DANGEROUS DEFECTS IN RESOLUTION PLANNING

FOR GLOBAL SYSTEMICALLY IMPORANT BANKS

By Thomas Moers Mayer[1]

Abstract: The Dodd-Frank Act requires each Global Systemically Important Bank ("GSIB") to submit, and the regulatory agencies to approve, a plan for resolution of its holding company's insolvency in a chapter 11 bankruptcy. The eight American GSIBs have adopted resolution plans that provide for the holding company to assume the losses of insolvent subsidiaries, so that only the holdco enters "resolution" -- a "Single Point of Entry" ("SPOE"). This appears consistent with Dodd-Frank's command that a holdco serve as a "source of strength" for its insured banks. Unfortunately, the agencies have approved GSIB resolution plans that fail to assure insured bank subsidiaries of holdco support because the plans are based on defective secured support agreements. The agreements are defective because they can be amended without prior regulatory consent, they are secured by undisclosed and changeable collateral that can be deployed at management's discretion, and they are not specifically enforceable in the holdco's bankruptcy. The agencies could remedy all of these defects without new legislation or regulation, by requiring, as part of their annual resolution plan review, amendments to each GSIB's support agreement giving the agencies the right to enforce the agreement for the benefit of the GSIB's bank and publicly disclosing (and maintaining) collateral pledged to support the bank. The failure of the agencies to do so leaves GSIB management the power to allocate holdco resources away from insured banks and to non-bank affiliates, exposing the FDIC to greater losses and contravening Dodd-Frank's source-of-strength mandate.

For 13 years, bank regulators and industry participants have proposed resolving insolvent "Global Systemically Important Banks" ("GSIBs") in a single judicial or administrative proceeding of the ultimate GSIB holding company ("holdco") – the "Single Point of Entry", or SPOE. Each material insolvent subsidiary, including a GSIB's insolvent insured bank, would

[1] Partner, Kramer Levin Naftalis & Frankel, LLP. The author is indebted to James McNamara, intern, for researching bank filings while finishing his masters in finance at Fordham University's Gabelli School of Business, and to Brian Boyle, Director of Knowledge & Research Services at Kramer Levin, for his Excel analyses of bank financial filings. The author thanks Professors Michael Ohlrogge, Edward Janger and Howell Jackson for their comments on, and criticisms of, drafts of this paper. They retain disagreements with the author, and their generosity in providing comments should not be interpreted as an endorsement of any portion of this paper. The author also thanks the lawyers who expressed their own serious disagreements but have not confirmed permission to identify them as critics. The views expressed herein are those of the author only and not of his firm.

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"transmit" its losses to the holdco, become solvent, avoid resolution and continue to operate and pay depositors, customers and other creditors without government assistance. The transmitted losses would be borne only by holdco investors and creditors.

How an insolvent bank can transmit its losses to the holdco, and how much loss the holdco is able and obligated to assume, have never been clear.

The FDIC, uninsured depositors and other bank creditors cannot rely on a holdco, no matter how well capitalized, to "assume" a bank subsidiary's losses or provide liquidity unless the holdco has claims against the bank it can relinquish (to increase bank capital), non-bank assets it can contribute (to increase bank capital and, possibly, liquidity), and an enforceable obligation to do so. A holdco's obligation to assume losses or contribute assets is meaningless unless the obligation is specifically enforceable in a holdco bankruptcy.

The FDIC and the Fed[2] (the "Agencies") have addressed this problem by allowing each of the eight American GSIBs to adopt resolution plans and "secured support agreements" that commit each holdco to support its material subsidiaries. However, each GSIB's resolution plan and each secured support agreement is defective.

The resolution plans are defective because they contain no public disclosure of how much bank loss the holdco is committed and able to assume. Without public disclosure of holdco support for a troubled bank, bank depositors have no reason to leave their money in the bank, bank noteholders have no reason to roll-over maturing paper and bank borrowers have no reason

[2] Shorthand for the Federal Deposit Insurance Corporation and the Board of Governors of the Federal Reserve.

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to refrain from drawing down their credit lines. Without public disclosure of holdco support, a troubled bank is unlikely to avoid receivership.[3]

The secured support agreements are described but not publicly filed; what is public suggests that the agreements can be amended without prior regulatory approval. The amount of collateral securing the agreements is not publicly disclosed, and there is no public disclosure of any restriction on the ability of a GSIB to reduce collateral pledged to support its bank or reallocate that collateral to support non-bank subsidiaries. Some secured support agreements contain unsecured commitments to transfer unpledged assets. These commitments can be breached in a holdco bankruptcy (and some transfer assets not to the bank but to a new holdco). Public disclosures contain no indication that the FDIC can enforce commitments to an insured bank except by putting the bank into a receivership under the Federal Deposit Insurance Act (whose avoidance is the whole point of SPOE). These defects will hinder if not preclude the FDIC from using unpledged holdco assets to cover FDIC losses from a troubled bank.

The Agencies could fix these defects without legislation or regulation. Under section 165(d)(4) of the Dodd-Frank Act[4] ("Dodd-Frank"), a GSIB holdco must submit a resolution plan every two years for Fed approval, and its insured bank must submit a resolution plan on alternating years for FDIC approval,[5] -- with a substantial portion disclosed in public filings.[6] As part of the annual approval process, the Fed and the FDIC could require each GSIB holdco and

[3] *See* Lubben, *The Impossibility of TLAC*, 23 J. LEGIS. & PUBLIC POLICY 45, 62-63. Lubben suggests that the filing of the GSIB holdco would cause bank runs in any event. Lubben focuses on the likelihood of holdco bail-outs; he assumes that secured support agreements are enforceable. *Id*. at 61.

[4] 12 U.S.C. § 5365(d)(4).

[5] 12 C.F.R. §§ 243(a)(3)& 360.10.

[6] This paper uses "resolution plan" to refer to the disclosed provisions.

its insured bank[7] to enter into, and publicly disclose, enforceable "source of strength" agreements to provide a disclosed amount of support for its insured bank.

Jackson and Massman suggested that GSIBs execute enforceable source-of-strength agreements in 2017,[8] but they did not anticipate the defects in GSIBs' secured support agreements – in part because they, like most other writers on SPOE, focused on defeating holdco creditors' rights to retain assets in the holdco rather than restricting holdco management's power to allocate holdco assets away from the bank to non-bank subsidiaries. Subsequent writers have not addressed the FDIC's inability to enforce secured support agreements outside of a bank receivership and the FDIC's inability enforce unsecured commitments even as the bank's receiver.[9]

Fixing these defects is important not just for the GSIBs, whose failure is unlikely, but for the resolution of non-GSIBs, whose failure is much more likely. In the wake of 2023's bank failures, regulators,[10] academics[11] and politicians[12] have suggested that smaller banks be required to adopt resolution plans as the GSIBs have done, [13] without addressing the defects in GSIB resolution plans and GSIB secured support agreements, and less-than-GSIB banks have argued

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[7] Bank America Corp. owns more than one bank. Whether a holdco owns one or more banks, the analysis of this paper remains the same. Therefore the paper refers to each holdco as the owner of one insured bank, even if it owns more than one.

[8] H. Jackson & S. Massman, *The Resolution of Distressed Financial Conglomerates*, THE RUSSELL SAGE FOUNDATION JOURNAL OF THE SOCIAL SCIENCES Vol. 3 No. 1 48, 65-66 (Jan. 2017).

[9] *Cf.* A. Levitin, *Samson's Toupee: Banking Law's Source-of-Strength Doctrine*, 41 YALE J. REG. 1078 (2024) (hereinafter "Levitin, '*Samson's Toupee*'). Levitin compares the GSIBs' agreements, which he assumes are enforceable in bankruptcy, against non-GSIBs' lack of any agreements.

[10] Michael S. Barr, Fed Vice Chair for Supervision, *Review of the Federal Reserve's Supervision and Regulation of Silicon Valley Bank* (April 28, 2023) ("*Fed SVB Review*").

[11] Edward Janger, *Equity for Intermediaries: The Resolution of Financial Firms in Bankruptcy And Bank Resolution*, 41 YALE J. REG. 965 (2024) (hereinafter, "Janger, '*Equity for Intermediaries*')..

[12] The White House, *FACT SHEET: President Biden urges Regulators to Reverse Trump Administration Weakening of Common-Sense Safeguards and Supervision for Large Regional Banks,* March 30, 2023, https://archive.is./SD6ne ;

[13] *See* Janger, *Equity for Intermediaries, supra* n. 11 at 997.

that they should be allowed to adopt GSIB resolution plans and agreements in lieu of capital requirements otherwise proposed by the Agencies.[14]

This paper describes the development of SPOE resolution plans and secured support agreements generally in Part I. Part II recounts the development, enforcement and current state of the "source of strength" doctrine. Part III explores defects in GSIB resolution plans, GSIB secured support agreements and the FDIC's Dodd-Frank receivership powers. Part IV suggests remedies for the defects that the Agencies could implement immediately by requiring amended secured support agreements as part of their annual review of resolution plans..

The paper concludes with opinions on the dangers, futility and fundamental flaw of the SPOE structure, which may be summarized as follows:

- SPOE treats holdco and bank as separate corporate entities so that holdco resolution may proceed without affecting the bank, but at the same time treats holdco and bank as the same corporate entity by assuming that holdco capital absorbs bank losses.
- In the absence of source-of-strength agreements, SPOE is dangerous because it leaves holdco resources to deploy as management sees fit under the shelter of a bankruptcy case, even if the deployment increases losses to bank depositors and potentially the deposit insurance fund.
- SPOE is futile unless the holdco can immediately provide liquidity to save an insolvent bank, and there is no reason to believe any holdco can do so.

[14] See January 14, 2024 Letter from The Bank Policy Institute and American Bankers Association to the Agencies commenting on the 2023 Proposed Large Bank Rule, available at https://bpi.com/wp-content/uploads/2024/01/ABA-BPI-Basel-III-Endgame-Comment-Letter-Final-2024.01.16.pdf, and June 12, 2024 supplemental letter from The Bank Policy Institute, available at https://bpi.com/wp-content/uploads/2024/06/BPI-Supplemental-Comment-CCF-2024-06-12.pdf

SPOE pursues the unattainable goal of avoiding bank bailouts rather than the attainable goal of diminishing the cost of such bailouts. The laws of the United States mandate the latter goal and give the Agencies the tool to achieve it without further regulation or legislation. The Agencies should execute their statutory mandate.

I. THE ROAD TO SPOE.

The Insufficiency of a Strong Holdco

The financial crisis of 2008 forced major American financial institutions to seek funding from the Fed for their "runnable liabilities" – principally, deposits, customer accounts, short-term debt, swaps and other derivatives. Faced with political and intellectual condemnation of big bank bailouts, regulators world-wide addressed "too big to fail" through regulatory initiatives developed by the Financial Standards Board (FSB) – an affiliate of the Bank for International Settlements in Basel, chartered in 2009[15] and comprised of senior bank regulators and policy makers from the world's 20 largest economies.

The FSB proposed "key attributes" for "resolution" of GSIBs[16] in 2011 (and the FDIC and the Bank of England collaborated on a contemporaneous paper) with the following salient features, restated by the Fed in 2020[17]:

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[15] The FSB is the successor to the Financial Stability Forum, established in 1999 by the Bank for International Settlements in Basel, and comprised of the finance ministers and central bank governors of the seven largest world economies (the "G7"). In 2012, the FSB was re-chartered as an Association under Swiss Law in 2012 and continues to be funded by the Bank for International Settlements. Report to the G20 Los Cabos Summit on Strengthening FSB Capacity Resources and Governance, 18-19 June 2012, available at https://www.fsb.org/wp-content/uploads/r_120619c.pdf

[16] The 2011 FSB acronym was "SIFIs" – Systemically Important Financial Institutions.

[17] *Total Loss-Absorbing Capacity, Long-Term Debt and Clean Holding Company Requirements for Systemically Important U.S. Bank Holding Companies and Intermediate Holding Company of Systemically Important Foreign Banking Organizations*, 85 Fed. Reg. 17003 n.3 (March 26, 2020).

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The GSIB holding company should be "***clean***" – that is, it should have few employees, no operations other than the management of subsidiaries, only financial assets such as securities and interests in (or debt of) subsidiaries, and only a limited amount of "runnable liabilities" such as short-term debt, debt subject to acceleration, and derivatives.

The GSIB holding company should be ***well capitalized***, not just with equity but with a special layer of long-term debt ("LTD") with no defaults other than insolvency or non-payment -- preferably (in Europe) automatically converted to equity or written off by regulatory action ("bailed-in"), or (in the United States) subordinated to all other debt of the holdco. The book value of common equity[18] plus LTD would create "Total Loss Absorbing Capacity", or TLAC. The FSB and the Fed today set TLAC at a minimum of 18% of the GSIB's consolidated on-balance sheet "risk weighted assets."[19] Roughly one third of the TLAC must be composed of LTD.[20] If a GSIB's losses deplete its common equity, rendering the GSIB insolvent and subject to "resolution" in a judicial or administrative proceeding, the LTD would absorb further losses in the resolution.[21]

Finally, the FDIC and the Bank of England jointly proposed adoption of a ***"Single Point of Entry" ("SPOE")*** strategy in which only a GSIB's holdco would seek resolution in a bankruptcy or administrative proceeding, sparing its bank from receivership because all losses

[18] This paper uses "common equity" to refer to the common equity plus retained earnings; the technical term is "Common Equity Tier 1", or ("CET-1").

[19] Different categories of assets have different "risk weights" applied to their book values. For example, a real estate construction loan – an inherently risky asset – has a risk weight of 200%, so that bank with nothing but real estate construction loans would have to reserve 18% x 200%, or 36% of the booked amount of its loans. TLAC must also exceed 6% of the GSIB's on-balance sheet total assets and 3% of the GSIB's on- and off-balance sheet total assets. A U.S. Treasury bond has a risk-weight of zero but would count towards the 6% of total assets reserve.

[20] The Fed requires LTD to exceed 6% of risk weighted assets, which is roughly one-third of the 18% TLAC required by the FSB.

[21] *Total Loss-Absorbing Capacity, Long-Term Debt and Clean Holding Company Requirements for Systemically Important U.S. Bank Holding Companies and Intermediate Holding Company of Systemically Important Foreign Banking Organizations*, 85 Fed. Reg. 17003 n.3 (March 26, 2020).

would be borne by the holdco and holdco investors.[22] Bank America Corporation, Citicorp, Goldman Sachs and JP Morgan & Company were early proposers of SPOE resolution plans; Bank of New York Mellon and Wells Fargo Corporation did so after the Agencies rejected their original multiple-point-of-entry resolution plans.[23]

Most resolution planning has focused on simplifying GSIB corporate and operational structures – so that operating subsidiaries continue to operate without interruption after a holdco failure, and lines of business can be readily separated and sold to maximize the value of the GSIB and minimize disruption to the financial system. These elements of resolution planning are unquestionably beneficial to all parties, including the regulators who must administer resolution. Janger is right to argue for the application of similar resolution planning for less-than-GSIB banking firms,[24] and the Agencies are taking steps to do precisely that.

But Agencies and commentators have not considered how success in the financial, corporate and operational restructuring of GSIBs has diminished the relevance of holdco resolution and the utility of SPOE.

Resolution plans which create a perfectly "clean" and well capitalized" holdco have created an entity whose "resolution" is irrelevant. To illustrate: assume the holdco has no debt at all. It is 100% capitalized with equity and it has no contingent liabilities. Such a holdco cannot be insolvent. It cannot fail; it cannot threaten the stability of the financial system. If its bank becomes insolvent, the holdco's chapter 11 would be unnecessary and meaningless.

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[22] BANK OF ENGLAND & FEDERAL DEPOSIT INSURANCE CORPORATION, JOINT PAPER, RESOLVING GLOBALLY ACTIVE, SYSTEMICALLY IMPORTANT, FINANCIAL INSTITUTIONS (Dec. 10, 2012).

[23] The Agencies have since disavowed any preference for SPOE vs MPOE in their guidance for large less-than-GSIB banking organizations. *Guidance for Resolution Plan Submissions of Domestic Triennial Full Filers* 89 Fed. Reg. 66388, 66389 (Aug. 15, 2024).

[24] See Janger, *Equity for Intermediaries*, *supra*, n. 11.

Assume the debt-free holdco has $400 billion in book value of holdco assets, including (among other assets) $100 billion book value of its subsidiary bank's equity and $200 billion in book value of its equity in a broker/dealer. The bank is entirely capitalized with equity. Interest rates rise causing the bank to lose over $100 billion over nine months from depreciation in its portfolio of low-coupon long-dated government securities. The broker/dealer makes $100 billion over the same nine-month period by shorting low-coupon long-dated government securities. Unless the holdco is obligated to sell (or borrow against) the increased value of its equity in the broker/dealer and downstream proceeds to the bank, there is no reason to expect that the holdco will contribute any amount of the broker/dealer's value to save the bank.[25] The "well capitalized" holdco is meaningless.

The "external LTD" requirement is also insufficient for SPOE. To illustrate: assume the holdco has $25 billion in external LTD and $375 billion in equity. The bank loses $400 billion and becomes insolvent. Commentators assume that the holdco's write-down of its $25 billion in external LTD somehow magically restores $25 billion in equity to the bank.[26] It does nothing for the bank. Only a write-down of ***<u>internal</u>*** LTD – LTD owed to the holdco – would be relevant to the bank.[27] Just as external LTD provides a cushion for the resolution of the holdco after its equity capital is exhausted, so internal LTD provides a cushion for the recapitalization of the

[25] Levitin assumes that each GSIBs' bank constitutes a sufficiently great share of the GSIB's value that the GSIB's abandonment of the bank is unthinkable. Levitin, *Samson's Toupee* at 1117-18. There is no basis for this assumption. Goldman Sachs' commercial bank accounts for a fraction of Goldman's enterprise value, as witness Goldman's recent efforts to downsize or sell its bank. The same could be said of Morgan Stanley and (on a non-GSIB level) The Charles Schwab Corporation.

[26] *See, e.g.*, J. Sommer, *Why Bail-in? And How!*, available at https://www.newyorkfed.org/medialibrary/media/research/epr/2014/1412somm.pdf/1000

[27] *See The Bank of* England's *Approach to Resolution*, 47 (Dec. 15, 2023), available at https://www.bankofengland.co.uk/paper/2023/the-bank-of-englands-approach-to-resolution; *E Pluribus Unum: single vs. multiple point of entry* (Dec. 03, 2018), available at https://www.moneyandbanking.com/commentary/2018/12/2/e-pluribus-unum-single-vs-multiple-point-of-entry-resolution; Dewatripont, Mathis, Montigny, Marie, Nguyen, Gregory, *When Trust is not enough: Bank Resolution, SPE, Ring-fencing and group support*, NBB Working Paper No. 403, NATIONAL BANK OF BELGIUM, BRUSSELS (2021) at 13 & n.17; available at .

subsidiary bank. The FDIC would, presumably, put the bank into receivership after bank losses exhaust the bank's equity capital but before the losses exhaust the bank's internal LTD. ***External*** holdco LTD is irrelevant. Only the bank's ***internal*** LTD matters.

The Fed's 2015 release on the proposed TLAC Rule admitted as much (emphasis added):

> "Under the SPOE resolution strategy, severe losses must be passed up from the operating subsidiaries that initially incur them to the covered holding company, and then on to the eligible external TLAC holders (in the case of a covered BHC[28]) or the foreign parent (in the case of a covered IHC[29]). Both steps are necessary to achieve the key goal of the SPOE resolution strategy: Allowing material operating subsidiaries to continue to operate normally by ensuring that losses that would otherwise fall on their creditors (potentially sparking contagious runs and other generators of financial instability) will instead be borne by the holders of the TLAC issued by the covered holding company. The proposed rule is intended to ensure that covered holding companies issue a sufficient amount of loss-absorbing resources to absorb such losses, ***but the proposed rule does not ensure that firms have in place adequate mechanisms for transferring severe losses up from their operating subsidiaries to the covered holding company – that is domestic internal total loss-absorbing capacity ("domestic internal TLAC")***.
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> ***The Board is therefore considering the costs and benefits of imposing domestic internal TLAC requirements between covered holding companies and their subsidiaries***." [30]

In its 2017 release adopting the final TLAC rule, the Fed retreated.

With respect to intermediate domestic holdcos of foreign GSIBs, the Fed required internal TLAC ("iTLAC") at 16% of the intermediate holdco's risk weighted assets, of which 6% would be internal LTD issued to the foreign parent.

But the Fed promulgated no iTLAC requirements for domestic banks owned by domestic GSIBs.

With respect to domestic banks owned by domestic GSIBs, the Fed acknowledged that iTLAC "would complement this final rule." The Fed reported that it had received a number of

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[28] A "covered BHC" a GSIB holding company domiciled in the United States.
[29] A "covered IHC" is the foreign-owned intermediate holdco of a United States bank.
[30] 80 Fed. Reg. 74926 at 74948 (Nov. 30, 20215)

comments on iTLAC for domestic banks owned by domestic GSIBs. But the Fed took no action following its 2017 release.

The Fed again considered iTLAC in connection with its review of resolution plans, and again ducked the issue in its 2019 Final Guidance on Resolution Plans:

> While the capital and liquidity sections of the final guidance remain unchanged from the proposed guidance and the 2016 guidance, ***the Agencies intend to provide additional information on resolution and internal loss absorbing capacity in the future***. Accordingly, while certain concerns raised by commenters in connection with the proposed guidance have not resulted in changes to the capital and liquidity sections of the final guidance, the Agencies will consider these comments as they determine what future actions should be taken in these areas. The Agencies expect that any future actions in these areas, whether guidance or rules, would be adopted through notice and comment.[31]

The Fed's 2020 release on the adoption of Regulation YY setting TLAC and external LTD for GSIBs made no reference at all to iTLAC or internal LTD.[32]

By contrast, the Agencies proposed a rule in 2023 for large holdcos other than GSIBs (holdcos with more than $100 billion in assets) that ***did*** prescribe iTLAC and internal LTD. The proposed rule would require each large holdco to issue and maintain external LTD equal to at least the greater of 6% of its consolidated risk weighted assets and 3% of its total assets,[33] and purchase ***and maintain a matching amount of internal (and subordinated) LTD from its bank*** – similar to the requirements for foreign GSIBs' intermediate holding companies (the "2023 Proposed Rule"[34]).

On August 15, 2024, the Agencies issued Final Guidance for Resolution Plans for "Triennial Full Filers" – less-than-GSIB large banking organizations filing resolution plans every

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[31] 84 Fed. Reg. 1438, 1439 (Feb. 4, 2019)

[32] *Total Loss-Absorbing Capacity, Long-Term Debt and Clean Holding Company Requirements for Systemically Important U.S. Bank Holding Companies and Intermediate Holding Company of Systemically Important Foreign Banking Organizations*, 85 Fed. Reg. 17003 (March 26, 2020).

[33] There is a third "liquidity coverage ratio" test, but it is complicated to explain; as the rule requires iTLAC LTD at the highest of the three tests, the liquidity coverage ratio test is not relevant to this paper.

[34] 88 Fed. Reg. 64524 (Sept. 19, 2023).

three years[35] -- indicating that iTLAC LTD is still on the table for those banking organizations (emphasis added):

> A firm's external LAC should be complemented by appropriate positioning of loss-absorbing capacity within the firm (i.e., internal LAC), ***consistent with any applicable rules requiring prepositioning resources at IDIs[36] in the form of long-term debt. After adhering to any requirements related to prepositioning long-term debt at IDIs***, the positioning of a firm's remaining resources should balance the certainty associated with pre-positioning resources directly at material entities with the flexibility of provided by holding recapitalization resources at the parent (contributable resources) to meet unanticipated losses at material entities.[37]

But neither the Fed nor the FDIC has proposed a similar requirement for domestic GSIBs, and public reporting discloses little or no iTLAC LTD.[38]

Secured Support Agreements

Instead of maintaining iTLAC LTD, the GSIBs adopted an opaque and unreliable substitute for iTLAC LTD: the Secured Support Agreement.

In November 2015, the FSB finalized a standard requiring each GSIB's bank to maintain iTLAC of at least 75% of the external TLAC that would be required if the bank was a stand-alone company.[39] As the FSB requires each GSIB to maintain external TLAC of 18% of its consolidated risk weighted assets, the iTLAC requirement for a GSIB's bank would be at least 13.5% of the bank's risk weighted assets. The discrepancy between external TLAC LTD of 18%

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[35] "Triennial Full Filers" are "Category II" and "Category III" firms that are not US GSIBs. Category II firms are have more than $700 billion in total consolidated assets or more than $100 billion and more than $75 billion in cross-jurisdiction activities. Category III firms are firms that have more than $250 billion in total consolidated asset, ***or*** more than $100 billion in total consolidated assets ***and*** more than $75 billion in any of the following: weighted short-term wholesale funding, non-bank assets or off-balance sheet exposure. 12 CFR §§ 243.4(b)(1) & 252.5(c)&(d).

[36] "IDI": Insured Depository Institutions.

[37] *Guidance for Resolution Plan Submissions of Domestic Triennial Full Filers* 89 Fed. Reg. 66388, 66404 (Aug. 15, 2024).

[38] Bank America Corporation's 10K at 103 shows no iTLAC LTD for Bank of America, N.A.

[39] Technically, the FSB requires each GSIB's "material subgroup" of companies to maintain internal TLAC of no less than 75%-90% of external TLAC that would be required were the "material subgroup" to be the entity subject to an insolvency "resolution". Each American GSIB's insured bank and its subsidiaries would qualify as a "material subgroup".

of risk-weighted assets and iTLAC of 13.5% of risk-weighted assets would, presumably, allow the holdco to stockpile capital of 4.5% of risk-weighted assets for deployment to the bank.

The FSB proposed Guiding Principles for iTLAC at the end of 2016[40] and finalized the principles six months later,[41] suggesting that that 33% of iTLAC consist of internal LTD[42] -- i.e., 4.5% of risk weighted assets.[43]

However, the FSB also suggested that regulators may "agree to substitute on-balance sheet internal TLAC with internal TLAC in the form of collateralized guarantees"[44] from the holdco, with the collateral consisting of high quality liquid assets ("HQLA").[45]

The GSIBs adopted a variant of this suggestion in resolution plans approved by the Agencies.

In the United States, bank holding companies are eligible for reorganization under chapter 11 (and liquidation under chapter 7) of the Bankruptcy Code. Section 165(d) of the Dodd-Frank[46] requires each GSIB holdco to submit to the Fed a plan for the GSIB holdco's resolution in a bankruptcy proceeding (a "resolution plan"). Each GSIB holdco must submit a resolution plan to the Fed every two years and its insured bank must submit a resolution plan to the FDIC in alternating years. If a GSIB fails to get approval of its resolution plan, the Fed and

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[40] FSB, Guiding Principles on the Internal Total Loss-absorbing Capacity of GSIBs ("Internal TLAC") Consultative Document (16 December 2016), available at https://www.fsb.org/wp-content/uploads/Guiding-Principles-on-the-Internal-Total-Loss-absorbing-Capacity-of-G-SIBs.pdf

[41] FSB, Guiding Principles on the Internal Total Loss-absorbing Capacity of GSIBs ("Internal TLAC") (6 July 2017), Available at https://www.fsb.org/wp-content/uploads/P060717-1.pdf

[42] *Id.*, Guiding Principle 8: Internal TLAC composition, at p. 16

[43] *FSB iTLAC Principles*, p. 7 ("external TLAC in the form of senior debt might be provided as internal TLAC to material sub-groups in the form of subordinated debt").

[44] *Id*., Guiding Principle 9: Collaterised guarantees, at p. 17.

[45] HQLA are securities issued or guaranteed by the United States Treasury, a federal agency or the Federal National Mortgage Association or Federal Home Loan Bank Corporation.

[46] 12 U.S.C. § 5365(d).

FDIC may jointly impose more stringent capital, leverage, or liquidity requirements, or restrictions on the growth, activities or operations of the GSIB holdco or the GSIB bank.[47]

The Agencies have pushed the GSIBs to adopt SPOE resolution plans which provide in general terms (with material variations discussed below) as follows.

Each GSIB holdco has transferred (and has agreed to continue to transfer) financial assets (securities, intercompany notes and/or receivables, and "cash"[48]) to an intermediate holdco ("fundco"[49]) in return for funding notes which are subordinated to fundco's other obligations and which are automatically forgiven upon the holdco's resolution. Fundco in return has entered into an agreement, secured by the transferred assets, to provide capital and liquidity support to the GSIB's material subsidiaries, including the GSIB's insured bank. Fundco has no obligations other than its obligations under the secured support agreement.

Each GSIB holdco has further agreed to transfer substantially all of its remaining assets (principally, the equity interests in non-bank subsidiaries) to fundco or to a newly formed holdco, either immediately before or after filing its chapter 11 petition.

To secure their agreements, holdco and fundco have granted a security interest in substantially all of their respective assets other than equity interests in non-bank subsidiaries. These agreements are collectively referred to herein as a "Secured Support Agreement."[50]

Under the Secured Support Agreement, fundco is "contractually bound" upon the occurrence of certain triggering events to provide liquidity to material subsidiaries in need of

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[47] Dodd-Frank § 165(d)(5)(A), 12 U.S.C. § 5365(d)(5)(A).

[48] I put "cash" in quotes because "cash" exists in the form of deposits at a bank – and if the deposits are at the holdco's bank, they are nothing more than priority claims against the bank.

[49] Resolution plans often use the term "intermediate holding company", or "IHC". But there are many different intermediate holding companies in bank regulation. This paper is concerned only with the company whose sole function is to hold assets to support operating subsidiaries, and therefore uses the term "fundco".

[50] Goldman Sachs Group Inc.'s resolution plan refers to its agreement as a "Capital and Liquidity Support Agreement" – a difference in terms which is interesting as discussed below.

liquidity and to forgive (or convert to equity) debt of material subsidiaries in need of capital. Where the fundco is owned by the holdco, the Secured Support Agreement is the vehicle by which the holdco and its investors bear losses at a GSIB's bank: the holdco's equity in fundco diminishes in value as fundco provides liquidity or capital support to operating subsidiaries, and holdco loses substantially all of the rest of its assets to fundco immediately before the holdco's bankruptcy so that fundco may continue to support operating subsidiaries such as the bank.

The Secured Support Agreement appears to have distinct advantages over iTLAC LTD. The write-down of a bank's iTLAC LTD would recapitalize the bank, but it would do nothing to help liquidity. If the Secured Support Agreement was collateralized with HQLA, the bank can obtain first liquidity (from borrowing under the agreement funded by the sale of pledged HQLA) and then capital (through the write-down of the borrowing).

If the Secured Support Agreement's collateral included pre-existing deposits at the bank, intercompany advances to the bank or notes issued by the bank, fundco's forgiveness of such deposits, advances or notes (or the conversion thereof to bank equity) would give the bank everything it would receive from subordination of iTLAC LTD.

If the Secured Support Agreement provided for the holdco to sell its equity in non-bank subsidiaries and contribute the proceeds to the insured bank, it would provide both capital and liquidity to the insured bank, thereby enhancing the bank's chance of avoiding resolution and diminishing losses otherwise borne by uninsured depositors or the FDIC.

Indeed, the Secured Support Agreement appears at first blush to be the GSIB holdco's contractual fulfillment of its obligation under Section 616 of Dodd-Frank[51] and the Fed's Regulation Y,[52] to be a "source of strength" for its bank.

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[51] Section 38A of the Federal Deposit Insurance Act, 12 U.S.C. § 1831o-1.
[52] 12 C.F.R. § 225.4(a).

Appearances are deceiving. Assuming the public information about Secured Support Agreements is not only materially correct but also materially complete, Part III shows that there is no pledged HQLA, that there is no restriction on the withdrawal of pledged deposits or the prepayment of pledged intercompany notes (which would defeat the pledge), that holdco's unsecured agreement to transfer unpledged equity to fundco is not specifically enforceable in a holdco bankruptcy, that the Secured Support Agreement is amendable without prior Agency consent and that the Agencies have no ability to enforce a Secured Support Agreement outside of resolution – all loopholes enabling circumvention rather than execution of a GSIB holdco's obligation to serve as a "source of strength" for its insured bank.

II. "SOURCE-OF-STRENGTH"

Reg Y & MCorp.

Forty years ago, the Federal Reserve Board adopted Regulation Y ("Reg Y"), which provides as follows:

> (1) A bank holding company shall serve as a source of financial and managerial strength to its subsidiary banks and shall not conduct its operations in an unsafe or unsound manner.[53]

In 1987 the Fed dilated on the "source of strength" in a "Policy Statement:"

> [I]t is the Board's policy that a bank holding company should not withhold financial support from a subsidiary bank in a weakened or failing condition when the holding company is in a position to provide the support. A bank holding company's failure to assist a troubled or failing subsidiary bank under these circumstances would generally be viewed as an unsafe and unsound banking practice or a violation of Regulation Y or both. *Where necessary, the Board is prepared to take supervisory action to require such assistance*.[54] (Emphasis added).

Shortly thereafter the Fed and FDIC collaborated in FDIC's seizure of the MBank subsidiaries of holding company MCorp. and the Fed initiated administrative proceedings under Reg Y, including a temporary "cease and desist" order directing MCorp to use "all of its assets to

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[53] Reg. Y 4-012(a)(1), 12 C.F.R. 225.4(a)(1) (1983).
[54] 52 Fed. Reg. 15707 (1987) (emphasis added).

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provide capital support to its Subsidiary Banks in need of additional capital."[55] MCorp and its creditors put MCorp into chapter 11 bankruptcy before the Fed's order could take effect. The bankruptcy case was removed to federal district court, which held that Bankruptcy Code's "automatic stay" barred the Fed's proceedings. The Fifth Circuit disagreed, finding that the Fed's proceedings constituted regulatory enforcement exempt from the automatic stay,[56] but then held that the Fed lacked statutory authority to adopt Reg Y. The Supreme Court agreed that the Fed's proceeding was exempt from the automatic stay but dismissed MCorp's challenge to Reg Y as premature: MCorp had to wait for the Fed to conclude its proceedings with a final order and only then seek review of Reg Y.[57] There never was a final order. The Board of Governors terminated its administrative proceeding after finding that MCorp had complied with its "source of strength" order.[58]

Dodd-Frank

Twenty years after MCorp.'s challenge to the validity of Reg Y and the "source of strength" doctrine, Section 616 of the Dodd-Frank Act in 2009 amended Section 38A of the Federal Deposit Insurance Act ("FDIA") to read as follows:

> (a) HOLDING COMPANIES -- The appropriate Federal banking agency for a bank holding company or savings and loan holding company shall require the bank holding company or savings and loan holding company to serve as a source

[55] *Board of Governors of the Fed. Reserve Sys. v. MCorp Fin.,* 502 U.S. 32, 35 (1991).

[56] 11 U.S.C. § 362(b)(4).

[57] The Fed issued three temporary cease-and-desist orders against MCorp, including the order compelling MCorp. to downstream its assets. MCorp. timely challenged to temporary cease-and-desist orders in the U.S District Court for the *Northern* District of Texas, and the Fed agreed to suspend enforcement of the temporary cease & desist order while the subsidiary banks sought assistance from the FDIC. The FDIC denied assistance, put the banks into receivership and the holding company's bankruptcy in the *Southern* District of Texas followed. The debtor's adversary proceeding did not challenge the temporary cease & desist order. The Supreme Court therefore did not address it: "The current status of this order is unclear. See Tr. of Oral Arg. 22-25, 41-42. We address only MCorp's effort to enjoin the Board's administrative proceedings and express no opinion on the continuing vitality or validity of any of the temporary cease-and-desist orders." 502 U.S. 36, nn. 5-6.

[58] Leonard Bierman & Donald R. Fraser, *MCorp. And the Future of the Source of Strength Doctrine*, 110 BANKING L.J. 145, 153 (1993), citing & quoting *In the Matter of MCorp.*, Board of Governors of the Federal Reserve System, Docket No. 88-062-B-A2, 88-062-C1-HC, 88-062-C3-HC (June 15, 1992) ("*Bierman & Fraser*").

> of financial strength for any subsidiary of the bank holding company or savings and loan holding company that is a depository institution.
>
> *   *   *
>
> (e) DEFINITION. In this section, the term "source of financial strength" means the ability of a company that directly or indirectly owns or controls an insured depository institution to provide financial assistance to such insured depository institution in the event of the financial distress of the insured depository institution.

There is not much legislative history to Section 616 – it shows up late in the legislative process. Section 616 is mentioned in the House and Senate Reports without comment, and the hearing testimony and submissions by the FDIC and the Fed Reserve contain no mention of MCorp or any request for legislative reinforcement of Reg Y's source-of-strength doctrine, perhaps because the Gramm-Leach-Bliley Act of 1999 had implicitly validated Reg Y.[59]

The language of Section 616, codified at 12 U.S.C. § 1831o-1, is problematic. It states that the "appropriate" regulator "shall require" each of its regulated holding companies to "serve as a source of financial strength."

Both Reg Y and Dodd-Frank can be read as requiring holdcos to maintain the *ability* to provide assistance to their banks rather than requiring holdcos to actually provide such assistance[60] -- but this "ability only" reading contradicts the Fed's post-Dodd-Frank statement

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[59] The Fed cannot compel a bank holding company to provide funds or other assets to a subsidiary bank if the bank holding company is an insurance company, a registered broker/dealer, a registered investment company or a registered investment advisor. 12 U.S.C. § 1844(g)(1). "Implicit in the provision is the belief that the Fed . . . possesses the power to order such transfers." Eric J. Gouvin, *Financial Holding Company Liability after Gramm-Leach-Bliley*, WESTERN NEW ENGLAND UNIVERSITY SCHOOL OF LAW (2002) at 44, available at http://digitalcommons.law.wne.edu/facschol

[60] *Levin v. Miller*, 900 F.2d 856, 859 (7th Cir. 2018). In *Levin*, the holding company had transferred a tax refund to the bank under pressure from regulators and upon advice of counsel that the "source of strength" doctrine imposed a duty to support the bank. When the bank failed and the holding company filed for bankruptcy, the bankruptcy trustee sued the former officers for failure to transmit information to the board that could have led the board to file for chapter 11 earlier and keep the refund. The district court had agreed with the trustee that Reg Y did not compel the holding company to downstream assets but held that the board was entitled to take Reg Y into account in making its decisions, *Levin v. Miller*, 2017 U.S. Dist. LEXIS 49949 at *41 (S.D. Ind. 2017); the Seventh Circuit affirmed on the ground that under applicable state corporate law, the officers had no duty to provide information to the board in contravention of board directives. Compare JP Morgan's 2023 Annual Report at p. 91 (capital planning promotes the holding company's ability to support its subsidiaries),

enforcement manual providing that holding companies must "*act*" as a source of strength. [61]

Contemporary commentators read the statute as more than toothless:

> In light of [MCorp.], the new [Dodd Frank Act] provisions are a significant clarification of the law in this area. The [Dodd-Frank Act] makes clear that a bank holding company's obligation to serve as a source of strength is a substantial ongoing obligation.[62]
>
> Prior to the Dodd-Frank Act, the Federal Reserve required bank holding companies to serve as a source of strength as a matter of policy. Section 616(d) of the Dodd-Frank Act codified and enhanced that source of strength principle and applies it to S&L holding companies and to insured depository institutions that are not subsidiaries of bank holding companies or S&L holding companies.[63]

Rating agencies[64] and holdco 10Ks warn investors that Dodd-Frank requires them to provide financial assistance to their bank subsidiaries.[65]

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https://www.jpmorgan.com/content/dam/jpmc/jpmorgan-chase-and-co/investor-relations/documents/annualreport-2023.pdf, with JP Morgan's 2019 Annual Report (holding company is required to serve as a source of strength), available at https://stocklight.com/stocks/us/nyse-jpm/jpmorgan-chase/annual-reports/nyse-jpm-2019-10K-19634240.pdf..

[61] Bank Holding Company Supervision Manual, 2010.0 (2013); 1062.0.4 (2019).

[62] Paula Norris & John Yanish, *Holding companies as a 'source of strength': Dodd-Frank puts new emphasis on long-standing doctrine*, Fed Notes July 3, 2012 (Bank Holding Company Association/Federal Reserve Bank of Minneapolis), originally published in Bank Owner Magazine (Summer 2012), https://thebhca.org/holding-companies-as-a-source-of-strength/ (hereinafter, "BHCA Note").

[63] GAO REPORT TO CONGRESS, CHARACTERISTICS AND EXEMPTIONS OF BANK HOLDING COMPANIES AND CONSEQUENCES FROM REMOVING EXCEPTIONS (January 2012) at n.37, https://www.gao.gov/assets/gao-12-160.pdf

[64] FITCH *Affirms Charles Schwab at 'A'/'F1"; Outlook Stable*, February 3, 2023, available at https://www.fitchratings.com/research/banks/fitch/affirm-charles-schwab-at-a-f1-outlook-stable-03-02-2023 at page 1 ("Bank holding companies are mandated in the U.S. to act as a source of strength for their bank subsidiaries"); https://www.fitchratings.com/research/banks/fitch-affirms-capital-one-at-a-f1-outlook-stable-20-10-2022 (id.); https://www.fitchratings.com/research/banks/fitch-affirms-new-york-community-at-bbb-outlook-revised-to-stable-28-01-2022 (id.).

[65] Bank of America 2023 Annual Report on Form 10K at 4 (holdco is obligated to serve as a source of strength to its banks); JP Morgan's 2019 Annual Report (holding company is required to serve as a source of strength), available at https://stocklight.com/stocks/us/nyse-jpm/jpmorgan-chase/annual-reports/nyse-jpm-2019-10K-19634240.pdf.; Wells Fargo 2023 Annual Report on Form 10K at 4 (the "FRB has a policy that [holdco] is expected to act as a source of financial and managerial strength to support each of its subsidiary banks and under appropriate circumstances to commit resources to support each subsidiary bank), available at https://www.wellsfargo.com/assets/pdf/about/investor-relations/sec-filings/2023/10k.pdf; "The FRB may require a financial holding company to contribute additional capital to an undercapitalized subsidiary bank." CF BANKSHARES, INC. 2022 ANNUAL REPORT ON FORM 10K, page 15. *See also* HAWTHORNE BANCSHARES, INC. 2021 ANNUAL REPORT ON FORM 10K at 7 ("Under the source of strength requirement, the Company could be required to provide financial assistance to the Bank should it experience financial distress.") INDEPENDENT BANK CORPORATION (MICHIGAN) 2022 ANNUAL REPORT ON FORM 10K at 9: "Federal law requires bank holding companies to act as a source of strength to their bank subsidiaries and to commit capital and financial resources to

Oddly, the legislative history to Dodd-Frank (enacted in 2010) nowhere refers to "capital and liquidity maintenance agreements" ("CALMAs"), even though the FDIC and its predecessors have exacted CALMAs from savings institutions for decades[66] and the agreements have been specifically enforceable in bankruptcy since 1990 under Section 365(o) of the Bankruptcy Code.

CALMAs

> (o) In a case under chapter 11 of this title, the [debtor] [67] shall be deemed to have assumed . . . and shall immediately cure any deficit under, any commitment by the debtor to a Federal depository institutions regulatory agency . . . to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority . . .

The Bankruptcy Code "deems" a chapter 11 debtor to assume a CALMA and requires the immediate cure of any deficit under a CALMA. In a chapter 7 bankruptcy, Section 507(a)(9) provides that any claim arising from the breach of a CALMA is entitled to a ninth priority claim – payable ahead of all unsecured claims, including bonds. An individual who files for bankruptcy after committing to maintain bank capital cannot obtain a discharge of a claim for "malicious or reckless" failure to fulfill such a commitment.[68]

The sparse legislative history to the 1990 Bankruptcy Code amendments contains no reference to Reg Y's "source of strength" doctrine – perhaps because Reg Y imposes obligations

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support those subsidiaries. Such support may be required by the Federal Reserve at times when we might otherwise determine not to provide it." WILSON BANK HOLDING COMPANY 2022 ANNUAL REPORT ON FORM 10K at 12: "Under the Dodd-Frank Act, and previously under FRB policy, the Company is required to act as a source of financial strength for the Bank and to commit resources to support the Bank. This support can be required at times when it would not be in the best interest of the Company's shareholders or creditors to provide it."

[66] The FDIC did not originally insure or regulate savings & loans; other agencies, since folded into the FDIC, did so.

[67] Technically, Section 365(o) deems "the trustee" to assume a CALMA; in a chapter 11 case where a trustee has not been appointed for the debtor,, the term "trustee" includes the debtor-in-possession. 11 U.S.C. § 1107. As a Section 365(o) Commitment binds both a debtor-possession and the trustee, this paper uses the term "debtor" to encompass both.

[68] No malice or recklessness is necessary to preclude the discharge of a corporate debtor, as Section 365(o)'s "deemed assumption" ensures that a reorganizing debtor continues to be bound by the commitment, and Section 1141(a)(3) provides that no liquidating debtor may obtain a discharge.

only on Fed-regulated holdcos. The Bankruptcy Code amendments enforce CALMAs against *any* debtor, including holding companies, affiliates, individuals or even unaffiliated third parties.

The commitment must be to a "federal depository institutions regulatory agency," which is the FDIC once appointed receiver or conservator of the debtor's bank,[69] and otherwise "the appropriate federal banking agency" as defined in Section 3(q) of the FDIA, 12 U.S.C. § 1813(q): the Comptroller for national banks, the FDIC for all insured banks that are not members of the Federal Reserve System, and the Fed for bank holding companies and state-chartered banks that are members of the Federal Reserve System. Of the more than 4,000 institutions insured by the FDIC,[70] only 700 are state-chartered members of the Federal Reserve System, including Silicon Valley Bank.

A CALMA qualifying for enforcement under § 365(o) must be a commitment to the regulator of the *bank*. It differs significantly from Reg Y, which asserts the power of the Fed against the holding company, whether or not the Fed is the regulator of the bank. Therefore, as discussed below, the Fed or the FDIC could require a § 365(o)-compliant CALMA from a bank holding company and its relevant subsidiaries as a condition to its approval of a resolution plan -- but the CALMA must be a commitment to both the FDIC and any other appropriate regulatory agency under the FDIA to be enforceable against a bankrupt holdco.[71]

The commitment is *to* the bank regulator – but it is a commitment to provide capital and liquidity to the *bank.* The bank is the beneficiary of a commitment enforceable only by its regulator. Thus even if the FDIC is the appropriate regulator entitled to enforce the commitment,

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[69] 11 U.S.C. § 101(21B). If the debtor owns an insured credit union, the definition includes the National Credit Union Administration if appointed as receiver or conservator of a credit union.

[70] As of March 17, 2023, the FDIC insured 4,703 institutions.

[71]The insured banks owned by JP Morgan, Bank of America, Citigroup, Wells Fargo and Morgan Stanley and Goldman Sachs are all "national associations" and thus their primary regulator is the Office of the Comptroller of the Currency. Bank of New York Mellon, State Street Bank and Trust Company and Goldman Sachs Bank USA are all state-chartered banks that are members of the Federal Reserve System; thus their primary regulator is the Fed.

only the bank regulated by the FDIC (and not the FDIC itself) is the direct beneficiary. The FDIC as receiver of the bank ("FDIC-Receiver" or "FDIC-r") succeeds to that status; thus the FDIC as receiver can enforce a commitment to provide capital and liquidity to the bank in receivership. The federal deposit insurance fund, sometimes personified as FDIC in its corporate capacity ("FDIC-corporate" or "FDIC-c"), is an indirect beneficiary of a § 365(o)-compliant CALMA, in that payments into the bank receivership will decrease the loss incurred by FDIC-c.[72]

Even if FDIC-c has no loss because the bank in receivership has sufficient assets to satisfy all insured deposits, FDIC-r could enforce additional payments under a § 365(o)-compliant CALMA for the benefit of uninsured depositors and other creditors of the bank, and even holders of preferred or minority common stock interests in the bank.

After the Crime Control Act of 1990 amended the Bankruptcy Code to enforce CALMAs, Congress enacted the Federal Deposit Insurance Company Improvement Act of 1991 ("FDICIA"). FDICIA amended Section 38 of the Federal Deposit Insurance Act ("FDIA"), enacted at 12 U.S.C. § 1831o, to provide that the "appropriate Federal banking agency" require a "severely undercapitalized" bank to take "prompt corrective action" by adopting a capital plan guaranteed by its holding company.

The statute limits the holding company's guaranty liability to 5% of the bank's assets at the time the bank becomes undercapitalized.[73] The 5% limitation grew out of the experience of FHLBB and OTS with unlimited net worth maintenance agreements. Such agreements had the

[72] *But see* Levitin, *Samson's Toupee*, *supra* n. 9 at 1104 n. 131, which postulates that damages for breach of a Fed-mandated CALMA would go to the Fed for payment to the U.S. Treasury or to FDIC-corporate rather than to the federal deposit insurance fund. As Section 365(o) enforces a commitment to FDIC-r to maintain capital of the bank in receivership, it is difficult to see why breach of that commitment would result in the payment of damages to the Fed, the Treasury or FDIC-corporate.

[73] 12 U.S.C. § 1831o.

effect of deterring acquirors. In the midst of the S&L crisis, the S&L regulators were interested in attracting acquirors who would put at least some capital into S&Ls – so the S&L regulators began to negotiate net worth maintenance agreements with limited liability and limited duration,[74] and Congress limited the FDICIA guaranty to 5% of the undercapitalized bank's assets.

Note, however, that FDICIA requires a holding company guaranty only after [a] the bank's federal regulator determines that it is undercapitalized, and [b] the bank has proffered a "capital plan" in response to that determination – a process that takes months.[75] According to the Fed, Silicon Valley Bank had adequate capital until the day it was seized, and would have passed any liquidity test applicable then,[76] or proposed now,[77] until the unprecedented deposit withdrawals of March 8-10, 2023.

As noted below, the Agencies can require a CALMA immediately without a determination that the bank is undercapitalized.

CALMAs in Court.

In 1992, the Fourth Circuit held that where the Federal Home Loan Bank Board had approved Firstcorp's acquisition of an S&L's acquisition on the condition that Firstcorp maintain the S&L's capital, the condition was an enforceable commitment under Section 365(o). The

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[74] Howell Jackson, *The Expanding Obligations of Financial Holding Companies*, 107 HARV. L. REV. 507, 520-522 (1994).

[75] For a description of the process, see *In re Colonial BancGroup, Inc.*, 436 B.R. 713 (Bankr. M.D. Ala. 2010).

[76] *Fed SVB Review*, *supra* n. 10, at 84.

[77] Christopher M Russo, *Tailoring Liquidity Rules Did Not Cause the Failure of Silicon Valley Bank*, U.S. CONGRESS JOINT ECONOMIC COMMITTEE (May 16, 2023), available at https://www.jec.senate.gov/public/_cache/files/f85576f4-0b9f-4827-b475-109db9b742b3/jec-svb-report.pdf ("*Russo*"); Francisco Covas, *How Did Regulatory Tailoring Affect SVB's Capital Requirements?*, BANK POLICY INSTITUTE (May 3, 3023), https://bpi.com/how-did-regulatory-tailoring-affect-svbs-capital-requirements/#:~:text=

Fourth Circuit also held that "immediate" cure of all defaults under the commitment was a condition to Firstcorp's continuing in chapter 11.[78]

In 2001, the Tenth Circuit followed suit. As a condition to its acquisition of a thrift, Overland Park Financial Corporation had "stipulated" that it would infuse sufficient additional equity capital to comply with FDIC requirements. Following *Firstcorp.*, the Tenth Circuit held the "stipulation" was a "commitment" enforceable under Section 365(o), rejecting the debtor's arguments that the "stipulation" was not a contract, lacked consideration and was open-ended: "[N]owhere in 11 U.S.C. § 365(o) does Congress mention the commitment must be contractual, executory [or] formal." The Tenth Circuit found the stipulation was a "unilateral pledge" to maintain capital, saw "no reason why Overland Financial should not be held to its commitment" and agreed that the failure to comply with Section 365(o) was grounds for conversion of the chapter 11 case.[79]

The Agencies did not always win. Courts refused to enforce capital commitments under Agency orders or agreements where the order or agreement directed the holdco board to increase the bank's capital rather than directing the holdco itself to do so,[80] or where the agreement was with the wrong Agency.[81] Levitin concludes from these losses that the source-of-strength doctrine must be implemented through new regulation or legislation – that it cannot be left to the "vagaries of contract drafting."[82] But the FDIC's losses in court do not discredit the enforceability of CALMAs. The losses show only that the Agencies did not draft their orders or

[78] Resolution Trust Corp. v. Firstcorp., (*In re* Firstcorp), 973 F.2d 243 (4th Cir. 1992).

[79] Office of Thrift Supervision v. Overland Park Financial Corporation, 236 F.3d 1246 (10th Cir. 2001).

[80] FDIC v. Amtrust Fin. Corp., 694 F.3d 741 (6th Cir. 2012). *Cf. Branch v. FDIC*, 825 F. Supp. 384, 398 & n.10 (D. Mass. 1993) (Fed's Cease & Desist Order failed to specify assets or amounts the holding company was to contribute to its banks and therefore created no obligation to do so).

[81] *In re* Colonial BancGroup, Inc., 436 B.R. 713 (Bankr. M.D. Ala. 2010) (Section 365(o) did not apply to the Fed's Cease & Desist Order or Memorandum of Understanding because the order directed the board, not the holdco, to comply with an FDIC capital plan and the FDIC was not a party to the MOU.

[82] Levitin, *Samson's Toupee*, *supra*, n. 9 at 1077.

negotiate their agreements to meet the requirements of Section 365(o). Some Agencies have learned to do so.

The FDIC Learns Everything.

The Fed does not have jurisdiction over all holding companies. Industrial banks and industrial loan companies -- special purpose banks chartered in one of five states[83] and which do not take retail deposits – are excluded from the definition of "banks" in the Bank Holding Company Act of 1956 and are therefore regulated by the FDIC. In 2020, ten years after Dodd-Frank commanded regulators to require holding companies to serve as a source of strength and more than nine years after the regulators were required to adopt regulations to enforce Section 616,[84] the FDIC proposed a rule that would do exactly that with respect to industrial loan companies.[85] As finally adopted in 2021[86] and codified at 12 C.F.R. § 354, the rule provides that no industrial bank[87] may become a subsidiary of a holding company unless the holding company enters into one or more written agreements with the FDIC and the subsidiary industrial bank[88] containing commitments to comply with each of eight requirements, of which the seventh is as follows:

As required, the [holding company] must:

[83] Utah, Nevada, California, Minnesota and Hawaii. *FDIC Opens for Business for Industrial Banks*, Morrison Foerster Client Alert April 3, 2020.

[84] Dodd-Frank Section 616(d), 12 U.S.C. § 1831o-1(d), directed the Fed, the OCC and the FDIC to adopt regulations no later than one year after the "transfer date", i.e., the date on which various authorities and functions were to be transferred to the various regulatory agencies under Dodd Frank. The "transfer date" is defined in 12 U.S.C. § 5411(a) as July 21, 2010. The statute provides that the Secretary of the Treasury may extend the transfer date by no more than 18 months by a written determination, published in the Federal Register and delivered to the Senate Committee on Banking, Housing and Urban Affairs and the House Committee of Financial Services, that commencement of an orderly process is not feasible by that date, setting a new date and a plan for implementation by such extended date. The writer has been unable to locate any such determination in the Federal Register and has found no commentary referring to any extension of that date.

[85] 85 Fed. Reg. 17771 (March 31, 2020).

[86] 86 Fed. Reg. 10703 (Feb. 23, 2021).

[87] Defined to include industrial loan companies. 12 C.F.R. § 354.2.

[88] 12 C.F.R. § 354.3.

> (7) Maintain the capital and liquidity of the subsidiary industrial bank at such levels as the FDIC deems appropriate, and take such other actions as the FDIC deems appropriate to provide the subsidiary industrial bank with a resource for additional capital and liquidity, including, for example, pledging assets, obtaining and maintaining a letter of credit from a third-party institution acceptable to the FDIC; and providing indemnification of the subsidiary industrial bank.[89]

On March 23, 2020 – shortly after it proposed the rule and nine months before final adoption -- the FDIC approved deposit insurance for Square, Inc.'s industrial bank conditioned on the holding company's agreement to:

- make ***cash*** capital contributions to its industrial bank to ensure that the bank remains "well capitalized" and meets leverage ratio and total capital ratio levels in the bank's plan,
- maintain the industrial bank's liquidity at levels set by the FDIC by providing a line of credit to the bank in an amount not less than 10% of the bank's total assets; and
- secure holdco's obligations to the industrial bank with a $50 million deposit in the industrial bank's name at an unaffiliated bank.

The holdco agreed that its commitments were enforceable in bankruptcy pursuant to Section 365(o).

Now ***that's*** a CALMA![90]

The Comptroller Learns Something.

The Office of the Comptroller of the Currency as the successor to the Office of Thrift Supervision is the "appropriate" federal regulator for federal savings banks or commercial banks chartered as national associations or trust companies. The Comptroller routinely requires CALMAs as a condition to the acquisition of a national association or federal savings bank.[91]

[89] 12 C.F.R. § 354.4(a)(7).

[90] The Square CALMA should address Levitin's concern that CALMAs cannot be sufficiently definite to be enforced under Section 365(o). Levitin, *Samson's Toupee*, *supra* n. 9 at 1177,

[91] Comptroller's Licensing Manual: General Policies and Procedures (April 2022) at page 9, https://www.occ.gov/publications-and-resources/publications/comptrollers-licensing-manual/files/gpp.pdf

Like the FDIC, the Comptroller seems to have learned from Agency defeats: in 2013, the Comptroller approved GE Capital's acquisition of a national bank conditioned upon GE Capital's agreement to make capital infusions and to maintain the bank's minimum capital, and financial support to maintain the bank's minimum liquidity, within 10 days of the bank's request. The agreement provides that GE Capital's obligations survive the appointment of a receiver.

The Fed Learns Nothing

One would think that the Fed – the originator of the "source of strength" doctrine – would enforce that doctrine through § 365(o) Commitments to *act* as a source of strength. One would be wrong.

The Fed does obtain "memoranda of understanding" (MOUs), or consented-to cease & desist orders, to enforce Reg Y – but the MOUs and cease-and-desist orders are directed at the holding company's board of directors, not the holding company itself,[92] and the orders require merely implementation of a "plan" rather than directing the contribution of specific assets or amounts. That is not good enough to qualify as a § 365(o) Commitment or even create an enforceable claim against the holding company in bankruptcy.[93] On the day regulators seized Silicon Valley Bank, the Fed proffered a draft non-binding MOU in favor of the Fed (not the FDIC) requiring the board of directors (not the holdco itself) to "fully utilize [the holdco's] financial and managerial resources" pursuant to Reg Y and 12 U.S.C. § 1831o-1 – patently inadequate under Section 365(o).

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[92] See, e.g., Written Agreement dated June 28, 2023 among Lake Shore MHC, Lake Shore Federal Bancorp, Inc. and Federal Reserve Bank of Philadelphia, available at https://www.federalreserve.gov/newsevents/pressreleases/files/enf20230630a1.pdf ; Written Agreement dated June 9, 2023 between AgCom Holdings, Inc. and Federal Reserve Bank of Chicago.

[93] Paul Lee, *The Source-of-Strength Doctrine: Revered and Revisited – Part II*, 129 THE BANKING LAW JOURNAL 867, 890-91 (2012).

Since *M Corp*., there is no reported bankruptcy case where the Fed has even shown up in bankruptcy court to enforce Reg Y or a memorandum of understanding. If the Fed does not show up to enforce its own regulation or its own MOU, the FDIC cannot do so.[94]

Regulations Q and Y provide further evidence of the Fed's abandonment of the "source of strength" doctrine in that they require bank holding companies to be "well capitalized" on a *condensed* basis. To serve as a "source of strength" for its banking subsidiaries, a holding company must be "well capitalized" on a *stand-alone* basis (i.e., calculating its capitalization by reference to only holding company liabilities and holding company assets *exclusive* of its equity in its subsidiary bank or banks. The Fed does require large holding companies to report, on Form Y-9LP, holding-company-only revenues, expenses, net income, cash flows, assets and liabilities. However, this writer has found no record of the Fed using Form Y-9LP data to determine adequacy of any holding company's capitalization on a stand-alone basis after excluding any value from its equity in or claims against its bank subsidiaries. As noted below, the GSIBs' Secured Support Agreements neuter the public disclosure requirements of Form Y-9LP.

Neither Reg Q nor Reg Y require a holdco to hold its cash deposits at an *unaffiliated* bank. SVB Financial Group's largest asset is its $1.93 billion deposit at Silicon Valley Bank. But a deposit at the bank is not cash that SVBFG could have used to provide strength to the bank – it is, instead, a claim against the bank. A deposit is the *opposite* of "capital" -- it is (from the perspective of the bank) *immediately payable senior debt* because it is entitled to priority over all

[94] *Cf. In re* Colonial BancGroup, 436 B.R. 713, 739 (Bankr. M.D. Ala. 2010) (debtor argued that FDIC could not enforce an agreement to which it was not a party; as the agreement did not qualify for enforcement under Section 365(o), court declined to reach the issue). Levitin, *Samson's Toupee*, *supra* n. 9 at 1106-12, criticizes the FDIC for not enforcing source-of-strength claims in several crisis cases, but does not address the issue of standing beyond a cite to *Colonial BancGroup*.

claims in an FDIC receivership behind only administrative expenses.[95] Thus the larger the holding company's deposit, the greater the threat to recoveries by other depositors (and the FDIC) and the less value available for the non-deposit bank creditors – in the absence of a specific agreement to subordinate or convert deposits to equity, deposits turn the holdco into a source of weakness.

Given the Fed's failure to craft agreements and orders that comply with Section 365(o), it is not surprising that the Fed has accepted Secured Support Agreements that fail to comply with Section 365(o), in that such agreements are not commitments to the FDIC and to the bank's appropriate regulator to maintain the capital and liquidity of the GSIB's bank. This failure is both cause and consequence of the defects in the Secured Support Agreements.

III. SECURED SUPPORT AGREEMENT DEFECTS.

> [S]ecured support agreements remain an imperfect substitute for the certainty (and transparency) provided by pre-positioned resources. First, the Agencies note that secured support agreements are untested. While secured support agreements may offer a measure of assurance that available contributable resources within the firm will be allocated in a pre-determined manner, on their own, the agreements do not provide the same certainty as pre-positioned resources. . . . Second, the availability and sufficiency of contributable resources for group resolution purposes may be unclear.
>
> -- 2019 Final Guidance on Resolution Plans.[96]

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Instead of making subordinated long-term loans to its insured bank to provide a disclosed amount of iTLAC LTD, as originally suggested by the FSB and the 2023 Proposed Rule for

[95] FDIA § 11(d)(11)(A); 12 U.S.C. § 1821(d)(11)(A). *See* Ohlrogge, *Why Have Uninsured Depositors Become De Facto Insured?* 100 NYU Law Review ____ (Nov. 5, 2023), available at https://ssrn.com/abstract=4624095, advocating a higher priority for insured deposits than for uninsured deposits.

[96] 84 Fed. Reg. 1438, 1443 (Feb. 4, 2019).

large holdcos, many GSIBs have used their Secured Support Agreements to provide not only undisclosed amounts but unspecified, unsupported and changeable amounts of iTLAC.[97]

Secured Support Agreements are Amendable without prior Agency consent..

> "The amount guaranteed under the guarantee should not be capable of variation by agreement between the resolution entity and the material sub-group entity without the prior consent of the host authority."
>
> -- FSB Internal TLAC Principle 9(a).

There is nothing in the GSIBs' public disclosure indicating that Secured Support Agreements comply with the above quoted FSB principle; what is public suggests that they do not.

The Secured Support Agreement is described in the public section of a GSIB's resolution plan, but the documents comprising the agreement are not publicly filed. Each GSIB's resolution plan describes its Secured Support Agreement as "contractually binding" agreement among the GSIB holdco and parties who are controlled by the holdco – but not an agreement that the FDIC could enforce as a party or a third party beneficiary.

In the absence of third party beneficiary provisions, an agreement among parties under common control is amendable at will.[98] No GSIB's resolution plan discloses restrictions on amendment of its Secured Support Agreement. No GSIB's resolution plan discloses that any Agency is a party to its Secured Support Agreement or a third party beneficiary of such agreement, and no resolution plan discloses that Agency approval is required for an amendment.

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[97] Partial exception: Morgan Stanley, which defines bank iTLAC as the sum of the bank's equity and intercompany debts that can be forgiven pursuant to the Secured Support Agreement. Morgan Stanley 2023 Resolution Plan at 39.

[98] *Cf.* Levitin, *Samson's Toupee*, *supra* n.9 at 1114 (Reg Y's command that holdco act as a source-of-strength for its bank will not be enforced by the bank prior to receivership because bank and holdco are under common control).

The FDIC's public guidance indicates that a GSIB holdco and its subsidiaries can, in fact, amend their Secured Support Agreement without prior Agency approval:

> Q6: Can a firm amend its contractually binding mechanism from time to time as long as there is no undue risk to enforceability?
>
> A6: Yes, however the Agencies should be informed . . . ***Any amendments should be identified and discussed as part of the firm's next U.S. resolution plan submission***." [99]

The Q&A indicates that the Agencies' approval is not required for an amendment to take effect.

<u>Most GSIBs show no liquid assets pledged to their banks</u>.

> "The guarantee is provided for at least the equivalent amount as the internal TLAC for which it substitutes . . . . The collateral backing the guarantee is, following appropriately conservative haircuts, sufficient to cover fully the amount guaranteed." FSB Internal TLAC Principle 9a. & b.
>
> "As contemplated under SPOE, holding companies are to have three kinds of assets: direct equity investments in subsidiaries, loans to subsidiaries, and reserves of some sort (presumably marketable securities or cash equivalents." Jackson & Massman, n. 8 *supra*, , at 52.

No depositor can determine how much capital is actually provided to the bank through the medium of the Secured Support Agreement, even in holding company structures where the bank is the primary beneficiary of the Secured Support Agreement. This opacity is a consequence of the GSIBs' establishment of a separate fundco. If the holdco was the fundco, the holdco would disclose the collateral for the agreement every quarter in its unconsolidated balance sheet on Form FRY-9LP. But a separate fundco does not file a Form FRY-9LP.

Under the 2023 Proposed Rule, iTLAC LTD would be publicly disclosed on a bank's balance sheet;[100] by contrast, the value of collateral pledged under the Secured Support

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[99] FDIC RIN 3064-ZA15/Federal Reserve System Dkt. No. OP-1699: Guidance for Resolution Plan Submissions of Certain Foreign-Based Covered Companies, 85 Fed. Reg. 15449, 15474 (March 18, 2020),

[100] "If [Silicon Valley Bank] had enough long-term debt outstanding, it might have reduced the risk of a run by uninsured depositors . . ." Speech by Michael S. Barr, Fed Vice Chair for Supervision, to the Bipartisan Policy Center, July 10, 2023.

Agreement to the bank, in lieu of bank iTLAC, is not publicly disclosed anywhere. The literature on SPOE, TLAC, iTLAC and Secured Support Agreements focuses on assuring ***regulators*** that the GSIB holdco, through fundco, has committed sufficient resources to keep its bank solvent and liquid,[101] but even after the 2023 bank run on Silicon Valley Bank there seems to be little or no concern for assuring ***the public*** that holdco & fundco resources are sufficient to keep the bank solvent and liquid.

What is publicly disclosed casts doubt on the ability of most fundcos to provide any material liquidity to a GSIB bank.

Fundco's securities must be included in the holdco's consolidated securities holdings. Fundco's securities cannot be included in the bank's reported securities holdings. Therefore fundco's securities cannot exceed total securities reported on the holdco's consolidated balance sheet (which would include securities owned by fundco)[102] minus total securities reported on the bank's balance sheet (which would not include securities owned by fundco).[103] If this basic calculation is correct, most GSIB fundcos do not hold a material amount of securities.

JP Morgan Chase & Co. ("JP Morgan") and its insured bank, JP Morgan Chase Bank, N.A., both reported (to the FDIC) approximately $571 billion of securities held as of December 31, 2023. Based on these public reports, JP Morgan's fundco cannot hold a material amount of securities that could be sold to support the bank (or any other subsidiary).[104] Data from JP

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[101] See, e.g., Patrick Bolton & Martin Oehmke, *Bank Resolution and the Structure of Global Banks*,32 REV. FIN. STUDIES 2383 (2019); Stephen Cecchetti & Kermit L. Schoenholtz, *E Pluribus Unum: single vs. multiple point of entry resolution*, MONEY & BANKING December 3, 2018, available at https://www.moneyandbanking.com/commentary/2018/12/2/e-pluribus-unum-single-vs-multiple-point-of-entry-resolution.

[102] Available from each GSIB's 10K.

[103] Available from the FDIC.

[104] JP Morgan's resolution plan reports consolidated holdings of $1.4 trillion in cash and securities, the numbers include securities subject to repurchase agreements and trading liabilities, which cannot be held by Fundco as the resolution plan reports that Fundco has no liabilities to third parties.

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Morgan holdco's filings on Form FRY-9LP disclose zero in U.S. Treasuries from 2012 through 2017, and $3.54 billion in other government issued securities in 2012 dropping to zero in 2017 – again indicating that the holdco could not have endowed its fundco with material amounts of government securities.

The same is true for BNY Mellon (approximately $126 billion in securities on both consolidated and bank balance sheets – the holdco reported less than $1.7 billion in 2016 before dropping to zero) leaving no excess securities that can be pledged to support its bank. Wells Fargo reports approximately $393 billion on its consolidated balance sheet and $386 billion on its bank balance sheet, leaving only about $7 billion in securities available to be pledged to support a bank with over $1.1 trillion in reported risk weighted assets. This roughly consistent with Wells Fargo's 2012-2019 FRY-9LP reports showing a maximum of $7.5 billion in Treasuries and other governments at year-end 2016, diminishing to zero by 2018.

Bank America Corporation reports $871 billion of securities on its consolidated balance sheet and $841 billion on its banks' balance sheet – leaving only about $30 billion in securities available to be pledged to support banks with almost $1.4 trillion in risk weighted assets, and it is doubtful that NB Holdings got any material portion of that $30 billion.[105] Bank America Corporation's 2023 Resolution Plan contains no indication that NB Holdings has any securities.

[105] Bank America Corporation's FRY-9LP Reports disclose holdco holdings of Treasuries and other government securities never exceeded $500 million.

Most[106] Secured Support Agreements Do Not Provide Liquidity to Banks.

Bank America Corporation's 2023 Resolution Plan reports that NB Holdings' assets consist of investments in subsidiaries, loans to affiliates and cash deposited with Bank of America, National Association.[107] In the absence of restrictions on NB Holdings' deposit withdrawals, nothing prevents BAC from drawing down deposits from its principal bank, through NB Holdings, to fund non-bank subsidiaries.

No restrictions on such withdrawals, repayments or prepayments are disclosed.

It is probable that Citigroup poses a similar problem. Citigroup's resolution plan discloses that:

- Citigroup Parent prefunded Citicorp LLC (its fundco) with "liquid assets";
- Citigroup Parent must make additional contributions to its fundco as it acquires new funding in excess of certain limits; and
- In business-as-usual conditions, fundco serves as the primary funding vehicle for Citigroup's material legal entities.[108]

Citicorp LLC cannot serve as the primary funding vehicle for Citigroup's material legal entities unless Citicorp LLC has either its own credit facility with an unaffiliated third party (unlikely, if not indeed prohibited)[109], or large deposits that can be withdrawn instantaneously. If those deposits are at Citibank, N.A., then Citicorp LLC becomes the conduit through which

[106] The possible exceptions, again, are Goldman Sachs and Morgan Stanley, which have sources of liquidity and HQLA outside of their [relatively small] banks.

[107] Bank America Corporation 2023 Resolution Plan at 50.

[108] Citigroup 2023 Resolution Plan at 10, available at https://www.fdic.gov/system/files/2024-07/citi-165-2307.pdf

[109] A search of UCC filings against Citicorp LLC discloses a single UCC-1 financing statement, filed by "Citicorp North America, Inc." Fundcos such as Citicorp LLC are not supposed to have unaffiliated third-party creditors.

Citibank N.A. can be compelled to meet the liquidity needs of non-bank affiliates, even when the bank itself is under pressure.[110]

The same is probably true for Wells Fargo, whose 2023 Resolution Plan reports that its fundco (WFC Holdings, LLC, or "WFCH") "has a committed line of credit available to the Parent" which WFCH must use to provide liquidity to Wells Fargo's material operating entities.[111] WFCH does not appear to have any material cash of its own to lend,[112] so WFCH's "committed line of credit" is presumably provided by an undisclosed lender with cash to lend. Given that WFCH's assets appear to consist primarily of "intercompany balances" [113] and equity investments in subsidiaries, it is unlikely that any third party lender would extend substantial credit for the support of subsidiaries collateralized by the equity in and claims against such subsidiaries – and indeed, Wells Fargo Bank, National Association is the only secured party filing a UCC-1 against WFCH . This all but proves that Wells Fargo Bank, National Association is the provider of the line of credit to WFCH.[114] WFCH has no ability to provide liquidity to the bank; WFCH instead binds the bank to provide liquidity to non-bank subsidiaries.

A GSIB insured bank's commitments to the GSIB's non-bank affiliates should be subject to the bank's "Resolution Capital Adequacy and Position (RCAP)" and "Resolution Liquidity

[110] Citigroup's Annual Report for 2017, the year it established Citicorp LLC as its fundco, discloses that Citibank, N.A. could make loans to affiliates not exceeding $15 billion, subject to satisfying regulatory requirements as to eligible collateral for such loans, under Section 23A of the Federal Reserve Act, 12 U.S.C. § 371c.

[111] https://www.fdic.gov/resources/resolutions/resolution-authority/resplans/plans/wellsfargo-165-2307.pdf

[112] Wells Fargo's 2023 and 2021 Resolution Plans do not report WFCH as having any substantial cash; as noted above, a comparison of the securities holdings of Wells Fargo Bank, N.A. with the consolidated securities holdings of Wells Fargo Corporation suggests that WFCH cannot hold material amounts of securities.

[113] Wells Fargo 2023 Resolution Plan, at 119. Wells Fargo's parent company made its "initial parent contribution in 2017. The parent-only balance sheets on Form FRY-9LP show decreases from 2016 to 2018 of approximately: $13 million in parent company deposits at Wells Fargo Bank, N.A., $163 million in loans to, non-equity investments in and other receivables due from the bank, and $145 million in non-equity investments in, loans to and other receivables from non-bank subsidiaries – totaling $321 million in non-equity investments.

[114] It is theoretically possible that Wells Fargo Bank, National Association, is named as the secured party under the UCC-1 because it is acting as agent for undisclosed third party lenders. There is no disclosure of such an arrangement in Wells Fargo's 2023 Resolution Plan and it seems highly unlikely.

Adequacy and Position (RLAP)" frameworks. RCAP is designed to ensure that each of the GSIB's material subsidiaries has access to sufficient loss-absorbing capacity in the form of equity, subordinated debt and unsecured senior debt so that each is able to wind down following a holdco bankruptcy (its "Resolution Capital Execution Need", or "RCEN"),[115] RLAP is designed to ensure that each material subsidiary has sufficient access to liquidity to operate after a holdco bankruptcy (its Resolution Liquidity Execution Need, or "RLEN").

To the extent the RCAP framework is intended to substitute for bank iTLAC[116] – in providing the FDIC with a trigger for receivership while there is still value to cover depositors – it is distinctly inferior to the 2023 Proposed Rule's iTLAC LTD. The iTLAC LTD would be disclosed. The RCAP framework and the bank's RCEN are not disclosed.[117] The 2023 Proposed Rule's iTLAC LTD represents the Agencies' determination of iTLAC LTD which provides a supplemental capital buffer protecting the FDIC from loss. Using RCEN and RCAP instead delegates that determination to the GSIB: RCEN and RCAP are not legal requirements enforceable by the Agencies.[118]

<u>The Secured Support Agreement Contains Unsecured Commitments.</u>

The resolution plans provide high level analysis of holdco creditor challenges to the Secured Support Agreement in bankruptcy. The resolution plans argue that the Secured Support Agreement is executed, collateral is pledged, and commitments to transfer unpledged assets

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[115] Paraphrased from page 20 of Goldman Sach's 2023 Resolution Plan; the other GSIBs use similar language.

[116] *See* Randall D. Guynn, *The Deposit Insurance Fund as an Early Resolution Tool* (July 23, 2024) at 78, available at, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4897571 (hereinafter "Guynn, *Early Resolution*"). Guynn argues that the FDIC should develop RCAP, RLAP, RLEN and RCEN models to determine when to put an insured bank into receivership.

[117] It is possible that each GSIB has entered into an agreement with the relevant Agency to maintain its bank's RCEN and RLEN, but not such agreement is referred to, and any such agreement would impair if not eliminate the "flexibility" which is touted as the advantage of the Secured Support Agreement over iTLAC LTD.

[118] *See Guidance for Resolution Plan Submissions of Domestic Triennial Full Filers* 89 Fed. Reg. 66388, 66393 &66404 (Aug. 15, 2024) (Agency guidance as to RCEN is not a mandatory minimum capital requirement but a methodology for the firm's estimate of capital needed to support material entities in bankruptcy.).

made, at a time when the GSIB holdco is solvent and conducting business as usual – and therefore holdco creditors will not be able to void the Secured Support Agreement or reclaim pledged collateral as a fraudulent transfer.

Quite right. Also, with respect to some GSIBs, materially incomplete.

Citigroup Parent owns the equity of fundco ("Citicorp LLC") which in turn owns the equity of the bank, Citibank N.A.. Citigroup Parent owns the equity of the broker/dealer subsidiaries. Citigroup's 2023 Resolution Plan provides that after filing a chapter 11 petition, Citigroup Parent would immediately file a "pre-drafted emergency transfer motion" providing for the transfer of the equity in both fundco (owner of the bank) and the broker/dealer subsidiaries to a new holding company ("New Citigroup"), whose equity would be held in a trust for the benefit of the debtor Citigroup Parent, its creditors and shareholders.

All well and good – but what if Citigroup Parent decided to file for chapter 11 relief and ***not*** file the motion to transfer the broker/dealer equity interests to New Citigroup?

No agreement can bind Citigroup Parent to file a motion in chapter 11 (resolution plans are not binding in bankruptcy).[119] Any agreement which purports to automatically divest Citigroup Parent of the equity in its broker/dealer subsidiaries upon a bankruptcy filing is unenforceable under the Bankruptcy Code.[120] Citigroup Parent has not pledged its equity interests in its broker/dealer subsidiaries to secure its obligation to transfer those interests,[121] so any claim for failure to transfer those assets would be an unsecured claim for liquidated damages pari passu with the holdco's other general unsecured claims.

[119] Dodd-Frank § 165(d)(6), 12 U.S.C. § 5365(d)(6).
[120] 11 U.S.C. § 541(c)(1)(B).
[121] Citigroup 2023 Resolution Plan at 12.

Morgan Stanley's 2023 resolution plan likewise discloses that holdco's equity interests in its subsidiaries are not pledged under its Secured Support Agreement.[122] BNY Mellon's resolution plan may be subject to the same weakness with respect to its equity interests in Pershing LLC.[123] Note that the transfer of unpledged assets to fundco under a Secured Support Agreement prior to, but within a year, of bankruptcy could be voidable as a preference.[124]

Worse yet: Citigroup's resolution plan describes a commitment to transfer unpledged broker/dealer equity not to its bank, Citibank, N.A., or even to a fundco committed to support the bank, but to a new holding company. Thus if Citibank, N.A. gets into trouble, there does not appear to be any commitment by Citigroup Parent to commit the value of its unpledged broker/dealer equity to support its bank. The public resolution plans filed by JP Morgan,[125] State Street[126] and BNY Mellon[127] disclose the same anomaly.[128]

The structure gives the GSIB holdco and its management, creditors and investors an option on the post-bankruptcy appreciation of the unpledged subsidiary equity -- depriving the bank of immediate access to value necessary to keep out of a bank receivership, depriving FDIC-

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[122] Morgan Stanley 2023 Resolution Plan at 25, available at https://www.fdic.gov/system/files/2024-07/morgan-165-2307.pdf

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[123] BNY Mellon's 2023 Resolution Plan shows the parent company holding equity in these entities, subject to a support agreement and a security agreement. However, the resolution plan does not describe the collateral pledged under the security agreement, and it is not clear how a security agreement in favor of BNY Mellon's fundco could secure the parent's commitment to transfer equity securities to a newco that does not yet exist. https://www.fdic.gov/system/files/2024-07/bonymellon-165-2307.pdf. See note 125, *infra*.

[124] 11 U.S.C. § 547(b).

[125] . https://www.jpmorganchase.com/content/dam/jpmc/jpmorgan-chase-and-co/investor-relations/documents/events/2023/resolution-plan/2023_JPMC_Resolution_Plan_Public_Filing.pdf

[126] State Street Corporation has as non-bank assets direct or indirect equity investments in investment management subsidiaries. These equity investments are not explicitly excluded from collateral pledged to the fundco, but the context suggests that they are not. https://www.federalreserve.gov/supervisionreg/resolution-plans/state-street-3g-20230701.pdf. State Street, like Citigroup, has prepared emergency motions to transfer the equity interests in its investment management subsidiaries to a new holding company.

[127] BNY Mellon's 2023 Resolution Plan states that prior to bankruptcy, the parent will transfer most of its remaining assets "other than stock in subsidiaries and a cash reserve" to the fundco. In bankruptcy, the parent will seek court authorization to transfer "all of its subsidiaries" to a new holding company. *Id*. at p.14.

[128] Compare Morgan Stanley's 2023 Resolution Plan, which provides for the parent to transfer all of its assets to the fundco.

r of immediate access to value necessary to a quick resolution of the receivership, and potentially diluting FDIC-r's recoveries from holdco assets necessary to reduce losses otherwise incurred by bank creditors and the deposit insurance fund.

"Blackhawk Down"

In the 1993 Battle of Mogadishu, U.S. forces failed to anticipate the downing of not one but two Blackhawk helicopters. The Secured Support Agreement has a similar flaw – it fails to anticipate the simultaneous failure of both the insured bank and a material non-bank subsidiary. The resolution plans disclose no mechanism for allocating the "contributable resources" of the holdco (or fundco) between the insured bank and the non-bank affiliate. The vaunted "flexibility" of the Secured Support Agreement leaves allocation of contributable resources to management's discretion.

This is not consistent with the source-of-strength doctrine, which would require the insured bank to have first call on contributable resources.

Imperfect Enforcement through Title II Receivership.

The foregoing shows that the Agencies have no standing to enforce a Secured Support Agreement outside of a bank receivership, that the FDIC as bank receiver cannot enforce one in a holdco or fundco bankruptcy because it does not meet the requirements of Section 365(o) of the Bankruptcy Code, and that holdco management retains discretion to allocate resources away from the insured bank to non-bank subsidiaries. The FDIC has a remaining but imperfect remedy: it can take control of the holdco (and fundco) in a receivership under Title II of Dodd-Frank and use that control to enforce compliance with some or all of the provisions of the

resolution plan[129] and with all provisions of the Secured Support Agreement, including direction of contributable resources to the insured bank.[130]

It is not clear how Title II can be used to compel holdco to support a troubled bank.[131]

Title II does not appear to allow the FDIC to contribute holdco resources to an insolvent bank to the detriment of the holdco.[132] The FDIC may lend to the receivership "funds for the orderly liquidation" of the holdco, but such loans are not entitled to priority in the receivership if the proceeds are loaned to the holdco's insured bank,[133] and the FDIC's authorities under Title II cannot be used to "assist" the deposit insurance fund,[134] which arguably prohibits the FDIC as holdco receiver from advancing any funds to the insured bank.[135] The FDIC can form a "bridge financial company" to receive the assets of the holdco, but the bridge financial company cannot buy assets from a subsidiary bank.[136]

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[129] Dodd-Frank § 165(d)(6) provides that a resolution plan is not binding on a Title II receiver. 12 U.S.C. §5365(d)(6).

[130] Dodd-Frank §§ 201-214, 12 U.S.C. §§ 5381-5394.

[131] *See* Kupiec & Wallison, *Can the "single point of entry strategy be used to recapitalize a failing bank?* AMERICAN ENTERPRISE INSTITUTE, Nov. 4, 2014, ssrn_id2535832_code2144173, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2519229 at 16 ("It is difficult to find in Title II any basis for the apparent belief at the FDIC that Title II somehow empowers the agency to use BHC resources for recapitalizing (but not liquidating) a failing bank"). *But see* Kupiec, *Why did Regulators Ignore Dodd-Frank and Orderly Liquidation for Failed Banks*, THE HILL March 16, 2023, arguing that the FDIC should have used Title II to liquidate Silicon Valley Bank) available at https://thehill.com/opinion/finance/3903231-why-did-regulators-ignore-dodd-frank-and-orderly-liquidation-for-failed-banks/.

[132] The FDIC has asserted that a Title II receiver can contribute the value of solvent subsidiaries to an insolvent insured bank so that holdco investors bear the bank's losses. FDIC, *Overview of Resolution under Title II of the Dodd-Frank Act* 2 & 33-34 (April 2024). These assertions are not consistent with the language of the statute, which requires the FDIC to manage the assets and property of the holdco "consistent with the maximization of value of assets in the context of the orderly liquidation" of the holdco, 12 U.S.C. § 5384(a)(1), and "to the greatest extent practicable" maximize "the net present value return from the sale or disposition of such assets", 12 U.S.C. § 5390(a)(9)(E).

[133] If the FDIC borrows money as holdco receiver, the loans are entitled to priority in the receivership only if used to fund loans to, purchases of assets from or assuming or guaranteeing the obligations of, "covered subsidiaries", Dodd-Frank § 204(d)(1)-(3), 12 U.S.C. § 5384(d)(1)-(3), which term does not include insured banks, registered broker/dealers or insurance companies. Dodd-Frank § 201(a)(9). 12 U.S.C. § 5381(a)(9).

[134] Dodd-Frank § 210(n)(8)(A)(i), 12 U.S.C. § 5390(n)(8)(A)(i).

[135] Kupiec & Wallison, *supra* n. 131, at 5: the orderly liquidation fund "expressly prohibits OLF use for the benefit of the deposit insurance fund, a benefit which happens whenever the OLF is used to recapitalize a bank subsidiary using the SPOE strategy."

[136] The FDIC can transfer the assets of holdco to a "bridge bank", but the bridge bank cannot buy assets from an insured bank. Dodd-Frank § 210(h)(9), 12 U.S.C. § 5390(h)(9).

It appears that Title II can be used to avoid a bank receivership only if the holdco (and fundco) have executed a Section 365(o)-compliant CALMA as suggested below so that the FDIC as Title II receiver can downstream funds in accordance with the CALMA.

IV. THE REMEDY

Bank capital benefits third parties – depositors and, in the United States, the FDIC. Banks are required to disclose their capital to reassure depositors; banks are required to maintain their capital to protect depositors and the FDIC.

To the extent a Secured Support Agreement is intended to provide iTLAC to a bank, it fails both requirements – it does not disclose contributable resources pledged to the support of the bank, and the Agencies cannot enforce it to maintain the amount of contributable resources pledged to the support of the bank. The latter weakness was (inadvertently) demonstrated by the Bank Policy Institute[137] in its argument against the 2023 Proposed Rule's requirement of iTLAC LTD. The Institute argued that a large bank holdco should be allowed to establish a fundco with a secured support agreement (in lieu of investing in iTLAC LTD) upon providing an analysis of fiduciary duties similar to the analyses provided by the GSIBs:

> This analysis could be provided upon request or through the resolution planning process to satisfy the Agencies that the boards of directors of the holding company or funding affiliate will determine that it is in the best interest of their respective companies and shareholders and otherwise consistent with their fiduciary duties to direct their companies to perform their obligations under the secured support agreement . . . ."[138]

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[137] The Bank Policy institute is "a Nonpartisan Public Policy, Research and Advocacy Group Representing the Nation's Leading Banks".

[138] See January 14, 2024 Letter from The Bank Policy Institute and American Bankers Association to the Agencies commenting on the 2023 Proposed Large Bank Rule, available at https://bpi.com/wp-content/uploads/2024/01/ABA-BPI-Basel-III-Endgame-Comment-Letter-Final-2024.01.16.pdf, and June 12, 2024 supplemental letter from The Bank Policy Institute, available at https://bpi.com/wp-content/uploads/2024/06/BPI-Supplemental-Comment-CCF-2024-06-12.pdf

An agreement whose performance depends on a board determination that performance is in the obligor's best interest, and is otherwise consistent with the board's fiduciary duties, is not a contractually binding agreement. "Consistent with fiduciary duties" does not mean the holdco or fundco must comply with its Secured Support Agreement – it means only that it may do so without the board incurring liability to shareholders or creditors.[139] A contractually binding agreement is, by definition, an agreement that is enforceable by an obligee irrespective of the obligor's board's duties or the obligor's best interest.

The Secured Support Agreement is similar to a parent corporation's agreement to infuse capital or liquidity to a subsidiary, and to subordinate its own loans to the subsidiary, in order to induce a senior lender to extend credit to the subsidiary.

In a commercial transaction, no senior lender to the subsidiary would rely on such a parent-sub agreement if the agreement could be amended at any time, the senior lender had no right to enforce it, and performance depended on the decisions of the respective boards of directors at the time of enforcement. No senior lender to the subsidiary would rely on subordination of an intercompany loan if the subordinated loan could be prepaid before the senior loan.

The FDIC and uninsured bank depositors are the senior lenders to the subsidiary bank -- they should not rely on a Secured Support Agreement that can be amended at any time or collateral that can be reduced at any time through withdrawal of pledged bank deposits or pre-payment of pledged bank notes or receivables.

The remedy for these defects is obvious.

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[139] Query whether any advice as to a board's fiduciary duties rendered years before performance is even relevant to the determination of fiduciary duties at the time of performance.

As a condition to approval of a resolution plan, the Agencies should require the following amendments to the resolution plan and its Secured Support Agreement:

- The Secured Support Agreement should be filed publicly as an exhibit to its public resolution plan, should include a publicly-disclosed amount of bank iTLAC that it satisfies ("Satisfied iTLAC"), and should disclose the nature and book value of collateral posted to secure it.
- The Secured Support Agreement should require fundco and holdco to maintain the amount of their deposit balances at the bank, and the amount of notes and receivables payable by the bank, at the minimum amount of Satisfied iTLAC collateralized by the deposits, notes and receivables.
- The Secured Support Agreement should contain commitments to each Agency (and the appropriate state regulator) that holdco and fundco will contribute capital to the insured bank by releasing (or contributing) intercompany loans or deposits and will provide liquidity from the proceeds of the sale of the equity of non-bank subsidiaries, in an amount equal to Satisfied iTLAC.
- The Secured Support Agreement should entitle the insured bank to "first call" on the cash proceeds of holdco and fundco assets up to the amount of Satisfied iTLAC, and contain a Title II "liquidation plan" providing for the sale of non-bank assets over the period already projected in the resolution plan. This would allow the FDIC, in a Title II receivership, to provide the insured bank with funding necessary to avoid a bank receivership.

- The Secured Support Agreement should require FDIC approval as a condition to any amendment and provide the FDIC with the right to enforce the agreement without commencement of a receivership.[140]

In sum, each Secured Support Agreement should be a Section 365(o)-compliant CALMA, specifically enforceable against holdco and fundco even in a bankruptcy case.[141]

Randall Guynn has recently argued that the FDIC can and should assist troubled banks prior to receivership in order to induce sale of a troubled bank (or its assets) at lower cost to the FDIC.[142] It would be consistent with Guynn's suggestion for Secured Support Agreements to give the FDIC the power to enforce holdco contributions prior to a bank receivership or a holdco bankruptcy.

Finally, the Agencies should require amendments to each Secured Support Agreement providing for public disclosure of fundco's financial statements as if fundco were subject to FRY-9LP.

As noted above, the Agencies have the opportunity to require GSIBs to make such amendments within a year, as each GSIB must file a resolution plan with either the Fed or the FDIC each year. The Agencies have a similar opportunity to require the five less-than-GSIB firms -- "Triennial Full Filers"[143] – in connection with review of their resolution plans due

[140] *See* Guynn, *Early Resolution*, *supra* n. 116, arguing for FDIC's resolution of troubled banks without commencing a receivership.

[141] Levitin argues that enforcement of the source-of-strength doctrine should not be left to the "vagaries of contract drafting. Levitin, *Samson's Toupee*, *supra*, n. 9, at 1119. Competent lawyers for commercial lenders routinely draft agreements binding parent companies to support subsidiary borrowers that courts will enforce. There is no reason why lawyers for the FDIC and the Fed cannot do the same.

[142] Guynn, *Early Resolution*, supra, at n. 116.

[143] See n. 33 for definition of Triennial Full Filers. As of July 2024, the following were domestic Triennial Full Filers: U.S Bancorp, The PNC Financial Services Group, Inc., Truist Financial Corporation, Capital One Financial Corp. and Northern Trust Corporation. Arthur J. Merton, Memorandum to Federal Reserve Board (July 30, 2024) attachment 4, available at https://www.fdic.gov/system/files/2024-07/bc-final-guidance-for-title-i-resolution-plan-triennial-full-filers-and-extension-of-submission-deadline.pdf

October 1, 2025.[144] The Agencies have the opportunity to require 14 domestic banking organizations with greater than $100 billion to adopt source-of-strength strength agreements in their review of such banks' triennial filing of "targeted resolution plans."[145] The FDIC has required banks with more than $50 billion in assets and not otherwise subject to the Fed's resolution plan requirements to file their own resolution plans by October 1, 2025.[146]

These existing regulations, enforceable under existing law, give the Agencies all the power they need to require enforceable source-of-strength agreements that do not affect bank profitability, do not require any increase in capital and do not restrict the business of any operating subsidiary.

Enforceable source-of-strength agreements are critical to SPOE.[147] Without such agreements, SPOE allows the holdco to retain capital which holdco management can deploy under the protection of the Bankruptcy Code for the benefit of non-bank subsidiaries and even for the benefit of holdco investors. This is precisely the opposite of what Dodd-Frank was enacted to prevent.

Levitin argues for regulations which would make every holdco a guarantor of all subsidiary bank liabilities,[148] but such a guaranty is unworkable and inconsistent with SPOE. Such a guaranty would give every bank depositor and every bank creditor the right to sue the

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[144] Fed & FDIC press release announcing *Guidance for Resolution Plan Submissions of Domestic Triennial Full Filers*, https://www.federalregister.gov/documents/2024/08/15/2024-18191/guidance-for-resolution-plan-submissions-of-domestic-triennial-full-filers#:~:text=On%20January%2017%2C%202024%2C%20the,%2C%20to%20March%2031%2C%202025.

[145] As of June 30, 2024, these banking organizations included Charles Schwab Corporation, American Express Company, Citizens Financial Group, Inc., First Citizens Bancshares, Inc., Fifth Third Bancorp, M&T Bank Corporation, Huntington Bancshares Incorporated, Ally Financial Inc., KeyCorp, Ameriprise Financial, Inc., Regions Financial Corporation, Discovery Financial Services, Synchrony Financial and New York Community Bancorp., Inc. https://www.ffiec.gov/npw/Institution/TopHoldings

[146] https://www.fdic.gov/news/financial-institution-letters/2024/fdic-establishes-initial-submission-dates-resolution-plans.

[147] Levitin, *Samson's Toupee*, *supra* n. 9 at 1125-26.

[148] Levitin, *Samson's Toupee*, supra n. 9, at 1121-27.

holdco only after the bank has failed. The guaranty of every bank creditor would be difficult to administer consistent with FDIC and depositor priorities in bank receivership. Giving guaranty claims a priority ahead of other holdco creditors would require special legislation amending the Bankruptcy Code. Given the Supreme Court's recent rejection of *Chevron* deference to administrative agency interpretations[149] and the Supreme Court's use of the "major questions" doctrine to limit expansion of agency authority under general statutes,[150] it is not clear that any regulation can impose a priority guaranty liability on a holdco[151] or impose joint-and-several liability on non-bank affiliates.

Requiring Section 365(o)-compliant CALMAs in favor of the insured bank solves all these problems without legislation or regulation, and in a favorable procedural posture. No solvent holdco has any reason to resist executing a Section 365(o) CALMA that takes effect only in the event of bank or holdco failure, as opposed to a bankrupt holdco that has every reason to challenge a regulation as unauthorized or a statute as in conflict with the Bankruptcy Code.[152]

CONCLUSION: THE FLAW IN THE MACHINE

SPOE and the Secured Support Agreements that implement it are based on a fundamental flaw: The conceit that holdco capital deployed in the discretion of management somehow keeps a failing bank out of receivership. Without a bankruptcy-proof commitment of holdco assets to

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[149] Loper Bright Enters. v. Raimondo, 603 U.S. ___, 144 S. Ct. 2244; 219 L. Ed. 2d 832, 2024 U.S. LEXIS 2882, 2024 WL 3208360 (June 28, 2024). Among the cases that *Loper* appears to have overruled was a decision upholding a Comptroller of the Currency regulation which protected late charges from state usury laws. Smiley v. Citibank (South Dakota), N. A., 517 U. S. 735, 740-741, 116 S. Ct. 1730, 135 L. Ed. 2d 25 (1996).

[150] West Virginia v. EPA, 597 U.S. 697; 142 S. Ct. 2587, 213 L. Ed. 2d 896, 2022 U.S. LEXIS 3268, 2022 WL 2347278 (2022).

[151] Levitin himself notes that it is far from clear that Dodd-Frank § 616(d) authorizes the Fed to issue a source-of-strength regulation imposing liability on holdcos. Levitin, *Samson's Toupee*, *supra* n. 9, at 1078.

[152] The FDIC imposed its source-of-strength requirement on new industrial bank holdcos by requiring the holdco to execute an agreement with the FDIC and the industrial bank. 12 C.F.R. § 354.3.

support the bank, requiring capital at the holdco does not help the bank – instead, it gives a weapon to the holdco management responsible for bank failure. The vaunted "flexibility" in the deployment of holdco (or fundco) capital by definition gives holdco management the freedom to allocate capital away from the bank.

SPOE is also, I submit, futile because it does not address liquidity. Silicon Valley Bank failed because of a liquidity crisis, not because it lacked capital. I suggest the same is true of most bank failures. Holdcos or fundcos can provide liquidity to subsidiary banks only to the extent they have HQLA (which they do not appear to have) or can immediately sell (or borrow against) non-bank assets[153] and contribute cash to their failing banks. Holdco or fundco is unlikely to raise cash fast enough or in sufficient quantity to rescue a bank from a liquidity crisis. Title II does authorize the FDIC to make loans to the holdco's receivership and does provide the FDIC with access to a line of credit from the U.S. Treasury, (the "Orderly Liquidation Fund", or "OLF"), but even if such loans can, consistent with the statute, be used to save a failing subsidiary bank (as noted above, there is reason to doubt), the FDIC cannot lend from its own resources or tap the OLF for a loan until the FDIC and the U.S. Treasury have agreed on an "orderly liquidation plan."[154] The liquidation plan is likely to come too late to raise the OLF loan necessary to save the bank.

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[153] Non-bank assets: assets of the holdco other than equity in the bank, deposits in the bank or claims against the bank.

[154] Dodd-Frank § 210(n)(9)(A); 12 U.S.C. § 5390(n)(9)(A). The FDIC and banking authorities have read Dodd-Frank as authorizing FDIC to borrow up to 10% of the GSIB's consolidated assets from the U.S. Treasury during the first 30 days of the Title II proceeding, without pre-conditions under Section 210(n)(5). See Paul H. Lee, *The Dodd-Frank Orderly Liquidation Authority – A Preliminary Analysis and Critique Part II*, 128 BANKING L. J. 867, 889 (2011), available at https://www.debevoise.com/-/media/files/insights/publications/2011/11/the-doddfrank-act-orderly-liquidation-authority-__/files/read-the-article/fileattachment/paullee.pdf?rev=ff87c08b89b74d508800912319676bb4&hash=EED70F999F36763031E5BBED6FC02C6F. However, Section 210(n)(1)&(2) provide that proceeds of all loans from the U.S. Treasury must be deposited in the Orderly Liquidation Fund, and Section 210(n)(9)(A) provides that amounts in the fund shall be available "after the [FDIC] has developed an orderly liquidation plan that is acceptable to the Secretary." Section 206The time needed to develop a "liquidation plan" is not addressed by Lee or by the FDIC in its own papers on OLA. See FDIC, *Overview of Resolution under Title II of the Dodd-Frank Act*, available at

Private funding is unlikely. Commentators and regulators have suggested that "debtor-in-possession" loans would be available to holding companies if only the holdcos planned for them in advance[155] -- but that assumes private lenders will advance billions of dollars to a holding company on the security of its equity interests in, and claims against, financial subsidiaries whose continued operation is at the whim of different regulatory bodies and subject to destruction by runnable liabilities owed to structurally senior subsidiary creditors.[156] And if a holdco in chapter 11 ***can*** raise DIP financing, the holdco is under no obligation to use the proceeds of DIP financing to save its insolvent bank in the absence of a Section 365(o)-compliant CALMA.

One goal remains: Minimizing costs of bank failure otherwise incurred by the FDIC, by depositors (to the extent not directly or indirectly paid by the FDIC) and by other bank creditors.

That goal does not require transferring bank losses to the holdco – it requires transferring holdco assets to the bank. Citibank provides an example of the difference: resolution caused by the insolvency of Citibank, N.A. will commit Citibank Parent to transfer its non-bank assets not to its insolvent bank but to a new holding company. This may "visit losses" upon Citibank Parent's shareholders and creditors, but it will do nothing for Citibank, N.A.[157]

The best purpose of holdco resolution (and the best use of properly drafted Secured Support Agreements) is not to avoid bank failure or even to avoid government bail-outs of failing banks, neither of which is likely to be achieved through resolution of a holdco which cannot

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fdic.gov/system/files/2024-07/spapr1024b_0_1.pdf Section 204(d) authorizes the FDIC to make loans from its own resources to the holdco "subject to ***the plan*** described in section 210(n)(9)."

[155] H. Jackson & S. Massman, *The Resolution of Distressed Financial Conglomerates*, THE RUSSELL SAGE FOUNDATION JOURNAL OF THE SOCIAL SCIENCES Vol. 3 No. 1 48, 67 (Jan. 2017)

[156] *See* Kupiec & Wallison, *supra* n. 131, at 6, querying whether any private lender will advance funds to a holdco if the holdco is exposed to the losses of the subsidiary. The whole point of SPOE is to expose the holdco to losses of the subsidiary..

[157] If there is a "contractually binding" mechanism for the value of these non-bank assets to be transferred from the new holdco the bank, that mechanism is not described in the resolution plans.

provide liquidity to the bank. The best purpose of holdco resolution is to minimize the costs of the bail-out and the losses of subsidiary creditors: ***if*** there is a holdco and ***if*** the holdco owns, directly or indirectly, valuable non-bank assets, ***then*** non-bank assets must be committed (to the extent permitted by applicable law) on a priority basis to a failing bank, to the reimbursement of the FDIC and to the payment of uninsured bank depositors and other bank creditors. Holdco capital is irrelevant. The well-capitalized holdco without contributable non-bank assets cannot minimize losses from bank failure. The poorly capitalized and over-levered holdco with contributable non-bank assets can minimize losses from bank failure.

SPOE is thus a dangerous mirage. In pursuit of holdco resolution that is unlikely to prevent bank receiverships, the Agencies have approved resolution plans and Secured Support Agreements that, at best, are inadequate to commit holdco assets to the bank, and, at worst, actually commit the bank (and by extension, the FDIC) to support non-bank affiliates. All of this is hidden in the rubric of "bail-in" or "structural subordination" of holdco liabilities. These concepts are irrelevant to a bank that needs holdco support. Holdco "capital" is irrelevant in resolution. Giving the bank a priority claim on holdco assets, enforceable by the FDIC, is the only thing that matters.

Everything else is a meaningless number on a page.