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Alert Memo

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FSOC Poised to Begin Nonbank SIFI Designations Following Release of Final Rule

The Financial Stability Oversight Council issued a final rule and interpretive guidance this week outlining the process and considerations for designating systemically important nonbank financial companies ("Nonbank SIFIs").[1] As expected, the release made only minor clarifying changes to a proposal released last October,[2] and the FSOC has sought to retain very broad discretion with respect to both the substantive analysis and the designation process. The final rule and guidance lay out a procedural framework and certain factors that the FSOC will consider in making designations, but the quantitative thresholds and examples of metrics that will be used are expected to evolve further and are effectively non-binding. As a result, until the Council begins requesting information from firms and makes some initial designations, it will be difficult to predict implications for individual institutions. The FSOC is expected to begin evaluating companies immediately.

The broader implications of any designations will depend upon the finalization of the Section 165 and 166 rules regarding heightened prudential standards and how they are applied to Nonbank SIFIs.[3] Nonbank SIFIs will become subject to heightened prudential regulation and supervision by the FRB, including a combination of capital and liquidity regulations, resolution and recovery planning mandates, risk management standards, single counterparty exposure limits, stress testing and a framework for early remediation. The FRB has indicated that its proposed rules under Sections 165 and 166 may have to be tailored to address individual Nonbank SIFIs or classes of Nonbank SIFIs. Only when those substantive rules are applied to Nonbank SIFIs will the full ramifications of designation for individual firms or classes of firms become more clear.

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[1] FSOC, Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies (Apr. 3, 2012), available at http://www.treasury.gov/initiatives/fsoc/Documents/Nonbank%20Designations%20-%20Final%20Rule%20and%20Guidance.pdf. The final rule implements Section 113 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").

[2] 76 Fed. Reg. 64,264 (Oct. 18, 2011) (the "Second NPR"). See also Derek M. Bush and Shara M. Chang, FSOC Reproposes the Nonbank SIFI Designation Rule: A Revised Procedure, But No Greater Clarity Regarding Who Will Be Designated or When, BNA Securities Regulation & Law Report (Dec. 19, 2011), available at http://www.cgsh.com/fsoc_reproposes_the_nonbank_sifi_designation_rule/.

[3] In January, the Board of Governors of the Federal Reserve System (the "FRB") published proposed rules for heightened prudential regulation and supervision that would apply to the large bank holding companies and Nonbank SIFIs subject to Sections 165 and 166. See 77 Fed. Reg. 594 (Jan. 5, 2012). For more information on those rules, see our alert memo The Federal Reserve Board's Heightened Prudential Requirements for Systemically Important Financial Institutions: Initial Framework, but More Detail to Follow, available at http://www.cgsh.com/federal_reserve_boards_heightened_prudential_requirements/.

The FSOC also released this week its final rule regarding public access to Council documents under the Freedom of Information Act ("FOIA"), and the FRB issued a reproposal of a definition in Regulation Y regarding companies that are deemed to be "predominantly engaged in financial activities", and thus potentially subject to designation as Nonbank SIFIs.[4] Key observations related to these releases and an outline of the final FSOC designation framework are provided below.

Key Observations

- *Timing of First Round Designations*. In a fact sheet released concurrently with the final rule, the FSOC stated that it will "immediately initiate the process of evaluating nonbank financial companies" for designation as Nonbank SIFIs, and Treasury officials have indicated they expect to begin making designations by the end of the year. The FSOC has estimated that fewer than 50 nonbank financial companies meet the Stage One thresholds. While there will be pressure to make designations by year-end, the FSOC is likely to proceed cautiously in light of the novelty of the designation process and the potential that designations could be challenged in court. Achieving consensus among members of the FSOC may also prove challenging in some cases.

- *Broad Discretion*. Although the final rule provides more clarity about the designation process than the statute or the FSOC's first proposed rule,[5] the FSOC has clearly sought to retain broad discretion in making its determinations. Much of the substantive content in the FSOC's release is included as interpretive guidance that does not purport to limit the FSOC's discretion,[6] and the final rule provides no safe harbor under which nonbank financial companies would be ineligible for designation.[7]

- *Confidentiality of Submissions*. The preamble to the final rule responds to concerns raised by commenters about the confidentiality of information submitted to the FSOC. It states that the FSOC expects that much of the information it collects from firms or other agencies and regulators would be exempt from disclosure under FOIA

[4] See FSOC, Implementation of the Freedom of Information Act (Apr. 3, 2012), available at http://www.treasury.gov/initiatives/fsoc/Documents/FSOC FOIA regulations Draft Final Rule3-30-2012.pdf; FRB, Definition of "Predominantly Engaged in Financial Activities" (Apr. 2, 2012), available at http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20120402a1.pdf. See note 10 for a discussion of the FRB's Regulation Y proposals.

[5] 76 Fed. Reg. 4555 (Jan 26, 2011).

[6] Despite comments urging it to do so, the FSOC pointedly refused to commit that any future changes to the interpretive guidance would follow notice and comment procedures, saying only that it may do so if it determines such procedures "appropriate". A number of industry commenters also requested that the FSOC conduct cost-benefit analyses with respect to the final rule and to individual designations of companies as Nonbank SIFIs. In response, the FSOC indicated (i) that the final rule was generally procedural in nature and therefore it did not need to conduct a cost-benefit analysis regarding the final rule, and (ii) that a cost-benefit analysis was not one of the required statutory considerations with regard to individual designations.

[7] The FRB may, by regulation and in consultation with the FSOC, create criteria for exempting certain types or classes of nonbank financial companies from supervision by the FRB. See Section 170 of the Dodd-Frank Act. As of the date of this memorandum, the FRB has not proposed any such regulations.

as either privileged and confidential trade secrets and commercial or financial information or as confidential supervisory information.[8] In addition, the final rule clarifies that its confidentiality protections extend to information collected by federal and state financial regulatory agencies and information voluntarily submitted by nonbank financial companies. These protections, which require that the Council maintain the confidentiality of any data, information and reports that it collects, would appear to supersede the standard reservation of authority in the FSOC's final FOIA rule to make discretionary disclosures of information if such disclosures would not be precluded by law. Despite these measures, however, there are still significant confidentiality issues in light of the statutory requirements of FOIA (and the certainty that some parties will seek the disclosure of FSOC information pursuant to FOIA), as well as the risks of intentional or inadvertent release of confidential information due to the broad dissemination of information among the FSOC's member agencies. The preamble notes that FSOC members will be free to use confidential FSOC information for their own enforcement, examination, resolution planning or other purposes.

- *Initial Screening and Notification*. The initial quantitative thresholds established to select a pool of companies for further analysis are low, providing little insight into which companies might eventually be designated as systemically important. The FSOC also acknowledged that relevant data for all nonbank financial companies may not be available. The FSOC may choose to advance a nonbank financial company to the Stage Two and Stage Three analyses even if it does not meet the Stage One quantitative thresholds (or if relevant data was not available).

- *Treatment of Investment Funds and Asset Managers*. The FSOC will consider establishing additional metrics in the future tailored to hedge funds and private equity funds and their advisers. For now, such entities will be reviewed under the terms of the final rule and interpretive guidance. Funds managed by the same adviser may be evaluated in the aggregate, "especially when such funds' investments are identical or highly similar."

- *Treatment of Foreign Companies*. The release clarifies that foreign nonbank financial companies will be evaluated solely on their U.S. assets, liabilities and operations. It also indicates that the FSOC generally expects to consult with the relevant foreign regulatory authorities to the extent it deems appropriate. The interplay between the Financial Stability Board's designation of so-called "G-SIFIs" and the FSOC's designation of Nonbank SIFIs will remain a key area to watch.

- *Notifications to Companies*. The FSOC does not currently intend to notify companies that they are being evaluated in Stage One or Stage Two, or that they have been evaluated and a decision was made not to advance them to Stage Three. As a result, companies that are not subjected to Stage Three review could be left in a

[8] This is similar to the approach that the FRB and the Federal Deposit Insurance Corporation ("FDIC") took to addressing commenter concerns about confidentiality in their final rules on resolution plan, or "living will", requirements.

state of uncertainty about their status for some time. The FSOC will notify companies that are selected for additional review in Stage Three.

- *Voluntary Submission of Information*. Uncertainty about whether and when a company has moved from Stage One to Stage Two will raise strategic questions for some firms about taking proactive steps to address a potential designation, including voluntarily submitting information.

- *Metrics and Availability of Information*. Although the interpretive guidance provides "representative" sample metrics, it expressly leaves open the possibility that other metrics will be used. In addition, it is unclear whether all the metrics the FSOC currently proposes to use will be applicable to, or available for, different types of nonbank financial companies, particularly since the FSOC intends to rely on public and existing regulatory sources of information in Stage One and Stage Two. The lack of clarity around which metrics the FSOC will consider in Stage Two, and how such metrics will be applied to individual firms, is likely to further complicate firms' efforts to address the FSOC's concerns through voluntary submissions in Stage Two.

- *Focus on Resolvability*. The final rule retains the focus on resolvability first introduced in the Second NPR, but specifies that it could be either an aggravating or mitigating factor in assessing whether a firm might pose a threat to U.S. financial stability. The guidance also notes that complex or opaque structures may exacerbate potential threats to U.S. financial stability. Potential designees should look to the "living will" requirements implemented by the FRB and the FDIC under Section 165(d) of the Dodd-Frank Act for indications of likely areas of regulatory concern, and may consider preparing a scaled-down version of a living will in order to demonstrate "resolvability".[9]

- *Publicity of Determinations and Related Considerations*. The FSOC will publicly announce a final determination to designate a firm as a Nonbank SIFI (or to rescind a designation). The FSOC rejected suggestions that it publish the names of companies under consideration for a determination, citing the preliminary nature of the evaluation and "the potential for market participants to misinterpret such an announcement." Although the FSOC will not publicly disclose a decision to move a firm to Stage Three, public companies that are notified that they are in Stage Three will need to evaluate their disclosure obligations under U.S. securities laws when they receive that information.

Statutory Framework

Under Section 106 of the Dodd-Frank Act, a nonbank financial company potentially subject to designation under Section 113 includes any U.S. or foreign company that is "predominantly engaged in financial activities" other than a bank holding company, a foreign

[9] For more information on the FRB and FDIC living wills requirements, see our alert memos FDIC Acts on Living Wills Rulemaking, Adopting Staggered Deadlines for Submission of Resolution Plans Starting in 2012, available at http://www.cgsh.com/cgsh/SIFI_and_IDI_Resolution_Plan_Rules.pdf; and A Non-US Bank's Guide to US Resolution Plans, available at http://www.cgsh.com/a_non-us_banks_guide_to_us_resolution_plans/.

banking organization that is treated as a bank holding company in the United States, and certain other types of entities. A company is "predominantly engaged in financial activities" if (1) 85% or more of the company's consolidated annual gross revenues derive from activities that are financial in nature as defined by the Bank Holding Company Act of 1956, as amended (the "BHCA"); or (2) 85% or more of the company's consolidated assets relate to activities that are financial in nature.[10] Firms that do not satisfy this 85% test could still be designated if they are organized or operate in a manner that evades the application of Title I of the Dodd-Frank Act, including Section 113. The FSOC does not intend to provide any industry-based exemptions from potential determinations, although industry-specific factors will be taken into account in the determination process..

Section 113 includes two determination standards that the FSOC must consider in order to designate a Nonbank SIFI. The FSOC must determine that either:

- material financial distress at the nonbank financial company could pose a threat to U.S. financial stability; or
- the nature, scope, size, scale, concentration, interconnectedness or mix of the activities of the nonbank financial company could pose a threat to U.S. financial stability.

Section 113 of the Dodd-Frank Act sets forth ten statutory considerations that the FSOC must consider in making a determination;[11] these considerations are woven into the six categories of factors for the Stage Two and Stage Three analysis laid out in the guidance. The statute also grants the FSOC discretion to consider any other factor that it deems appropriate.

[10] Pursuant to Section 102(b) of the Dodd-Frank Act, in February 2011, the FRB published a proposed amendment to Regulation Y detailing the requirements for determining whether a company is predominantly engaged in financial activities. See 76 Fed. Reg. 7731 (Feb. 11, 2011). On April 2, 2012, the FRB issued a reproposal to amend the definition of "activities that are financial in nature" set forth in this proposed rule. The amendment would clarify that any financial activity referenced in, or incorporated into, Section 4(k) of the BHCA would constitute financial activity for the purposes of determining whether a company is predominantly engaged in financial activities under Title I of the Dodd-Frank Act. However, the boundaries of the definition of each financial activity would be determined without regard to the conditions imposed, by statute or regulation, upon a bank holding company or financial holding company with respect to such activities if the conditions are not an "essential element" in defining the activity itself. Such conditions were typically designed for safety and soundness purposes or to comply with other provisions of law limiting the activities of banks, bank holding companies or financial holding companies. Notwithstanding the finalization of the FSOC's rules on designations of Nonbank SIFIs, these FRB proposals have not yet been finalized, which could complicate the rapid implementation of the final rule.

[11] The ten statutory factors include: (i) the extent of the leverage of the company; (ii) the extent and nature of the off balance-sheet exposures of the company; (iii) the extent and nature of the transactions and relationships of the company with other significant nonbank financial companies and significant bank holding companies; (iv) the importance of the company as a source of credit for households, businesses, and state and local governments and as a source of liquidity for the U.S. financial system; (v) the importance of the company as a source of credit for low-income, minority, or underserved communities, and the impact that the failure of such company would have on the availability of credit in such communities; (vi) the extent to which assets are managed rather than owned by the company, and the extent to which ownership of assets under management is diffuse; (vii) the nature, scope, size, scale, concentration, interconnectedness, and mix of the activities of the company; (viii) the degree to which the company is already regulated by one or more primary financial regulatory agencies; (ix) the amount and nature of the financial assets of the company; and (x) the amount and types of the liabilities of the company, including the degree of reliance on short-term funding.

Chart 1: Evaluation Stages for Nonbank SIFIs	
Identification of Nonbank Financial Companies	A company is a nonbank financial company if (1) 85% or more of the company's consolidated annual gross revenues derive from activities that are financial in nature (as defined by the BHCA); or (2) 85% or more of the company's consolidated assets relate to activities that are financial in nature.
Stage One	Screening based on quantitative thresholds. Nonbank financial companies move to Stage Two if they have $50 billion in assets <u>and</u> one or more of: • $30 billion or more in gross notional credit default swaps for which the company is the reference entity;[12] • $3.5 billion in derivative exposures (after accounting for cash collateral and netting agreements); • $20 billion of total debt outstanding (broadly defined); • a minimum 15:1 assets to equity leverage ratio; <u>or</u> • short-term debt equal to 10% of total consolidated assets. Foreign firms will be screened based only on their <u>U.S.</u> assets, liabilities and operations, while U.S. firms will be tested based on their <u>global</u> assets, liabilities and operations. GAAP information based on most recent quarter to be used if available. Specific thresholds may be revisited by the FSOC based on advances in data availability, and the FSOC intends generally to review the thresholds every five years.
Stage Two	Individualized assessment of the firm's risk profile using quantitative and qualitative information based on six broad categories: • size; • substitutability; • interconnectedness with other financial firms; • leverage; • liquidity risk and maturity mismatch; and • existing regulatory scrutiny. To the extent possible, the FSOC will also assess qualitative factors, including the resolvability of the firm. No notice to firms, but voluntary submissions possible.
Stage Three	More detailed assessment of the firm's threat to U.S. financial stability based in part on information to be provided by the company. In addition to Stage Two considerations, the FSOC will focus on three potential "transmission channels": • <u>exposure</u> of creditors, counterparties, investors, or other market participants; • the potential for <u>rapid liquidation of the firm's assets</u> to cause market disruptions; • the potential consequences if the firm becomes unable or unwilling to provide a <u>critical function or service</u> relied upon by market participants and for which there are no ready substitutes.

[12] The FSOC currently intends to calculate this threshold using data available through the Trade Information Warehouse.

The Final Rule and Interpretive Guidance

The final rule is substantially the same as the Second NPR, making only minor changes and clarifications in response to concerns raised by commenters.[13] Like the Second NPR, the final rule and interpretive guidance set forth a three-stage process for the evaluation and designation of nonbank financial companies as Nonbank SIFIs. The considerations applicable at each stage are set forth in Chart 1 above, although the Council retains discretion to consider any additional factors it deems appropriate.

In Stage One, the FSOC will subject nonbank financial companies to an initial screening consisting of an asset test and a series of quantitative thresholds, using the most recent quarterly or other available data from existing public and regulatory sources. Although at this stage the designation process is primarily focused on size, a nonbank financial company that does not exceed the asset test or any of quantitative thresholds is not protected by a “safe harbor,” as the FSOC retains broad discretion to subject any company to further review.

In Stage Two, the FSOC will evaluate whether the nonbank financial firm’s failure poses a threat to U.S. financial stability. The FSOC will evaluate a company’s risk profile based on six broad categories that form a framework for applying the required statutory factors, including the ten statutory considerations described above. The guidance includes sample metrics representative of the types of information that the FSOC intends to apply in each of the six categories, but it warns that these metrics are only representative and may not apply to all industries. These sample metrics are outlined in Chart 2 below. The FSOC will use quantitative and qualitative information primarily from existing public and regulatory sources for the Stage Two screening, but will also consider in Stage Two information that a nonbank financial company voluntarily provides. The final rule also leaves the door open for information requests directed to companies in Stage Two. Although the final rule does not require the FSOC to give formal notice to companies being evaluated in Stage Two, the preamble to the final rule indicates that the FSOC may change its process for providing notification as it gains experience.

In Stage Three, the FSOC would request information from the nonbank financial company and work with the OFR to conduct a final determination of whether the company poses a threat to U.S. financial stability under one of the two statutory criteria discussed above. In addition to assessing the statutory factors and six Stage Two categories, in Stage Three the FSOC will also assess three “transmission channels” identified as likely to facilitate the spread of risk or instability to other firms or markets.

[13] These include, among others, clarifying that: (i) the FSOC will consider the effectiveness of existing consolidated supervision of a nonbank financial company; (ii) the FSOC’s assessment of resolvability in the designation process will consider whether a firm’s resolvability mitigates or aggravates the firm’s potential threat to U.S. financial stability; (iii) the FSOC does not intend to publicly announce or otherwise disclose the name of any nonbank financial company that is under evaluation for a determination prior to a final determination with respect to such company and will not notify a firm that it is undergoing Stage Two analysis; (iv) for funds and asset managers, the FSOC will take into consideration the distinct nature of a manager’s assets under management compared to an asset manager’s own assets, and may also consider the aggregate risks posed by separate funds that are managed by the same adviser, especially if they have the same or highly similar investments; (v) U.S. firms will be reviewed based on their global assets, liabilities and operations, while foreign firms will be reviewed based on their U.S. assets, liabilities and operations; and (vi) the Stage One thresholds will be applied based on GAAP, when possible, and based on the most recent quarterly data (or less frequently if quarterly data is not available).

Chart 2: Representative Metrics for Stages Two and Three[14]	
Size: • Total consolidated assets or liabilities. • Total risk-weighted assets. • Off-balance sheet exposures where a firm has a risk of loss (e.g., lines of credit). • Extent to which assets are managed rather than owned, and the extent to which ownership of assets under management is diffuse. • Direct written premiums reported by insurance companies. • Risk in force (i.e., aggregate risk exposure from risk underwritten in insurance related to certain financial risks, such as mortgage insurance). • Total loan originations.	**Liquidity Risk and Maturity Mismatch:** • Fraction of assets that are classified as level 2 and level 3 under applicable accounting standards. • Liquid asset ratios. • Ratio of unencumbered and highly liquid assets to net cash outflows in a short-term stress scenario. • Callable debt as a fraction of total debt. • Asset-backed funding versus other funding. • Asset-liability duration and gap analysis. • Short-term debt as a percentage of total debt and as a percentage of total assets.
Substitutability: • Market share of a firm and its competitors in a particular market. • Stability of market share across the firms in the market over time. • The market share of a firm and its competitors for products or services that serve a substantially similar economic function as the primary market under consideration.	**Leverage:** • Total assets and total debt relative to total equity. • Gross notional exposure of derivatives and off-balance sheet obligations relative to total equity or to net assets under management. • Ratio of risk to statutory capital (relevant to certain insurance companies). • Changes in leverage ratios.
Interconnectedness: • Counterparties' credit exposures to a firm (broadly defined). • Number, size, and financial strength of counterparties. • Identity of principal contractual counterparties. • Aggregate amounts of gross or net derivatives exposures and the number of derivatives counterparties. • Amount of gross notional credit default swaps outstanding for which a firm or its parent is the reference entity. • Total debt outstanding. • Reinsurance obligations.	**Existing Regulatory Scrutiny:** • Extent of state or federal regulatory scrutiny, including processes or systems for peer review; inter-regulatory coordination and cooperation; and whether existing regulators have the ability to impose detailed and timely reporting obligations, capital and liquidity requirements, and enforcement actions, and to resolve the firm. • Existence and effectiveness of consolidated supervision, including whether and how non-regulated entities and groups are supervised on a group-wide basis. • For entities based outside the United States, the extent to which a firm is subject to prudential standards on a consolidated basis in its home country that are administered and enforced by a comparable foreign supervisory authority.

[14] The FSOC has indicated that these are not an exhaustive list of metrics, and any particular metric may not apply to all nonbank financial companies under evaluation.

Under the final rule, a Stage Three review is subject to certain deadlines, but in practice it places few limits on the length of the evaluation process. A company subject to Stage Three review will be given advance notice of its potential designation as a Nonbank SIFI and may be required to provide additional information about its operations to the FSOC. The firm would have at least 30 days to submit additional information following receipt of a notice, or such longer time as the FSOC determines appropriate. The FSOC will then provide another notice once it deems its evidentiary record complete, at which point it would have 180 days to come to a final determination. In practice, a nonbank financial company could be subject to multiple additional information requests before the FSOC declares its evidentiary record to be complete, starting the 180-day clock.

At the end of the Stage Three review, the FSOC will vote on whether a company should receive a proposed Nonbank SIFI determination, with an affirmative vote of at least two-thirds of the FSOC's voting members, including the affirmative vote of the FSOC's Chairperson, the Treasury Secretary, required to proceed. Upon an affirmative vote of the FSOC, it will issue a written notice stating the basis for the proposed determination to the nonbank financial company. Once notified, a firm may request a hearing to contest the proposed determination. The final rule contains timeframes and deadlines for the hearing and post-hearing processes. Whether or not a nonbank financial company requests a hearing, another two-thirds vote of the FSOC voting members (after the hearing, if one occurs, or shortly after the deadline for requesting a hearing has expired) would be required to make the determination final. Public disclosure will be made only after such final determination, and not at prior stages.

The final rule provides that the FSOC will no less than annually reevaluate its determinations, and can rescind designations if the FSOC determines, by a two-thirds vote, that a Nonbank SIFI is no longer systemically important. Such Nonbank SIFIs would receive notices of each reevaluation and would have the opportunity to submit written materials to support a decision to rescind their designation. It is not clear how often the FSOC will reevaluate nonbank financial companies that were reviewed and <u>not</u> designated as systemically important by the FSOC, although it appears that the FSOC will review information about nonbank financial companies on a quarterly basis to determine whether there are any companies that would exceed the Stage One thresholds or should otherwise be considered for designation. A Nonbank SIFI could request a reevaluation outside of the annual process, but the FSOC notes that any decision to reevaluate such Nonbank SIFI would be in its sole discretion and it appears that agreement to such reevaluation would only occur in the "event of an extraordinary change".

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