CENTER FOR CAPITAL MARKETS
COMPETITIVENESS

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August 15, 2017

The Honorable Steven T. Mnuchin
Secretary of the Treasury
U.S. Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220

Re: Review of Financial Stability Oversight Council determination and designation processes pursuant to the Presidential Memorandum for the Secretary of the Treasury of April 21, 2017

Dear Mr. Secretary:

The U.S. Chamber of Commerce[1] created the Center for Capital Markets Competitiveness ("CCMC") to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century economy. Pursuant to the ***Presidential Memorandum for the Secretary of the Treasury of April 21, 2017*** ("Presidential Memorandum"), the Department of the Treasury ("Treasury" or "Department") is reviewing the Financial Stability Oversight Council ("FSOC" or "Council") determination and designation processes under section 113 and section 804 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act" or the "Act").[2] We respectfully offer the following comments and recommendations to assist the Department in this review.

In our view, section 113 determinations are blunt tools that have harmed the efficiency of our capital markets and have not improved the ability of the United States to mitigate systemic risk. Rather than section 113 determinations, CCMC believes that the exercise of section 120 authority, in coordination with a company's

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[1] The U.S. Chamber of Commerce is the world's largest business federation, and represents the interests of more than three million businesses and organizations of every size, sector, and region.
[2] While "determinations" are made pursuant to section 113 and "designations" are made pursuant to section 804, for the purposes of this letter these terms may be used interchangeably.

or industry's primary federal regulator, is a more effective means of addressing systemic risk, promoting financial stability, and encouraging economic growth.

CCMC strongly supports the repeal of section 113, and respectfully requests that the Department endorse such efforts in Congress.[3] Pending legislative repeal or reform, we recommend that FSOC continue the determinations freeze required by section 3 of the Presidential Memorandum, and promulgate regulations to increase due process and transparency. Furthermore, FSOC should commit to utilizing section 120 to identify and address any activities that it determines may pose a risk to financial stability. However, we must note that even section 120 authority should be used *sparingly*, and only after considerable study and deliberation. FSOC's primary focus should be on regulatory coordination and in assisting the primary regulators in the execution of their mission.

CCMC's general recommendations, as offered in our September 2016 report *Restarting the Growth Engine: A Plan to Reform America's Capital Markets* are as follows:

- **<u>Reform the Designation Process</u>**: The process for designating financial institutions for systemic risk regulation should provide potential designees and their primary regulator with an opportunity to address FSOC concerns and, if appropriate, decide to take steps to de-risk before they are designated.

- **<u>Embrace Due Process</u>**: Designee targets should be provided with an opportunity to review the record for the determination recommendation and an opportunity to rebut the record. Designee targets should have an opportunity for a hearing prior to an FSOC determination, with the opportunity to compel the production of records and call witnesses.

- **<u>Implement an Effective Voting Structure</u>**: Any action taken by FSOC should require the affirmative vote of at least three-quarters of the Council members to ensure that decision reflects a diverse set of views. In the case of a determination vote, the primary regulator of the holding company or its primary operating subsidiaries (or the independent member with insurance

[3] H.R. 10, the Financial CHOICE Act of 2017, and H.R. 3280, the Financial Services and General Government FY2018 Appropriations Act, contain provisions repealing section 113.

expertise) must vote in the affirmative along with the Secretary of the Treasury for the determination to be effective.

- **<u>Expand the Grounds for Appeal</u>**: The grounds for judicial review of an FSOC determination, pursuant to section 113(h), should be expanded to provide a designee with the same grounds for appeal as anyone subject to an administrative tribunal.

- **<u>Establish a Designation Off-Ramp</u>**: A strong "off-ramp" process must be put in place for designated companies that wish to be considered for de-designation.

- **<u>Limit International Designation Powers</u>**: The Financial Stability Board ("FSB") and other interested international entities should not designate a firm for enhanced systemic risk regulations if the home domestic regulator has not designated said firm as a systemically important financial institution.

We are pleased to offer specific recommendations in greater detail below. As a prefatory matter, CCMC respectfully requests that any changes to the determination and designation processes be implemented through a rulemaking. The current processes are governed by a haphazard mix of a regulation, a formal interpretive guidance, supplemental procedures, and staff guidance. Such a regime fails to provide the certainty and predictability that U.S. companies deserve.

<u>Background</u>

To date, FSOC has determined that four nonbank financial companies should be supervised by the Board of the Governors of the Federal Reserve System ("Federal Reserve") and subject to enhanced prudential standards. Two of those companies remain subject to such a determination, known as a systemically important financial institution ("SIFI") designation. A federal district court invalidated a third determination, while the Council voted to rescind a fourth.

Indeed, the imposition of section 165 enhanced regulations upon General Electric is illustrative of the ill-advised application of bank-style regulation to nonbank financial companies.[4]

In light of the time, effort, and expense invested in the determination process by American businesses, the Department of the Treasury, FSOC member agencies, and the courts, we believe that nonbank SIFI designations have wasted substantial resources while failing to achieve their objectives of promoting stability and growth. As noted above, CCMC strongly supports the repeal of section 113 of the Dodd-Frank Act. Absent such legislation, FSOC should rescind outstanding determinations and refrain from consideration of future determinations.

Discussion and Detailed Recommendations

1. Replace SIFI Designations with an Enhanced Role of the Primary Regulator Through Section 120

Under section 120 of the Dodd-Frank Act, if FSOC determines that the conduct, scope, nature, size, scale, concentration, or interconnectedness of any financial activity or practice could create or increase system risk, the Council may issue recommendations to the primary financial regulatory agencies to apply new or heightened standards and safeguards for that activity or practice.

Section 120 recommendation authority should be the principal means by which the Council addresses systemic risk. The primary financial regulators are often the sole entity with jurisdiction over, expertise in, and experience with, a given activity or practice such that any heightened standards will be applied evenly, well-reasoned, narrowly tailored, and not unduly burdensome. This outcome would be wholly consistent with a critical "Core Principle" for financial regulation identified in the President's Executive Order 13772. Furthermore, section 120 authority accords with the fundamental truth that activities or practices, and not a single entity in and of itself, generate systemic risk.

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[4] *See generally* Letter from Tom Quaadman, Center for Capital Markets Competitiveness, to the Bd. of Governors of the Fed. Reserve Sys. (Feb 2, 2015) (offering comments on the Application of Enhanced Prudential Standards and Reporting Requirements to General Electric Capital Corporation), *available at* https://www.federalreserve.gov/SECRS/2015/February/20150224/R-1503/R-1503_020215_129875_536678533422_1.pdf.

In using its section 120 authority, FSOC should also consider whether any *existing* rules or regulation could be giving rise to any financial activity or practice that is potentially creating systemic risk. It is important that both FSOC and the primary financial regulators recognize that systemic risk is not always cured by further regulation. Indeed, it is very possible that in some instances regulations themselves could be the cause of increased risk throughout the financial system, and FSOC should consider that possibility when exercising its authority under section 120.

2. Jurisdictional Establishment and Preliminary Notice of Consideration

Prior to evaluating any nonbank financial company as a SIFI under section 113 of the Dodd-Frank Act, FSOC should promulgate new rules on the "predominantly engaged" test to ensure that it meets the Congressional intent to severely limit any use of designations.[5] This is a fundamental step that is statutorily required under section 102 of the Act, which provides that a company is subject to such jurisdiction if it is "predominantly engaged in financial activities." To satisfy this definition, 85% or more of its consolidated revenues or assets must derive from or relate to "activities that are financial in nature (as defined in section 4(k) of the Bank Holding Company Act of 1956)." In doing so, Congress has specifically tied the predominantly engaged test to solely take into account enumerated banking activities.

Nonbank financial companies do not necessarily correlate to or easily satisfy this statutorily prescribed test. It takes an asset-by-asset and revenue-by-revenue analysis of its financial statements against section 4(k) of the Bank Holding Company Act, which sets forth a list financial activities in which bank affiliates, known as financial holding companies, may permissibly engage.[6] If FSOC does not have jurisdiction over a company, the company should not have to wait for the entire process to run—and devote the human and financial resources it takes to respond to FSOC during the years-long process—before it learns the basis upon which FSOC may assert its jurisdiction over the company.

[5] *See generally* Letter from Senator David Vitter and Senator Mark Pryor to Ben Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys. (May 16, 2012); Letter from Senator David Vitter and Senator Mark Pryor to Ben Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys. (June 3, 2013). *See also* Letter from David T. Hirschmann to Bd. of Governors of the Fed. Reserve Sys. (Mar. 30, 2011) (offering comments on the Definition of "Predominantly Engaged in Financial Activities"), *available at* https://www.federalreserve.gov/SECRS/2011/April/20110404/R-1405/R-1405_033011_69263_589498687124_1.pdf.

[6] These activities are subject to rules and interpretations of the Federal Reserve. Section 4(k) activities are supplemented by the Federal Reserve's Regulation Y. These requirements are further detailed in the Federal Reserve's "Predominantly Engaged in Financial Activities" regulation (also known as Regulation PP).

We propose that FSOC establish its jurisdictional authority early in the process and provide the company with a **preliminary notice of consideration ("PNC")** that includes:

- A detailed statement that breaks down consolidated assets and revenue to specifically demonstrate how the 85% of assets or revenue tests are met;

- A description of the regulatory criteria and risks that FSOC believes support consideration of the company, including a statement of how the application of financial regulation by the Federal Reserve will mitigate the risks to the stability of the U.S. financial system that it foresees; and

- A preliminary opportunity to rebut FSOC jurisdiction and demonstrate how substantive risk concerns are not raised by the company, or how they may be reduced.

Providing a targeted company with a clear, written notice of the grounds on which FSOC asserts jurisdiction is necessary for the company to evaluate whether FSOC is acting within the bounds of the law. The delivery of a clear and unambiguous PNC would go a long way toward eliminating the mystery and informational abyss that now exists and also indicate whether FSOC is relying on the anti-evasion provisions of section 113(c) of the Act.

A clear, unambiguous statement of *how* supervision by the Federal Reserve and enhanced prudential standards will mitigate risks to the U.S. financial stability is particularly critical. Such analysis has long been recognized as a core component of well-reasoned decision-making and good governance.[7] FSOC, through section 115, or the Federal Reserve, through section 165, should define the full set of enhanced prudential standards and other rules that would apply to a SIFI before FSOC votes on a determination. Without such a definition, FSOC cannot know how designation will impact the company, a company's customers and counterparties, and the U.S. economy. Furthermore, FSOC will not know whether and to what extent designation will mitigate systemic risk.

3. Exempt Classes of Companies from Potential SIFI Designation

[7] *See, e.g.,* Exec. Order. 12,866; Exec. Order 13,563.

Congress empowered the Federal Reserve, in consultation with FSOC, to do this under section 170 of the Dodd-Frank Act. Congressional direction to the Federal Reserve is clear: "The Board of Governors shall promulgate regulations on behalf of, and in consultation with, the Council setting forth the criteria for exempting certain types or classes of U.S. nonbank financial companies or foreign nonbank financial companies from supervision by the Board of Governors."

Consistent with our recommendation that FSOC address systemic risk through its section 120 authority, we believe that regulated companies should be exempt from SIFI designation. The Department should recommend that the Federal Reserve use its authority under section 170 to exempt several classes of nonbank financial companies from supervision, including:

i. companies whose financial services businesses are already regulated (*i.e.*, holding company oversight is not required so long as the principal operating subsidiaries are regulated) and whose primary regulator does not consent to such designation;

ii. companies that do not exhibit all of the factors described in subsections (a) and (b) of section 113; and

iii. companies in a substitutable industry (*i.e.*, where designation of one entity will only lead to assets, customers and counterparties moving to another entity).

As Chair of the Council, the Secretary of the Treasury should require that the Federal Reserve take these and other steps before the FSOC will consider any new SIFI designations.

4. <u>Transparency and Due Process</u>

First, we must distinguish the various roles of FSOC and separate the determination process from its non-determination powers, such as regulatory coordination. While our concerns and suggestions below are confined to the use of section 113 determinations and regulatory actions related to systemic risk, CCMC also advocates for full transparency in all FSOC meetings and actions.

Procedures for section 113 determinations are set forth in the *Final Rule and Interpretive Guidance* of April 11, 2012, a *Supplemental Procedures* document of February 4, 2015, and *Staff Guidance* on methodologies relating to Stage 1 thresholds of June 8, 2015. Under current policy, FSOC first notifies a nonbank financial company within 30 days after the Deputies Committee instructs the Nonbank Designations Committee to form an analytical team to commence an active review of the company in Stage 2. Prior to approving a company for active review, the Deputies Committee considers any preliminary information gathered by the Nonbank Designations Committee. While CCMC appreciates the reforms implemented under the *Supplemental Procedures* and *Staff Guidance*, the section 113 determination process is still grossly insufficiently transparent, for both institutions potentially subject to designation and the public generally.

Once the Council asserts jurisdiction over a nonbank financial company and has provided the company the ability to respond and rebut it, **a potential designee should be involved in the determination process at the earliest point feasible**. This will prevent the creation of a one-sided record that becomes more difficult to rebut as the process unfolds. This involvement should include access to any data, financial metrics, and staff analysis that FSOC is considering in evaluating the company for designation. We respectfully observe that FSOC is not staffed by experts on any individual nonbank. FSOC should recognize this deficiency, and consult with the company in question to ensure analytic validity.

Notice, access, and consultation should be provided to companies in Stage 1 of the designation process. Currently, a company—if it even knows it is being reviewed—does not know the theories under which FSOC is proceeding and has no access to the information being collected and considered. Thus, the company cannot rebut FSOC's theories, correct inaccuracies in the information, or fill in any gaps at a stage in the proceedings *before* judgments (if not determinations) are formed. Both the company and FSOC should have an interest in using accurate, high-quality data and not wasting time and resources proceeding based on misinformation. Fundamental principles of transparency and basic notions of due process also support FSOC sharing the information it is collecting and considering from the outset.

Experience demonstrates that FSOC has not been forthcoming in identifying the factual bases underpinning its conclusions before the latest stage of the proceedings. Time and resources are often wasted responding to issues relating to data or materials that FSOC may or may not be focused on. It is very difficult to correct misunderstandings or to change judgments or biases formed on the basis of defective data. It is especially hard when a company is left to guess what data FSOC is relying upon in its evaluation. Therefore, it is critical that a potential SIFI have access to the data on which FSOC is actually relying and allowed the opportunity to correct and supplement it as early in (and throughout) the process as possible. Given the significance of SIFI designation to a company and the economy generally, such basic due process should be a standard practice as a matter of good governance, even before legal considerations are factored into the equation.

FSOC should identify specific risks or uncertainties that have prompted its consideration of the company. Notice of the areas of risk and uncertainty that give rise to FSOC's interest would allow both FSOC and the company to collect facts and develop expert analyses to better inform FSOC's review. In addition, it will be much easier for FSOC and the company to engage in this dialogue *before* the Stage 2 process, when FSOC's review is most likely to become public knowledge due to securities disclosure requirements.

With respect to stage 1 metrics and thresholds, we respectfully note that the April 2012 *Final Rule and Interpretive Guidance* stated that FSOC "intends to review the appropriateness of both the Stage 1 thresholds and the levels of the thresholds that are specified in dollars as needed, but at least every five years, and to adjust the thresholds and levels as the Council may deem advisable." **<u>These thresholds should be revised substantially upward.</u>** For example, there is a broad consensus that the $50 billion asset threshold for banks in section 165 is far too low; the Secretary of the Treasury recently suggested it be raised to at least $250 or $300 billion. As noted in the preamble to the *Final Rule and Interpretive Guidance*, the $50 billion asset threshold for the section 113 determinations process was simply imported from section 165. Accordingly, FSOC should likewise substantially raise the nonbank threshold.[8]

Expectations for full transparency should also apply to the Office of Financial Research ("OFR"), the research and analysis arm of the Council. Under the Dodd-Frank Act, OFR information gathering must be conducted pursuant to standard metrics and procedures which have been published for comment pursuant to section 153(a). Any company-specific information or analysis provided to the FSOC should also be provided to the company, and the company should be afforded the opportunity to comment on that information on the record. Past work by the OFR raises legitimate concerns about the quality and the credibility of some of OFR's

[8] In the alternative, any final rule governing section 113 procedures could reference the statutory threshold.

analysis.[9] Given the very significant consequences of designation, it is incumbent upon FSOC to follow a process that ensures its conclusions are supported by accurate facts, data, and analysis.

Finally, potential designees should be allowed to meet with FSOC principals, individually or collectively, through every stage of the determination process. The Council, like Congress and regulatory commissions in the executive branch, is a deliberative body. Formal or informal prohibitions on interaction with individual FSOC members are deeply antithetical to the core principles of such bodies.

5. Role of the Primary Financial Regulatory Agency

The Dodd-Frank Act requires FSOC to consult with the primary financial regulatory agency, if any, for each nonbank financial company that is being considered for a determination before the Council makes any final determination. As announced in the *Supplemental Procedures*, for any company under active review in Stage 2 that is regulated by a primary financial regulatory agency or home country supervisor, FSOC notifies such regulator or supervisor that the company is under active review no later than such time as the company is notified. FSOC's stated intention is to seek to begin the consultation process with such regulator or supervisor during Stage 2, before the Council votes on whether to advance the company to Stage 3. We propose several actions that FSOC should take as part of this consultation, to ensure that it is as substantive and meaningful as possible.

First, the quality of the primary regulator's consultation will be hamstrung if it is not provided meaningful facts and analytical data by FSOC. That will require a standard template for such sharing of materials, and a timeline that provides the consulting parties ample opportunity to evaluate them.

Second, because the primary regulator of the company being evaluated is best suited to identify and understand the risks posed by the company, the Council should establish standards that provide additional weight to the views of the primary regulator with regard to 1) the rationale for initiating the designation process, 2) the utility of information and data under review, and 3) the vote of its members. More importantly, logic suggests that **the Council should require the concurrence of the primary regulator in any final determination under section 113**. It is

[9] *See* Letter from David T. Hirschmann, Center for Capital Markets Competitiveness, to U.S. Sec. and Exch. Comm'n (Oct. 30, 2013) *available at:* http://www.sec.gov/comments/am-1/am1-3.pdf.

unfathomable that the Council would proceed with a designation that comes with significant consequences for a company and its industry if the company's primary regulator—the agency that is best suited to understand the business, its industry, and the risks it poses—determines that designation is not appropriate.

Third, while the statutory language is vague with respect to specifically who represents the primary regulator, the law must mean that the agency to be consulted is the entire agency (or agencies) that regulates the company's principal operating subsidiaries. While the head of an agency may sit on the Council, he or she, along with his or her colleagues on a multi-member board or commission, should all be a part of the consultation process. The statute cannot be interpreted to mean that a sitting FSOC member must consult with oneself. This will ensure that all points of view are considered.

Finally, the Council should make the results of its consultation available to the company at the earliest point, including a description of the precise nature of the consultation, the responses received by FSOC, the extent to which they were considered, and the basis for rejecting any such consultative advice. Doing so on the record will not only provide necessary transparency, but it will also strengthen the designation process by allowing companies the opportunity to correct any misinformation or to fill information gaps that may have led to an erroneous conclusion. To these same ends, materials from each agency, including memoranda analyzing the potential designee and designation, should also be provided to the company.

6. Pre-designation Economic Analysis

CCMC notes that it appears no economic analysis has been conducted on any SIFI designation to date. We believe that **FSOC should require that any determination or designation action under section 113 or section 804 include a detailed cost-benefit analysis or economic impact assessment**. This analysis or assessment should be informed by data provided by the company as well its responses or rebuttals to Council conclusions or arguments.

The Council acknowledged in its 2011 Second Notice of Proposed Rulemaking Regarding Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies that it is subject to Executive Orders 12866 and 13563, which direct agencies to assess available regulatory alternatives and to make this analysis available for public review and comment during the rulemaking process.[10] Apart from legal considerations, it would seem to be a matter of logic and good governance that a designation of a SIFI should not be made unless the government officials making such a decision understand the economic significance of their decision. Said another way, we view the law as leaning in the direction of requiring agencies to evaluate the competing economic costs and benefits of a proposal in order to avoid a finding by a court that its decision was arbitrary and capricious.

There have similarly been no economic or traditional analyses accompanying either of the 2011 proposed notices of rulemaking, and no indication that a cost-benefit analysis would be conducted when the Council considers whether to designate SIFIs. A rule establishing the designation process is exactly the type of rule that should be subject to a careful and thorough cost-benefit analysis that has the benefit of public input. It is difficult to understand how the Council can assess the desirability of such important rules without conducting and publishing an economic analysis.

FSOC's failure to expose its rules concerning the designation process to a cost-benefit analysis on which the public can comment is particularly troubling in light of the significant costs that may be incurred by individual companies in attempting to avoid the designation process (*i.e.*, by changing their structure or activities in response to Stage 1 metrics and other similar factors), during the course of the designation process, or as a result of their designation as SIFIs.[11] At a minimum, the Council should publish a cost-benefit analysis that compares the costs of review and designation to the cost of the Council making recommendations to the primary financial regulatory agencies for new or heightened standards and safeguards to address the conditions that might give rise to designation.[12] FSOC has stated that it intends to follow this approach with respect to asset management companies and to consider whether the systemic risks that they may pose "can be mitigated by subjecting such companies to Board of Governors supervision and prudential standards, or whether they are better addressed through other regulatory measures."[13] The Council should follow the identical process with respect to all nonbank financial

[10] 76 Fed. Reg. 64264, 64272 (Oct. 18, 2011). Under these Executive Orders, if regulation is necessary, an agency is directed to quantify costs and benefits, select regulatory approaches that maximize net benefits and reduce costs, harmonize rules and promote flexibility.
[11] Costs also would be imposed on the customers, investors, creditors and counterparties of a company designated as a SIFI flowing from the increased regulation that would be imposed on the designated company.
[12] *See* 12 U.S.C. § 5322(a) (2) (K).
[13] 76 Fed. Reg. at 64269.

companies and the Council's "numerous authorities and tools to carry out its statutory duty."[14]

The Council should not take any action under section 113 unless the evidence demonstrates that the costs are significantly outweighed by the benefits. In that regard, FSOC should clearly identify and describe to a targeted company the forms of regulation that will be imposed, the financial impact that they will have, and the attendant costs that will be created.

7. Pre-designation De-risking

During the Stage 3 of the determination process, the company and its primary functional regulator(s) should be given an opportunity to address FSOC's concerns and make appropriate changes in its operations or regulations, respectively, prior to preliminary designation.[15] Many governmental agencies do just that—they establish markers to assist companies in structuring their activities, so that the choice of how much regulation they want to confront is their own.

In that regard, companies should be given an opportunity to undertake voluntary risk mitigation, such as changes to business practices, the raising of capital, restructuring, divestiture, resolution plans, etc. Those actions should be given due weight and discussed on the record, if designation is still determined to be necessary and appropriate. Contemporaneously, primary regulators should be given the opportunity to enhance their regulatory regimes governing the company in question. Such a process would accomplish FSOC's main goal of mitigating risk, including systemic risk. This process may do so much more quickly and more broadly than designating a single company—especially a company in an industry for which the Federal Reserve has not designed enhanced prudential standards under section 165.

It seems logical and consistent with Congressional intent for the Council to identify systemically risky behavior so that companies or their regulators can voluntarily lessen systemic risk, rather than designating a *non-bank* to be subject to an

[14] *Id.* at 64267.

[15] We are aware that FSOC may view this as a difficult task. We have endeavored to consider those factors as best we can. However, we are left with the conclusion that if FSOC cannot articulate the precise risk factors or channels that require designation as a SIFI, it is hard to imagine that it can defend the designation in the face of a judicial challenge. This also points to an industry-wide activities-based approach as a better solution, as a proper analysis of the factors or channels usually makes it clear that any solution should apply to all relevant market participants that engage in the activity creating the concern.

additional layer of *bank-style* supervision by the Federal Reserve Board in an attempt to lessen systemic risk.

8. Off Ramp, Annual Reevaluations, and Opportunity to Appeal

FSOC has adopted few policies with respect to the annual reevaluation required by section 113(d) of the Dodd Frank Act. In considering annual reevaluations, FSOC should:

- Establish a precise methodology, with clear standards and metrics;
- Consider the benefits of an abbreviated rather than a *de novo* analysis;
- Adopt time limitations on the process not to exceed 60 days;
- Establish a standard and associated burden of proof for a rebuttable presumption that designation should be discontinued;
- Provide for full participation and comment by the company on the record;
- Communicate meaningful financial, examination, risk analysis and related materials (including OFR reports & written reports provided by the primary regulator and any other members of FSOC) to the company;
- Consider changes not just in the company's activities and structure but changes in the market and regulatory regime;
- Take full consideration of:

    a. Enhancements of regulation which reduce the risk to US financial stability;

    b. Voluntary de-risking achieved by the company;

    c. Changes in the assumptions, analysis, or in any of the other factors that supported the initial designation;

d. Responsive materials submitted by the company concerning any changed facts or circumstances that were relevant to the initial designation; and

e. The role and perspectives of the primary financial regulators.

Perhaps as important should be the establishment of targets or goals for a SIFI to work toward at the time of its designation so that it can eliminate the risks that caused it to be designated. FSOC must be able to articulate the principal risks that led to designation, and in doing so, the SIFI would be provided a roadmap of steps that can be taken to increase its chances of being "undesignated." Basic fairness suggests that the company should be told as best as possible how it came to be designated so it can work toward reversing the process. This result would be consistent with FSOC's primary goal of lessening overall systemic risk.

Finally, companies subject to a section 113 determination should be given a meaningful opportunity to contest or appeal a determination, both at the time of the determination and at regular intervals thereafter. The grounds for appeal of an FSOC decision should be expanded to provide a designee with the same grounds for appeal as anyone subject to an administrative tribunal. Under the *Supplemental Procedures*, each company subject to a determination has a right to an oral hearing to contest the determination once every 5 years. Such a long timeframe is wholly inconsistent with basic notions of due process and fairness.

9. International Coordination

The FSB and other relevant international standard-setting bodies should not designate a firm for enhanced systemic risk regulations if the home domestic regulator has not designated said firm as a systemically important financial institution. Furthermore, no FSOC member should approve or consent to a SIFI assessment methodology promulgated by FSB (or another international standard-setting body) until the completion of the Department's review and the implementation of any recommended reforms.

Conclusion

CCMC understands that true prosperity is built on a foundation of economic growth and financial stability. Towards these ends, CCMC supports FSOC's statutory mission to monitor and address systemic risk. However, after more than five years following implementation of the section 113 determinations process, we have concluded that the one-off SIFI designation of nonbank financial companies for bank-style regulation is ineffective, indefensibly burdensome, and constitutes an arbitrary and unfair exercise of governmental authority. CCMC supports repeal of section 113 of the Dodd-Frank Act, and looks forward to working with Congress on this matter. We respectfully request that the Treasury Department endorse such Congressional action in its report. However, notwithstanding potential legislation, the Council and the Department of the Treasury should implement common-sense and reasonable reforms–through rulemaking–to improve the determination and designation processes.

Sincerely,

David Hirschmann

David Hirschmann

cc: The Honorable Janet Yellen, Board of Governors of the Federal Reserve System
Mr. Keith Noreika, Office of the Comptroller of the Currency
The Honorable Richard Cordray, Consumer Financial Protection Bureau
The Honorable Jay Clayton, U.S. Securities and Exchange Commission
The Honorable Martin Gruenberg, Federal Deposit Insurance Corporation
The Honorable J. Christopher Giancarlo, U.S. Commodity Futures Trading Commission
The Honorable Melvin Watt, Federal Housing Finance Agency
The Honorable J. Mark McWatters, National Credit Union Administration
The Honorable S. Roy Woodall, Jr., Financial Stability Oversight Council
The Honorable Richard Berner, Office of Financial Research
Mr. Steven Seitz, Federal Insurance Office

cc: Mr. Peter Hartt, New Jersey Department of Banking and Insurance
Mr. Ray Grace, North Carolina Office of the Commissioner of Banks
Ms. Melanie Senter Lubin, Maryland Office of the Attorney General, Division of Securities