U.S. Chamber of Commerce

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March 10, 2023

The Honorable Janet L. Yellen
Secretary of the Treasury
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Re: Financial Stability Oversight Council's Activities-Based Approach to Nonbank Financial Company Systemic Risk

Dear Secretary Yellen:

The U.S. Chamber of Commerce's (the "Chamber") Center for Capital Markets Competitiveness supports the Financial Stability Oversight Council's (the "FSOC" or "Council") mission of addressing risks to U.S. financial stability. Specifically regarding monitoring and assessing nonbank financial companies, the Chamber has strongly supported the activities-based approach to determine threats to financial stability that was finalized in the 2019 guidance.

The Chamber believes that the 2019 guidance is the best means of achieving the intent of monitoring and addressing potential financial stability issues for nonbank financial companies. While recent pronouncements indicate that FSOC may attempt to craft new guidance for nonbank financial companies, it is important that such an effort include notice and comment for stakeholders. Additionally, any guidance in this area must adhere to the court holding in *Metlife, Inc. v. Fin. Stability Oversight Council*, 177 F. Supp. 3d 219 (D.D.C. 2016). [1]

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During your confirmation hearing in January 2021, we were encouraged by your support of the activities-based approach, when you stated "When I served on FSOC as Fed Chair, it was proposed to look at activities that asset managers engage in that might pose systemic risks….this is an activities-based approach that FSOC was pursuing. And I thought that was the right approach. So…I would hope to look again at some of those approaches."[2]

However, subsequent statements since the confirmation hearing have made it clear that the FSOC is, in fact, reassessing the activities-based approach. Most recently, during the

[1] *Metlife, Inc. v. Fin. Stability Oversight Council*, 177 F. Supp. 3d 219 (D.D.C. 2016).
[2] U.S. Senate Committee on Finance, Hearing to Consider the Anticipated Nomination of the Honorable Janet L. Yellen to the Secretary of the Treasury, January 19, 2021, available at https://www.congress.gov/117/chrg/CHRG-117shrg46951/CHRG-117shrg46951.pdf.

February 2023 meeting of the FSOC, it was reported that Treasury staff are presenting to the FSOC "options for assessing and responding to financial stability risks, including the process for designating nonbank financial companies for Federal Reserve supervision and prudential standards."[3]

The Chamber has been a leading voice supporting the activities-based approach established by the 2019 guidance. The current approach, which focuses on systemically important activities rather than entities, takes into account important lessons learned from the 2012 guidance and the 2016 U.S. District Court for the District of Columbia decision to invalidate MetLife's designation as a systemically important financial institution (SIFI). If the FSOC decides to proceed with revised recommendations for assessing nonbank financial company risks to financial stability, we remind the FSOC that any new guidance must abide by the MetLife decision and will be subject to notice and comment under the Administrative Procedure Act (APA).

Background

In December 2019, the FSOC unanimously voted to finalize guidance improving the transparency and due process of its activities. Importantly, the 2019 guidance established an activities-based approach for the Council's efforts to identify, assess, and address potential risks and threats to U.S. financial stability. The 2019 guidance formalizes work started in the Obama Administration, where the FSOC directed staff to "undertake a more focused analysis of industry-wide products and activities to assess potential risks"[4] as it related to the asset management industry. During the Treasury's 2016 review of asset management products and activities, Treasury Secretary Jacob Lew affirmed that "The Council was created to bring the financial regulatory community together to look across the entire system, ask tough questions, and address potential risks to financial stability before they materialize. Our analysis of asset management products and activities is a crucial piece of that work."[5]

<u>Activities-Based Approach Is Consistent with Congressional Intent</u>: As we noted together with other trade organizations in a September 3, 2014 letter to Secretary Lew, the products and activities-based approach is consistent with the approach that the authors of the Dodd-Frank Act envisioned for the FSOC in its oversight of the U.S. financial system and consideration of the nonbank financial institutions within it.[6] Congress did not delegate to the FSOC sweeping

[3] U.S. Department of the Treasury, Readout of the Financial Stability Oversight Council Meeting on February 10, 2023, available at https://home.treasury.gov/system/files/261/FSOC_20230210_Readout.pdf
[4] U.S. Department of the Treasury, Financial Stability Oversight Council, Press Release of the Financial Stability Oversight Council Meeting, July 31, 2014, available at https://www.treasury.gov/initiatives/fsoc/council-meetings/Documents/July 31 2014.pdf
[5] U.S. Department of the Treasury, Financial Stability Oversight Council Releases Statement on Asset management Products and Activities, April 18, 2016, available at https://home.treasury.gov/news/press-releases/jl0431
[6] Joint Trades Letter to the U.S. Department of the Treasury regarding the FSOC's review of the asset management industry, September 3, 2014, available at https://centerforcap.wpengine.com/wp-content/uploads/2014/09/2014-9.3-FSOC-Letter.pdf.

regulatory responsibility for nonbanks. Instead, Congress intended the FSOC to tread lightly and in a targeted fashion with respect to nonbank financial institutions and their activities.[7]

Activities-Based Approach Is Efficient and Effective: Unlike the entity-specific approach established by the 2012 guidance, which relied on a less transparent and less analytical process, the activities-based approach provides a more measured process through which the FSOC can identify, monitor, and analyze potential risks to financial stability. The Council may still consider a nonbank financial company for potential designation as a SIFI if it cannot adequately address the financial threat and the expected benefits of such a designation outweigh the costs. The Chamber agrees with the Council's assessment in 2019 that the current guidance would be efficient and effective, while also allowing it to focus on those risks to U.S. financial stability that would be most likely to be realized.[8]

FSOC Must Adhere to the MetLife Decision

We strongly encourage the FSOC to forego any changes to the 2019 guidance. Following the implementation of the 2019 guidance, the financial services industry navigated through the market stress related to the COVID-19 pandemic without the need for the FSOC to designate any nonbank financial company as systemically important. The activities-based approach has shown itself to be appropriate and effective.

If the Council reconsiders the guidance, it is critical that the FSOC adhere to the decision that struck down MetLife's designation as a SIFI under the Dodd-Frank Act. As a key finding in that case, the court determined that the FSOC relied on assumptions rather than conducting a vulnerability assessment to determine if any perceived material financial distress would result in a threat to U.S. financial stability.[9] By designating MetLife as a SIFI, the FSOC improperly assumed financial distress without failing to consider certain historical realities of their industry.

New Guidance Must Provide Notice and Comment

Should the FSOC decide to revise the guidance surrounding nonbank financial entities, the FSOC is required to comply with the APA's notice and comment requirements.

Section 553 of the APA generally requires a federal agency to provide public notice and an opportunity for comment on any proposed rule. 5 U.S.C. § 553. The law provides limited exceptions for "rules of … procedure." § 553(b)(3)(A). The basis for this procedural-rule exception is that an agency can change procedures so long as it does not affect members of the public and their obligations. Pickus v. U.S. Bd. of Parole, 507 F.2d 1107, 1113 (D.C. Cir. 1974).

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[7] Although the Dodd-Frank Act provided the FSOC with the authority to designate a nonbank financial entity as a SIFI, such a designation would have the Federal Reserve Board impose bank-like regulations that are inappropriately tailored for these entities.

[8] U.S. Department of the Treasury, Financial Stability Oversight Council Issues Final Guidance on Nonbank Designations, December 4, 2019, available at https://home.treasury.gov/news/press-releases/sm844.

[9] *Metlife, Inc. v. Fin. Stability Oversight Council*, 177 F. Supp. 3d 219, 223, 236-39 (D.D.C. 2016).

The D.C. Circuit has made clear that procedural rules are limited to “technical regulation of the form of agency action and proceedings ... which merely prescribes order and formality in the transaction of [agency operations].” Id. at 1113-14. “This category ... should not be deemed to include any action which goes beyond formality and substantially affects the rights of those over whom the agency exercise authority.” Id. at 1113.

However, even if this amendment would traditionally fall into that limited exception, in March 2019, the FSOC adopted a rule stating it would not amend or rescind its interpretive guidance without providing public notice and an opportunity to comment consistent with the APA.[10] The FSOC must follow its own rule if it seeks to amend its interpretive guidance.

Conclusion

The Chamber shares the objective of the FSOC to address concerns with systemic risk. We strongly believe that the activities-based approach finalized in the 2019 guidance is the most effective and appropriate way to monitor and assess nonbank financial companies. We strongly discourage the FSOC from amending such guidance away from the activities-based approach. Please let us know if we can answer any questions.

Sincerely,

Tom Quaadman
Executive Vice President
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce

cc: Stephen Ledbetter, Executive Director, Financial Stability Oversight Council
Eric Froman, Assistant General Counsel, Banking & Finance, U.S. Treasury

[10] Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 84 Fed. Reg. 8958, March 13, 2019, available at https://www.govinfo.gov/content/pkg/FR-2019-03-13/pdf/2019-04487.pdf.