U.S. Chamber of Commerce

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Financial Stability Oversight Council
Attn: Eric Froman
Office of the General Counsel
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

**RE: Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies (RIN 4030 – ZA02)**

Dear Mr. Froman:

The U.S. Chamber of Commerce ("Chamber") appreciates the opportunity to respond to the Financial Stability Oversight Council's ("FSOC" or "Council") notice of proposed interpretive guidance ("Proposed Guidance").[1] The Chamber supports the Proposed Guidance, which largely reinstates key provisions of the 2019 interpretive guidance ("2019 Guidance"),[2] while incorporating several new processes into FSOC's procedures and analytic methodologies. The Proposed Guidance would restore analytic rigor, objectivity, transparency, and due process at FSOC so that well-regulated nonbank financial companies are not designated without appropriate justification and evaluation.

Congress charged FSOC, acting in coordination with other financial regulators, with identifying and addressing risks to U.S. financial stability. FSOC has several tools to address potential threats to the financial system, including direct engagement with nonbank financial companies, coordination with primary regulators, and designating a nonbank financial company as a Systemically Important Financial Institution ("SIFI") under the supervision of the Federal Reserve Board. Since Congress created FSOC in 2010,[3] FSOC has alternated between two significantly different approaches to address systemic risk and the possible designation of a nonbank financial company as a SIFI. The Chamber has maintained an ongoing engagement with FSOC throughout the three

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[1] U.S. Treasury, Financial Stability Oversight Council, Authority to Require Supervision and Regulation of Certain Nonbank Companies (March 30, 2026).

[2] U.S. Treasury, Financial Stability Oversight Council, Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies (December 4, 2019).

[3] Dodd-Frank Wall Street Reform and Consumer Protection Act, July 21, 2010 ("Dodd-Frank").

previous iterations of interpretive guidance finalized in 2012, 2019, and 2023, and welcomes this current opportunity to comment on its latest proposal.

Historically, the Chamber has strongly supported the activities-based approach to addressing risks to U.S. financial stability over an entities-based approach, or designation-first approach. The 2019 Guidance not only prioritized an activities-based approach to addressing potential systemic risks, but it also instituted strong due process provisions for any nonbank company under consideration for designation by FSOC, including a clear commitment to conduct a cost-benefit analysis and to assess the likelihood of material financial distress. These important procedures were adopted by FSOC in response to the 2016 decision to invalidate MetLife's designation as a SIFI by the U.S. District Court for the District of Columbia in MetLife, Inc. v. Fin. Stability Oversight Council ("MetLife case").[4]

The current 2023 Guidance[5] and its associated Analytic Framework, which the Proposed Guidance seeks to replace, significantly changed FSOC's approach to evaluating systemic risk that may be posed by nonbank financial companies and the designation process without appropriate justification and in contravention of lessons learned from the MetLife case. The 2023 Guidance demoted the activities-based approach as a priority tool. It also eliminated the two critical due process safeguards for nonbank firms under consideration for SIFI designation that had been affirmed by the court in *MetLife*: the requirement to conduct a cost-benefit analysis and to assess the likelihood of a nonbank financial company's material financial distress or failure. In a further effort to make it easier to designate nonbank financial companies, the 2023 Guidance expanded the industries and activities that could be designated, while at the same time broadening the definition of "threat to the financial stability of the U.S."

As the Chamber explained to FSOC in its July 25, 2023 letter,[6] allowing FSOC to prioritize the designation of a nonbank financial company and to eliminate due process safeguards would run counter to the promotion of stable and competitive U.S. financial markets. The prospect of FSOC designations without clear systemic risk justifications could undermine the resilience and adaptability of our financial markets and, thereby, may increase the U.S. economy's vulnerability to economic shocks. Given the substantial cost of being regulated like a bank by the Federal Reserve Board, nonbank financial companies may seek to avoid growing or developing innovative products and

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[4] *MetLife, Inc. v. Fin. Stability Oversight Council*, 177 F. Supp. 3d 219 (D.D.C. 2016).

[5] U.S. Treasury, Financial Stability Oversight Council, Guidance on Nonbank Financial Company Determinations (November 17, 2023).

[6] U.S. Chamber of Commerce, Letter to FSOC on the Interpretive Guidance Proposal "Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies" and "Analytic Framework for Financial Stability Risk Identification, Assessment, and Response" (July 25, 2023).

activities to eliminate any chance of being designated by FSOC. Such actions would not only undermine incentives to develop products and activities that could minimize system risks but could also cause consumers to face higher costs and see fewer new financial products.

The Proposed Guidance is an important step in reestablishing analytic rigor, objectivity, and transparency in FSOC's process for identifying and addressing potential risks to U.S. financial stability. The Proposed Guidance outlines several important modifications to FSOC's current nonbank designation procedures, notably a return to the activities-based approach to addressing potential systemic risk and a restoration of due process safeguards if a nonbank financial company is under consideration for designation. The Chamber provides comments and recommendations below on several specific aspects of the Proposed Guidance.

## Comments and Recommendations

### 1. Updating the analytic methodologies and incorporating the analytic process into the designation guidance document

The Proposed Guidance recommends updates to FSOC's analytic methodologies, including a new list of the types of vulnerabilities that most commonly contribute to potential risks to U.S. financial stability. The Chamber supports the Council's goal of creating a more analytically rigorous and transparent process and appreciates its clarifying statement that the "mere presence of any single vulnerability does not indicate that a risk to U.S. financial stability exists."[7]

Among the additions to the analytic methodologies, the Chamber supports FSOC's intention to consider impediments to economic growth and economic security. We agree that economic growth provides the strongest foundation for financial stability, and that economic security should be "bolstered by encouraging technological innovation in the financial system and by modernizing financial regulation to ensure it is efficient, effective, and forward-looking."[8]

The Chamber supports FSOC's removal of "destabilizing activities" from the list of vulnerabilities. However, FSOC has also proposed adding asset valuations to the list of vulnerabilities, asserting that sudden drops in asset valuations could be a potential "trigger" for systemic risk. We encourage the Council to reevaluate the inclusion of asset valuations among the list of vulnerabilities it would consider as a risk to financial stability. Changes to asset values are a normal facet of the financial markets. Asset

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[7] Proposed Guidance at 15560.

[8] Proposed Guidance at 15553.

values on their own are not an indicator of systemic risk. It is only by the impact of some of the other vulnerabilities included in the Proposed Guidance, such as leverage, liquidity and maturity mismatch, or concentration, that could exacerbate stability concerns. We recommend FSOC consider if the other vulnerabilities outlined in the Proposed Guidance and the use of the activities-based approach are sufficient tools to monitor valuation concerns.

In line with the 2019 Guidance, the Chamber supports the Council's intention to merge the descriptions of its nonbank financial company designation process and its analytic methodologies for financial stability risks into a single document and then rescind the 2023 Analytic Framework. We agree with the Council that the consolidation of the guidance and methodologies into a single document will create a more efficient and accessible document.

## 2. Prioritizing and augmenting the activities-based approach to addressing potential systemic risk

The Chamber supports the Council's return to prioritizing the activities-based approach to addressing potential systemic risk. The purpose of utilizing an activities-based approach is to focus on the areas of the nonbank financial system that present potential systemic risks and that may escape other regulatory scrutiny. We agree that focusing on the activities-based approach to addressing potential systemic risk will enhance FSOC's analytical rigor, provide a more practical and effective way to address potential systemic risks and be consistent with its efforts to focus on impediments to economic growth and economic security.

Leveraging the expertise of primary financial regulators is a critical component of the activities-based approach to addressing risks on a system-wide basis. The proposed two-step process of the activities-based approach – first, monitoring financial markets and developments on a system-wide basis; and second, working with the relevant agency at the federal or state level to respond to any such potential risk – would ensure that the Council is appropriately utilizing the expertise of federal and state regulators to address specific risks to financial stability before FSOC considers a nonbank financial company for potential designation. Since truly systemic risks will very likely transcend individual companies and are likely to span industries and markets, FSOC can best accomplish its mandate to identify risks to U.S. financial stability and respond to emerging threats through enhanced information-sharing and reliance on the expertise of the primary regulators, as contemplated by the Proposed Guidance.

Moreover, primary financial regulators will be able to act in most cases far more quickly to address a potential systemic risk in comparison with the time-consuming process for designation and establishment of regulation by the Federal Reserve. By

relying on primary regulators, the activities-based approach also recognizes that, in most cases, the Federal Reserve will not be the appropriate regulator for addressing risks at a nonbank financial company. The Proposed Guidance therefore will help ensure that the best regulator(s) for addressing an identified systemic risk is promptly deployed, increasing the likelihood of a successful outcome.

Although Section 113 of Dodd-Frank authorizes FSOC to designate nonbank financial companies for supervision,[9] using this extraordinary power is meant to be an exception to the general rule that nonbank financial companies are not subject to bank-like supervision. Designating nonbank financial companies for bank-style regulation would impose onerous and costly requirements for supervision, examination, and regulation. It is an ineffective and burdensome exercise of governmental authority, which is why international coordinating bodies have largely moved on from nonbank designation as an effective or viable means of addressing potential systemic risks. Primary regulators are best suited to monitor for and mitigate potential risks associated specifically with the products and industries they regulate.

We also support the Council's intention to add to the activities-based approach by establishing a process by which the Council may, in certain cases, notify a member agency of a potential risk to U.S. financial stability. Under this process, FSOC would allow a specified period for the regulator to respond in writing regarding the actions it proposes to take to address the potential risk.[10] This new process will augment the Council's already strong engagement with regulators to respond to potential risks, while providing transparency to the public and incentivizing regulators and nonbank financial companies to take direct steps to mitigate identified systemic risks.

Whether the Council is information-sharing with regulators, issuing recommendations to regulators or the public, including through the Council's annual report, or making recommendations to Congress, each of these various avenues of engagement enable the Council to rely on the expertise and support of the primary regulators. These tools are effective and less distortionary than a designation-first approach. We agree that FSOC should only pursue entity-specific designations if a potential risk cannot be adequately addressed through the activities-based approach.

[9] Dodd-Frank Act, 12 U.S.C. § 5323(a)(1).

[10] Proposed Guidance at 15552-15553. Separate from this new authority, the Council can still issue a public, non-binding recommendation to a regulator to take action to address a potential risk to U.S. financial stability under Section 120 of the Dodd-Frank Act (12 U.S.C. § 5330(a)).

## 3. Reinstating due process safeguards from the 2019 Guidance

The Chamber supports the intention of the Proposed Guidance to return to key elements of the 2019 Guidance, namely reinstating a cost-benefit analysis and an assessment of the likelihood of material financial distress by any nonbank financial company under review for designation as a SIFI. As we noted, these are both critical due process safeguards affirmed by the court in the MetLife case but had been eliminated by FSOC in the 2023 Guidance without reasonable justification.

*Cost-benefit analysis*

The Chamber agrees with the Council that "rigorous cost-benefit analysis is an important element of thoughtful decision-making." FSOC should not designate a nonbank financial company as systemically important unless it can demonstrate that such designation would effectively mitigate any identified systemic risk posed by that entity and that the benefits outweigh the range of quantifiable and non-quantifiable costs.

Without a thoughtful and rigorous cost-benefit analysis, FSOC cannot adequately assess whether a nonbank designation would do significantly more harm than good. A cost-benefit analysis also supports the evaluation of reasonably effective alternatives, including actions that could be pursued via an activities-based approach, that are less costly than designating a company as a SIFI. In addition, a robust cost-benefit analysis should also evaluate the full costs to a nonbank financial company to be regulated by the Federal Reserve and the costs arising from competitive distortions between designated and non-designated firms in the marketplace.

The Council should only move from the activities-based approach to a designation analysis if the Council, in conjunction with the primary regulator, explains in writing the empirical basis for why the activities-based approach cannot address the risk. In the case where a nonbank financial company has been designated as a SIFI, the cost-benefit analysis should be part of the annual re-evaluation process, and if the benefits of designation do not outweigh the costs, the Council should rescind the company's designation.

*Likelihood of material financial distress*

The Chamber also agrees that FSOC should consider a company's likelihood of material financial distress before designating the company as a SIFI. As we explained in our July 2023 letter, the Council cannot presuppose a company's material financial distress since Congress authorized FSOC under Section 113(a)(1) of Dodd-Frank to designate a nonbank financial company for supervision "if the Council determines that

material financial distress at the U.S. nonbank financial company…could pose a threat to the financial stability of the United States."[11] Thus, materiality and discernible risk of company failure should be essential elements of any FSOC decision to review an activity or entity. We believe that the use and evaluation of empirical and historical data will aid FSOC in not only determining whether distress is reasonably likely to occur, but also that the distress is reasonably likely to inflict severe damage on the economy as a whole.

Materiality and a discernible risk of company distress or failure should be essential elements of any FSOC decision to review an activity or entity. By eliminating the requirement to consider a company's likelihood of financial distress, FSOC could treat an entity with only a 1% chance of impacting financial stability the same as an entity with a 99% chance. Given the inherent limit on regulatory resources, FSOC should focus its efforts on addressing the most likely systemic risks. This will also help avoid FSOC designating companies with the *de facto* purpose of expanding the Federal Reserve's regulatory remit.

4. Raising the threshold for "threat to the financial stability" of the U.S.

The Chamber supports the definition of "threat to the financial stability of the United States" under consideration in the Proposed Guidance, which is consistent with the definition in the 2019 Guidance, which stated that the threat should present "severe damage on the broader economy."[12] Under the Proposed Guidance, a threat to the financial stability of the United States would be defined as the "threat of an impairment of financial intermediation or of financial market functioning to a degree that would be sufficient to inflict severe damage on the broader U.S. economy."

The proposed definition represents a higher threshold than the current definition under the 2023 Guidance.[13] The 2023 Guidance broadened the definition of "threat to the financial stability of the U.S.," so that FSOC currently has the authority to investigate any entity over mere speculative risks – even for companies or entities that may not be a threat to the financial stability of the broader U.S. economy.

5. Allowing nonbank financial companies to address threats prior to government intervention

The Chamber believes that a nonbank financial company should have the opportunity for ongoing engagement and communication with both the Council and the

[11] U.S. Chamber July 2023 letter; quote from 12 U.S.C. § 5323(a)(1).

[12] 2019 Guidance, 84 Fed. Reg. at 71,763; see also 2012 Guidance, 77 Fed. Reg. at 21,657.

[13] The 2023 Guidance redefined it as a threat "that could substantially impair the financial system's ability to support economic activity."

entity's primary federal or state financial regulator if the Council identifies potential systemic risks with the company's activities. In line with this good faith and productive engagement, the Chamber supports the Council's newly proposed administrative process allowing a nonbank financial company or financial regulatory agencies to address a potential threat to U.S. financial stability within a period of 180 days. Direct engagement with the Council and regulators and an opportunity to directly address potential systemic risks before consideration of a formal designation are important due process considerations for nonbank financial companies.

### 6. Additional recommendations: administrative processes

As the Chamber considers FSOC's administrative process for nonbank financial company determinations, we would like to suggest three due process reforms to help protect the rights of nonbanks under the scrutiny of FSOC and to enhance FSOC's governance, transparency, credibility, and accountability.

First, FSOC principals, individually or collectively, should be available to meet with a nonbank financial company at every stage of the designation determination process. Direct and ongoing dialogue between the nonbank financial company, its primary regulator, and the FSOC decision-making principals is essential to ensure effective communication, transparency, and mutual understanding, especially given the magnitude of what a designation would mean for a company. In particular, Council members and their deputies should specifically be available to meet with nonbank financial companies during Stage 1 reviews, not just Stage 2.

Second, instead of the proposed one-day notification, the Council should provide a nonbank financial company with a notice of a final determination at least 10 business days before publicly announcing the determination. This reasonable advanced notice will help a company comply with various disclosure obligations under applicable securities laws and exchange requirements, both domestically and internationally.

Third, before making a final determination regarding a nonbank financial company, the Council, working with the Federal Reserve, should identify the specific prudential standards that would apply following a designation. FSOC should not, consistent with due process and its renewed obligation to conduct a cost-benefit analysis, designate a nonbank financial company without first identifying the specific prudential standards that would be imposed. Dodd-Frank Section 115(b)(2) requires FSOC to consider business model differences, assets under management, and other activities for which prudential standards may not be appropriate. Generally, FSOC and a nonbank financial company should know what prudential requirements and other regulations would apply to the company under a Section 113 designation prior to any designation being made. To that end, the Federal Reserve should provide detailed

information about the prudential requirements, other regulations, and estimated costs before FSOC votes on a proposed designation, and the Council should not vote to do so unless it can demonstrate that these prudential requirements would effectively mitigate the identified systemic risk posed by that company.[14]

Conclusion

The Chamber shares the objective of FSOC to address risks to U.S. financial stability. Effective systemic risk regulation should address activities across markets and be based on rigorous analysis of data. Individual designations should not be a metric for assessing FSOC's effectiveness in satisfying its congressional mandate. Imprudent designations risk undermining the effectiveness, innovation, and resiliency of U.S. financial markets and could make the U.S. more vulnerable to economic shocks.

We support the Proposed Guidance's restoration of the prioritization of the activities-based approach to addressing potential systemic risk, which will ensure that nonbank financial company designation remains a tool of last resort. We also support FSOC's intention to reinstate the requirement for a cost-benefit analysis and assessment of the likelihood of financial distress for nonbanks under consideration for designation. Both due process elements are necessary to increase FSOC's analytic rigor, objectivity, and transparency.

Collectively, the reforms in the Proposed Guidance will make FSOC more effective in addressing potential systemic risks by focusing its efforts on the risks of greatest likelihood and severity, providing faster deployment of better tailored remedial measures through primary regulators, and enhancing its analytical tools for better decision-making. They will also help prevent FSOC from neglecting the vital role economic growth plays in mitigating systemic risks and from imposing new regulations on companies that could undermine the resilience of our financial markets.

[14] This is consistent with previous input FSOC has received. See, e.g., United States Government Accountability Office, *Financial Stability: New Council and Research Office Should Strengthen the Accountability and Transparency of Their Decisions*, GAO-12-886 (2012) (FSOC must develop a framework for measuring the impacts of designation. Absent that, "Congress, the affected institutions, the public, and FSOC cannot determine whether the designations and associated oversight is actually helping to improve financial stability.").

Thank you for considering our comments. We look forward to further discussing them with FSOC and the relevant regulators.

Sincerely,

Mike Flood
Senior Vice President
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce