

THE FINANCIAL SERVICES ROUNDTABLE

Financing America's Economy



1001 PENNSYLVANIA AVE., NW
SUITE 500 SOUTH
WASHINGTON, DC 20004
TEL 202-289-4322
FAX 202-628-2507

E-Mail info@fsround.org
www.fsround.org

January 20, 2010

Mr. Alastair M. Fitzpayne
Deputy Chief of Staff and Executive Secretary
Office of the Chief of Staff
Department of the Treasury
1500 Pennsylvania Avenue, N.W., Room 3414
Washington, DC 20220

Re: Advance Notice of Proposed Rulemaking Regarding Authority to Designate Financial Market Utilities as Systemically Important

Dear Mr. Fitzpayne:

Pursuant to its authority under Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”), the Financial Stability Oversight Council (the “Council”) has published an Advanced Notice of Proposed Rulemaking (the “ANPR”) on the designation of a particular financial market utility (“FMU”) as systemically important. The ANPR invites public comment on the criteria and analytical framework that the Council should apply in determining that a particular financial market utility (“FMU”) should be designated as systemically important because the failure of the FMU could create or increase the risk of significant liquidity or credit problems and thereby may pose a threat to the financial stability of the United States. Systemically important FMUs will be subject to examination by a designated regulator (its “Supervisory Authority”). The Financial Services Roundtable (“The Roundtable”) appreciates the opportunity to submit this comment letter in response to the ANPR.¹

I. General Comments

The authority of the Council to determine that a financial market utility is systemically important and should be subject to supervision under Title VIII is one of the Council’s most significant powers. These determinations will have a material impact on the designated FMUs and the domestic and international markets in which the FMUs operate.

¹ The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America’s economic engine, accounting directly for \$74.6 trillion in managed assets, \$1.1 trillion in revenue, and 2.4 million jobs.

We urge the Council to exercise this power in a transparent and consistent manner. Determinations should be based upon a complete analysis of all relevant statutory factors. The company, its customers and competitors should be given a clear, transparent and complete explanation for the basis for a determination. The criteria and methodology applied by the Council in making determinations should be consistent and not vary arbitrarily from FMU to FMU.

We also encourage the Council to take a holistic approach to setting its final criteria and methodology for determinations of systemic importance with the purpose of ensuring that the effect of such determinations (both on entities that become systemically important and those that do not) are consistent with 1) the overall goal of Dodd-Frank to reduce systemic risk and 2) applicable international standards for management of such risk.

We also request the Council as an initial matter to provide more guidance regarding the statutory definition of the term “financial market utility” that appears in Title VIII. The statutory definition is short, but contains a number of concepts not commonly used in this context. For instance, what activities are covered by the term “manages and operates a system,” and how does that differ from ownership of the system if the owner is something other than a passive shareholder?

II. Specific Comments

We offer the comments below on a select number of issues identified in the ANPR (numbered in accordance with the numbering system used in that document). In some cases, we have responded to less than all the issues raised under a single item in the ANPR.

Question 1.

What quantitative and qualitative information should the Council use to measure the factors it is required to consider in Section 804(a)(2) when making determinations under Section 804 of the Dodd-Frank Act?

The Council should make use of existing publicly available quantitative information to the greatest extent possible instead of requesting FMUs to produce customized data. Federal Reserve Board Governor Tarullo has outlined some useful principles for data collection that could guide the Council. Those principles recognize that excessive data production requirements can be counter productive and that the Council should not need real time market data to make its determinations.² The Council should not create additional data requirements unless the existing data is substantially inadequate. The use of public rather than private data will also increase the transparency of the determination process.

² See Statement of Governor Daniel K. Tarullo before the Subcommittee on Security and International Trade and Finance, Committee on Banking, Housing and Urban Affairs, U.S. Senate, February 12, 2010, available at <http://www.federalreserve.gov/newsevents/testimony/2010testimony.htm>.

Question 2.

. . . Are there certain levels of quantitative measures (e.g., for value and exposure) or qualitative characteristics (e.g., registered clearing agencies versus exempt clearing agencies) that should trigger a review for systemic importance by the Council?

The Council should identify the major types of FMUs it will be considering and set quantitative measures for each type of FMU that define the threshold of systemic importance. The metrics should be public or available to FMUs. Such measures will effectively define a safe harbor for each type of FMU that will, absent special qualitative considerations, enable an FMU to predict whether it has systemic importance. Reasonable predictability of an FMU's status as systemically important will enhance stability in the market by reducing the current uncertainty surrounding FMUs with respect to the potential determination of systemic importance.

Question 3.

Which of the considerations listed in section 804(a)(2) are most important for the Council to consider? Should the application of the considerations differ depending on the type of FMU, and if so how?

The factors considered by the Council should always link back to the over-arching principles guiding the Council's determinations. Consequently, the most important considerations with respect to any FMU should be those that actually help the Council to assess whether the failure, or disruption in the functioning, of the FMU will create or increase the risk of significant liquidity or credit problems spreading among financial institutions or markets in a way that will threaten the stability of the financial system of the U.S. The statutory considerations that must be factored into the determinations of the Council should be applied differently to different types of FMUs only if such differences are justified by the practical circumstances of the relevant FMUs. While the Council should consider all factors in making a determination, the relative weight of the factors may vary from time to time. The importance of any one consideration can be affected by market conditions, technological changes, and policy developments.

Question 4(b).

What time horizon/statistics should be used when assessing value (e.g., daily, monthly or annual averages; daily, monthly, or annual peaks)? Should the Council consider historical values, projected future values, or both?

Annual historical values should be used because they are the most verifiable and readily available form of information. The time horizon does not need to be shorter in order to capture the importance of an FMU in the context of the entire U.S. financial system (*i.e.*, the importance of an FMU in that context is unlikely to change from month to month or quarter to quarter).

***Question 4(e).* Should certain payment systems that transfer relatively low aggregate values be considered by the Council for designation as systemically important given that the system's failure or disruption could still cause widespread disruption, especially if there is no ready alternative means of making payments? For example, the failure or disruption of a system used extensively to make payments could leave a significant portion of the general public with unexpected overdrafts and/or lack of liquid funds. If so, what factors should the Council consider in making a determination of systemic importance for such systems?**

We strongly discourage the Council from considering low aggregate value payment systems for designation as systemically important. Congress set a high standard for designation of a financial market utility as systemically important, requiring the failure or disruption of the system to “create, or increase the risk of significant liquidity or credit problems spreading among financial institutions or markets” and, as result, “threaten the stability of the financial system of the United States.” Designation of low aggregate value payment systems on the basis of a failure or disruption of such a system resulting in widespread disruption among the general public is not consistent with the standard set by Congress. While we do not discount the inconvenience to consumers that could possibly be caused by the failure of certain low aggregate value payment systems, the potential for widespread disruption among consumers simply does not meet the high bar of institutional instability and threat to the financial system of the United States set by Congress.

In addition, this question is premised on the notion that there might not be ready alternatives to a low aggregate value financial market utility that suffers disruption or failure. We respectfully disagree with that premise. Such systems exist alongside and compete against one another, the result of which is numerous retail payment system options that individually (and even collectively within a payment system type) account for only a portion of overall payments volume. There is intense competition among the numerous forms of low value payments, including checks, payment cards and ACH, and all of these compete against cash. This intense competition within the U.S. retail payments system has led to the development and widespread use among the general public of a large number of retail payment system options. As a result, the failure or disruption of a single retail payment system (or even more than one system within a payment system type) is unlikely to have the type of devastating cascading effects contemplated by the statutory standard for systemic importance.

In short, the concept of “widespread disruption” as the basis of a designation of systemic importance has no statutory foundation and cannot be justified for low aggregate value payment systems given the competitive marketplace for retail payments which operates as a structural barrier to the type of systemic risk Congress intended to address.

Question 6d & 7.

Should the Council consider whether there are readily available substitutes for the payment, clearing, and settlement services of financial market utilities?

How should the Council assess whether failures or disruptions to a financial market utility could potentially threaten the financial system of the United States?

We believe that the Council should give significant weight to the availability of substitutes for payment, clearing and settlement services and more generally that the Council should evaluate the risk posed by failure or disruption of any financial market utility in significant measure by the availability of substitutes. When financial market utilities operate in a competitive landscape, competition creates a structural hedge against systemic risk. This is particularly true in the field of low aggregate value transactions, where financial market utilities compete for the business of financial institutions, and financial institutions use a range of financial market utilities to complete transactions. Where competition has produced an environment in which financial market utilities can provide services in substitution for one another, the risk of instability in the financial system of the United States is significantly diminished.

Question 8.

Title VIII of the DFA contains distinct provisions with respect to financial market utilities and financial institutions engaged in payment, clearing and settlement activities. What factors should the Council consider in distinguishing between a systemically important financial market utility and a financial institution that is very substantially engaged in a systemically important payment, clearing, or settlement activity?

This distinction is a critical issue for market participants and requires substantial additional clarification by the Council in order to allow stakeholders to provide a substantive answer.

Question 10.

What role should international considerations play in designating financial market utilities?

Given the holding of the Supreme Court in *Morrison v. National Australia Bank Ltd.*, No. 08-1191 (decided June 24, 2010), the Council should be conservative in applying Title VIII to non-U.S. entities since Title VIII does not contain an express affirmative statement that the provision is intended to have extra-territorial effect. To the extent that the Council does apply Title VIII to non-U.S. entities, it should seek to ensure that its determinations maintain a level playing field for both U.S. FMUs and foreign FMUs. Likewise, the Council should seek to ensure that foreign FMUs that are subject to a comparable regulatory regime are not

Mr. Alastair M. Fitzpayne

January 20, 2010

Page 6 of 6

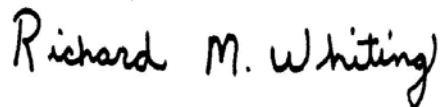
subject to undue regulatory burdens in the U.S. Participation in government support programs should not be a factor in identifying whether an FMU is systemically important.

Although this final point does not relate directly to any item flagged for comment in the ANPR, the Roundtable would like to point out an anomaly in the regulatory scheme of Title VIII. The Fedwire payment system is an obvious candidate for designation as a systemically important FMU. If that happens, however, Section 803(8)(iv) provides that the Board of Governors is the Supervisory Authority for any FMU not already subject to the jurisdiction of a federal banking agency (*e.g.*, depository institutions), the Securities and Exchange Commission (*e.g.*, registered clearing agencies), or the Commodities Futures and Trade Commission (*e.g.*, derivative clearinghouses). As result, the Federal Reserve would be in the unique position of supervising its own payment system.

III. Conclusion

The Roundtable appreciates the opportunity to comment on the ANPR, and looks forward to continuing to work with the Council on this important issue. For further information you may contact me or Brad Ipema, Senior Counsel for Legal & Regulatory Affairs, Brad.Ipema@fsround.org.

Sincerely,

A handwritten signature in black ink that reads "Richard M. Whiting". The signature is written in a cursive, slightly slanted style.

Richard M. Whiting

Executive Director & General Counsel