surprise switcheroo" in statutory justification and classification of LTD would be a major change in position without Congressional authorization in an attempt to expand the Agencies' regulatory power, and will be closely scrutinized under *Loper*.

Section 3909's statement that "[t]he appropriate Federal banking agencies are authorized to interpret and define the terms used" in ILSA does not salvage the Proposal.[67] When a statute "delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits."[68] In practice, "[t]he court fulfills that role by recognizing constitutional delegations, fixing the boundaries of the delegated authority, and ensuring the agency has engaged in reasoned decisionmaking within those boundaries."[69] Even where agencies "are authorized to interpret" terms in the statute as under ILSA Section 3909, courts still must "independently interpret the statute" under *Loper*. At its most deferential, the Court has supported decisions where "'this delegation will be respected and the administrative conclusion left untouched' so long as the agency's decision constituted 'a sensible exercise of judgment.'"[70] But the Agencies here will not get any deference; courts give "no basis for deference to the agency with respect to [a] pure legal question."[71] The Agencies' broad rulemaking and creation of novel LTD requirements under the Proposal are pure legal questions.

Further, courts may find that a broad reading of Section 3907 constitutes a near-limitless delegation of interpretive authority in violation of the nondelegation doctrine. "The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government."[72] First, "[t]he interpretation of the meaning of statutes, as applied to justiciable controversies," is meant to be "exclusively a judicial function."[73] ILSA cannot be read so broadly as to delegate authority that Congress did not confer, particularly in light of the Supreme Court's holding in *Loper* which requires a clear delegation that is absent from ILSA. Further, even if Congress could be said to have delegated the interpretation of the scope of ILSA's terms, courts will not support any argument from the Agencies that ILSA allows them to both redefine "capital" under Section 3909 to encompass LTD and set an arbitrary level of "adequate capital" under Section 3907 to impose whatever standard or layers of LTD requirements the Agencies

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[66] *Id.* at 2266 (emphasis in original).

[67] 12 U.S.C. § 3909.

[68] *Loper Bright Enterprises*, 144 S.Ct. at 2263.

[69] *Id.* (cleaned up).

[70] *Id.* at 2259 (quoting *Gray v. Powell*, 314 U.S. 402, 412–13 (1941)).

[71] *Id.*

[72] *Gundy v. United States*, 588 U.S. 128, 132 (2019).

[73] *Loper Bright Enterprises*, 144 S.Ct. at 2258 (quoting *U.S. v. Am. Trucking Assns., Inc.*, 310 U.S. 534, 544 (1940)) (also citing *Soc. Sec. Bd. v. Nierotko*, 327 U.S. 358, 369 (1946); *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 681–682, n. 1 (1944)).

seek to impose. As commenters have noted in response to the Basel III Endgame proposal, "[i]f it is indeed the [A]gencies' view that there are no meaningful limits to what they can do, and no standards to guide them, then their governing statutes cannot be reconciled with the non-delegation doctrine."[74] The nondelegation doctrine has long distinguished between "important" policy issues, "which must be entirely regulated by the legislature itself," and subjects "of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."[75] By utilizing ILSA to impose LTD as a novel "capital" requirement, the Agencies clearly cross the line into important policy issues that cannot be delegated by Congress. Attempting to utilize ILSA to justify the Proposal risks a ruling that the statute itself is unconstitutional.

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The Agencies do not have statutory authority to impose LTD requirements on Covered Entities or Covered IDIs. The Agencies' potential switch to reliance of ILSA does not resolve this lack of authority, and without further notice-and-comment would constitute an independent violation of APA requirements. Schwab requests that at a minimum the Agencies re-issue the Proposal with a clear articulation of the statutory authority they intend to rely on, allowing public notice-and-comment and understanding of the Agencies' reasoning. Should the Agencies proceed with promulgating the Proposal, Schwab requests that any LTD requirements exclude SLHCs for lack of authority as articulated in this comment letter and Schwab's ANPR and NPRM Comment Letters; comply with the statutory tailoring requirements of Section 165 of Dodd-Frank; and permit Covered Entities to comply with any LTD requirement at the holding company or IDI level, as articulated in Schwab's NPRM Comment Letter.[76]

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[74] Bank Policy Institute, Financial Services Forum, Securities Industry and Financial Markets Association, and U.S. Chamber of Commerce, Comment Letter Re: Regulatory Capital Rule: Large Banking Organizations and Banking Organizations with Significant Trading Activity (Federal Reserve Docket No. R-1813, RIN 7100-AG64; FDIC RIN 3064-AF29; Docket ID OCC-2023-0008) (Jan. 12, 2024), https://bpi.com/wp-content/uploads/2024/01/Joint-Trades-Legal-Comment-on-Basel-III-Endgame-Proposal-FINAL.pdf at 52; *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality) ("If the Government was correct in arguing that neither § 3(8) nor § 6(b)(5) requires that the risk from a toxic substance be quantified sufficiently to enable the Secretary to characterize it as significant in an understandable way, the statute would make such a 'sweeping delegation of legislative power' that it might be unconstitutional." (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 539 (1935))).

[75] *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825).

[76] NPRM Comment Letter at 3, 10–19.

Schwab greatly appreciates the opportunity to submit this supplemental 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,

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The Honorable Philip N. Jefferson, Vice Chair
The Honorable Michelle W. Bowman, Governor
The Honorable Christopher J. Waller, Governor
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