



CENTER FOR CAPITAL MARKETS  
COMPETITIVENESS

TOM QUAADMAN  
VICE PRESIDENT

1615 H STREET, NW  
WASHINGTON, DC 20062-2000  
(202) 463-5540  
tquaadman@uschamber.com

March 8, 2012

Financial Stability Oversight Council  
Attention: Lance Auer  
1500 Pennsylvania Avenue, NW  
Washington, DC 20220

**Re: Second Notice of Proposed Rulemaking Regarding Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies; 12 CFR Part 1310; RIN 4030-AA00**

Dear Mr. Auer:

The U.S. Chamber of Commerce is the world's largest business federation, representing over three million companies of every size, sector, and region. The Chamber created the Center for Capital Markets Competitiveness ("CCMC") to promote a modern and effective regulatory structure for capital markets to fully function in the 21<sup>st</sup> Century economy. The CCMC believes that the designation of certain nonbank financial companies for supervision and regulation by the Board of Governors of the Federal Reserve System ("Federal Reserve") may have far reaching ramifications throughout the American economy. In fact, the content of the rule itself, which was proposed for a second time in October 2011, is likely to have an impact on the economy of a similar magnitude. Despite the impacts this authority and the rule governing its use will likely have on the resiliency and growth of the economy, and although this re-proposed rule is the third rulemaking released from the Financial Stability Oversight Council ("FSOC") on this subject, we believe that there are many issues that still remain unresolved or are in need of public deliberation before a rule is finalized and any designations are made. Accordingly, we respectfully request that the FSOC hold a public hearing or, at a minimum, public roundtables to solicit further comment and engage in public dialogue as contemplated by Executive Orders 13563.

The concerns justifying this request are discussed in detail below.

**Discussion**

The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) established the FSOC as a college of regulatory agencies to monitor and address systemic risk and resolve regulatory differences among the financial regulators. Under Title I of the Dodd-Frank Act, FSOC may designate certain nonbank financial companies as systemically important financial institutions (“SIFI”) and those designated companies would then be subject to heightened supervision and regulation by the Federal Reserve.

FSOC issued an advanced notice of proposed rulemaking on October 6, 2010 (“ANPRM”) followed by a notice of proposed rulemaking (NPRM) on January 26, 2011. In response to concerns about the first NPRM, a second NPRM was published in the Federal Register on October 18, 2011 (“second NPRM”).

### **1. Compliance with Relevant Executive Orders.**

On January 18, 2011, President Barack Obama signed Executive Order 13563 entitled “Improving Regulation and Regulatory Review.” Executive Order 13563 seeks to increase public participation in the regulatory process, maximize economic analysis, and cost savings. It also lists burden-reducing principles that the agencies should follow. This Executive Order amplified the provisions of Executive Order 12866 issued by President William J. Clinton on September 30, 1993. On July 11, 2011, President Barack Obama signed Executive Order 13579 requesting that independent agencies follow the principles laid out in Executive Order 13563 when engaged in rulemaking.

The Treasury Department and related agencies are not independent agencies and must promulgate rules consistent with the Office of Information and Regulatory Affairs (“OIRA”) process and Executive Order 13563. The Federal Reserve is an independent agency, but it has pledged to abide by Executive Order 13563. Consistent with this approach, the Federal Reserve recently stated that it “continues to believe that our regulatory efforts should be designed to minimize regulatory burden consistent with the effective implementation of our statutory responsibilities.”<sup>1</sup>

---

<sup>1</sup> November 8, 2011 letter from Federal Reserve Chairman Ben Bernanke to OIRA Administrator Cass Sunstein.

In the sections relevant to this rulemaking, Executive Order 13563 states:

Section 2. *Public Participation* (a) Regulations shall be adopted through a process that involved public participation. To that end, regulations shall be based, to the extent feasible and consistent with law, on the open exchange of information and perspectives among State, local and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector and the public as a whole.<sup>2</sup>

Furthermore, Executive Order 13563 places upon the agencies the requirement that when promulgating rules they must do the following:

- 1) Propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to justify);
- 2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things and to the extent practicable, the costs of cumulative regulations;
- 3) Select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety and other advantages; distributive impacts; and equity);
- 4) To the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and
- 5) Identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made to the public.<sup>3</sup>

---

<sup>2</sup> Executive Order 13563, Section 2 (a).

<sup>3</sup> Ibid, Section 1 (b)

Mr. Lance Auer  
March 8, 2012  
Page 4

When it issued its second NPRM, FSOC acknowledged that it would comply with Executive Orders 12866 and 13563.<sup>4</sup> We believe that adherence to the requirements listed is necessary to permit the efficient and effective identification and supervision of any nonbank financial companies that could threaten U.S. financial stability. Achieving these objectives requires the FSOC not only to solicit input from stakeholders but also to engage in a dialogue with those stakeholders by clearly responding to the substantive comments they make. Engaging in such a dialogue would help the FSOC minimize unintended adverse impacts on economic growth and job creation, which may result from the inappropriate design of the rule for exercising the designation authority.

We do not question that the FSOC has solicited public participation through the comment process. Indeed, we (and many of our members) have provided FSOC with comments on each of the FSOC's rulemaking releases, including the second NPRM. However, the second NPRM is the third release by the FSOC on this issue and FSOC has not responded directly to substantive comments made on either of the previous two releases - the ANPRM or the NPRM. In the second NPRM, FSOC indicated that it would address substantive comments when it releases the final rule. This delayed approach obviously frustrates stakeholders' attempts to engage in a dialogue and their ability to provide meaningful comments because they don't know how FSOC viewed their previous comments. Furthermore, with complex rulemakings such as this, agencies will often hold public hearings or roundtables to allow for further input and dialogue in order to ensure that all material issues created by a proposed rulemaking are considered transparently and that it will impose the least burden upon society by avoiding potential problems. We encourage the FSOC to hold such a public hearing or, at a minimum, public roundtables to solicit further comment on this proposed rule and engage in public dialogue as contemplated by Executive Orders 13563.

Finally, as will be discussed in more detail, there are omissions to the second NPRM that raise serious questions as to its compliance with Executive Orders 12866 and 13563. For example, the lack of any cost-benefit analysis fails to abide by the requirements of Executive Order 13563 and does not permit affected parties to understand or fully comment on the impacts of the proposed rule. We are also

---

<sup>4</sup> Federal Register Volume 76, Number 201, Page 64272, October 18, 2011.

concerned that there may be inherent contradictions between the Dodd-Frank Act and well established existing laws that may place incompatible requirements upon companies and their management.

Accordingly, because of the complexity and unprecedented nature of the designation authority created by section 113 and the enhanced prudential supervision of designated nonbank financial companies required by section 165 of the Dodd-Frank Act, we believe that more public discussion is warranted to explore the issues raised by the second NPRM and those areas where it may need to be modified.

## **2. Potential Issues with the Second NPRM that Require Expanded Public Input**

We believe that the second NPRM contains a number of deficiencies and ambiguities that should be addressed more fully, particularly through a public hearing or roundtables.

The second NPRM fails to adequately explain whether it will result in a rule or guidance. Therefore, it is impossible for commenters to understand the legal significance FSOC will place on the second NPRM if it were to be finalized. If it is a proposed rule, would the FSOC and parties to be considered for SIFI designation be bound by it? Can it only be amended through a notice and comment procedure consistent with the requirements of the Administrative Procedures Act (“APA”)? These are important questions that should be understood in contemplating and commenting on the second NPRM.

Additionally, it is unclear what the standards are for determining if a company poses a threat to the financial stability of the United States. Indeed there is a lack of specific proposed metrics that will allow commenters to understand how these standards will be developed and applied. The second NPRM creates further uncertainty due to its lack of appropriate guidance and transparency for companies to understand the screening process for companies being reviewed for possible SIFI designation. Similarly, it appears that the second NPRM includes an overly-broad definition of a company, while failing to adequately explain the screens for asset size that would be applied for a Stage 1 review. It is also important that greater clarity be provided for Stage 2 and Stage 3 reviews.

Stakeholders also need a better understanding how FSOC will construct a process for annual reviews and rescissions of SIFI designations. Furthermore, the second rule proposal is not occurring in a vacuum, and it will be important to understand how other proposed significant rule makings, such as the “Predominantly Engaged in Financial Activities” test, the Volcker Rule, and Federal Reserve’s proposed rules for implementing section 165 will interact with the second rule proposal.

This is but a brief and non-exhaustive list of issues that need more public dialogue and clarity before the second NPRM can be finalized.

### **3. Failure to Provide a Cost Benefit Analysis**

The second rule proposal does not contain a cost benefit analysis. As stated earlier, the FSOC has acknowledged that it is subject to the requirements of Executive Orders 12866 and 13563. This includes the obligation to assess costs and benefits of available alternatives and to make this analysis available for public review and comment during the rulemaking process. The second NPRM does not contain a cost benefit analysis nor does it appear that one has even been conducted.

The content of the rule itself will impose costs across the U.S. economy. For example, in the NPRM, the FSOC has proposed quantitative thresholds that will be applied to companies in Stage 1 of the designation process. Any companies who exceed the size threshold and one of the secondary thresholds will proceed to Stage 2 of the designation process. One can only assume that these thresholds are strongly indicative of threats to U.S. financial stability. An assumption is required because the FSOC has not clearly explained the relationships between these thresholds and U.S. financial stability. It is also logical to assume that companies will carefully weigh the risks and potential costs of exceeding these thresholds and therefore, that economic activity will be impacted by companies changing existing business practices, foregoing business opportunities, and reallocating resources to avoid exceeding them.

The benefits of these reactions by large companies may be significant if they result in a more resilient and efficient U.S. financial system. They may outweigh the costs of reduced or inefficient economic activity. Unfortunately, however, the FSOC has provided no information to enable the public to consider whether the benefits are

likely to justify the costs. If the FSOC has conducted any analysis of the impact these thresholds will have on U.S. economic activity, that analysis has not been shared with the public.

Designating nonbank financial companies as SIFI's also will have impacts upon designated nonbanks and, by design, the U.S. financial system. For example, the cost of capital for designated nonbanks will increase and those increased costs will impact the counterparties of those companies. Yet commenters are not being afforded an opportunity to understand what those potential costs are, or if FSOC is contemplating regulations, that it will impose the least burdensome means of implementing these legislative provisions. Companies are also not able to ascertain the costs and resources they would need to expend in undergoing a stage 1, 2 or 3 review, much less if they are designated as a SIFI. Indeed the cost benefit analysis requirement exists to inform just these kinds of broad and complex rulemakings.

Accordingly, we believe that the FSOC should publish cost benefit analyses of the rule itself and of its likely application, allow sufficient time for notice and comment on them, and allow for a public discussion of these costs at a hearing that is made part of the rulemaking record before the NPRM is finalized.

#### **4. Failure to Comply with the Paperwork Reduction Act**

The second NPRM makes a blanket statement, without detailed explanation, that the paperwork burden for all respondents will be 1,000 hours. The Stage 1, 2, and 3 review process and enhanced regulatory burden that a SIFI nonbank financial company will bear would appear to be well above 1,000 hours. FSOC's estimate is based on the number of man hours it will take 1 employee over the course of a year. This indicates the lack of any meaningful analysis or total disregard of the burdens faced by companies under the second NPRM. This raises questions as to the level of thought and analysis employed by FSOC in issuing the second NPRM.

We believe that the FSOC should issue an estimate of the reporting burden faced by a company in each stage of the process and that this should be a part of a public discussion and open for comment.

#### **Conclusion**

Mr. Lance Auer  
March 8, 2012  
Page 8

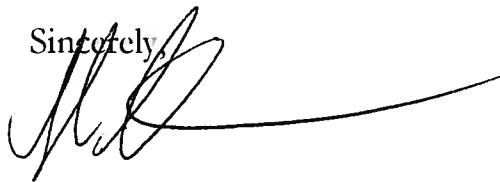
Monitoring and understanding threats to U.S. financial stability is an important outgrowth of the 2008 financial crisis, but we also must have reasonable risk-taking in order to allow a free enterprise system to thrive. An appropriate balance must be struck to achieve this goal and mitigate threats presented by individual institutions.

As it stands today, the second NPRM does not adequately strike that balance, nor does it appear that FSOC has sufficiently contemplated the key issues needed to achieve it. The FSOC also has not provided the public with adequate information to help it achieve this goal. More thoughtful deliberation and engagement with the public are needed to create a process to identify any nonbank financial institutions that threaten U.S. financial stability, and subject those institutions to enhanced prudential standards and supervision by the Federal Reserve Board. These enhanced standards and supervision should only be applied if such regulations would mitigate the threat more efficiently and effectively than the alternatives.

Accordingly, we respectfully request a public hearing to foster a deliberative dialogue between stakeholders and regulators to achieve an even-handed form of systemic risk oversight that will not adversely impact economic growth or job creation.

Thank you for your timely consideration of this request and we stand ready to work with you to achieve these goals.

Sincerely,

A handwritten signature in black ink, appearing to be 'Tom Quadman', with a long horizontal flourish extending to the right.

Tom Quadman