July 30, 2012

Financial Stability Oversight Council
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Re: ***Hearing Procedures for Proceedings Under Title I or Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act*** **(FSOC–2012–0002)**

To whom it may concern:

The American Financial Services Association ("AFSA") welcomes the opportunity to respond to the Financial Stability Oversight Council's ("FSOC" or "Council") request for comments on its procedures for hearings ("Council Hearing Procedures") conducted under Title I and Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. Its 350 members include consumer and commercial finance companies, auto finance/leasing companies, mortgage lenders, mortgage servicers, credit card issuers, industrial banks and industry suppliers.

Given its membership, AFSA is particularly interested in the application of the Council Hearing Procedures in connection with the proposed designation of a nonbank financial company under Section 113 of the Dodd-Frank Act. Designation under Section 113 by FSOC will, without question, have far-reaching impacts on an identified nonbank financial company from a cost, compliance, and operational perspective. These impacts include, but are not limited to, being subject to supervision and oversight by the Federal Reserve Board of Governors, enhanced capital and liquidity standards, enhanced risk management and concentration limit requirements and a requirement to develop resolution plans or "living wills." These requirements are not trivial, and place a significant, ongoing burden on a company that is designated.

With the significant regulatory obligations that accompany a Section 113 designation, the Council Hearing Procedures must be considered in context with the provisions of FSOC's final rule and interpretative guidance on its authority to require supervision and regulation of certain nonbank financial companies ("Final SIFI Designation Rule"). The Final SIFI Designation Rule generally provides nonbank financial companies with little opportunity to provide meaningful input throughout FSOC's Determination Process. Companies are unable to participate at all in Stages 1 or 2 of the Determination Process. Although FSOC is required to provide companies with a Notice of Consideration at the end of Stage 2, the rule does not require FSOC to explain the basis for its reasoning in the Notice. Nor does a company have an opportunity for an oral, evidentiary hearing at this stage of the Determination Process. Companies may only provide written materials to FSOC to contest the potential determination.

If after reviewing the written materials FSOC determines that a proposed designation is warranted, FSOC will provide the company with a Notice of Proposed Determination. The Final

SIFI Designation Rule does stipulate that the Notice of Proposed Determination must include an explanation of the basis of the proposed designation, but the rule provides little guidance on how detailed this explanation must be. Therefore, there is no guarantee that a company receiving such a Notice will understand FSOC's concern(s). As a result, AFSA contends that the Council Hearing Procedures must provide for robust participation by companies that are being considered for potential designation by FSOC under Section 113, and we are concerned that the current procedures unnecessarily limit said participation.

Section-by-Section

§ 1 Authority and Purpose

FSOC provides that the Council Hearing Procedures do not entitle petitioners to discovery or other similar rights. We maintain that companies that receive a Notice of Proposed Determination under the Final SIFI Designation Rule should at least have a full understanding of the basis upon which FSOC is proposing that they be designated. Even without full discovery, companies should be entitled to see the data and all sources of information that FSOC is using as the basis for its decision. AFSA recommends the adoption of a procedure where companies receiving a Notice of Proposed Determination would be allowed to ask FSOC clarifying questions and FSOC would provide necessary responses *before* a company would have to submit a petition for a hearing under these Procedures.

§ 2 Definitions

The Council Hearing Procedures define "hearing" as "a written or, at the sole discretion of the Council, an oral hearing conducted pursuant to 12 C.F.R. § 1310.21, § 1310.22, § 1320.12, or § 1320.14." While the Dodd-Frank Act permits nonbank financial companies to "request, in writing, an opportunity for a written or oral hearing before the Council to contest the proposed determination,"[1] AFSA believes that oral hearings are the only means to ensure an opportunity for dialogue between the potentially designated company and FSOC. Moreover, a potentially designated company will have already provided FSOC with written materials earlier in the process after receiving the initial Notice of Consideration. A written hearing may be of limited benefit to a company when FSOC has already reviewed materials provided by the company and rejected the company's argument that a designation is not warranted. Therefore, we suggest that FSOC use its discretion to grant oral hearings to any petitioner that requests one. This will be discussed in greater detail below. This change is particularly warranted since, as described in greater detail below, FSOC has stated that only 50 companies are expected to be reviewed past Stage 1 of the determination process.[2]

[1] See 12 U.S.C. 5323(e)(2).

[2] In the FSOC Final Rule and Interpretative Guidance on "Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies," the FSOC stated that it "has estimated that fewer than 50 nonbank financial companies meet the Stage 1 thresholds." See 77 *Federal Register* 21651.

§ 3 Initial Notice, Request for Hearing, Appointment of Hearing Clerk

AFSA asks that the FSOC follow Rule 4 of the Federal Rules of Civil Procedure ("Rule 4") when it serves the initial notice and any further notices to a petitioner. Currently, the Council Hearing Procedures do not specify how the notice will be delivered.

Under the Council Hearing Procedures, FSOC seems to imply that companies have the burden of proof as to "why the Council should exercise its discretion to grant [an oral] hearing." AFSA strongly believes and urges FSOC to acknowledge that oral evidentiary hearings allow for and promote the most efficient and effective dialogue between FSOC and a petitioner company. Without an oral hearing, a company may go through the entire designation process without a full understanding of why FSOC considers them to be systemically risky. Again, given the significance of a potential designation, AFSA maintains that FSOC should grant oral hearings to companies that request them, and that FSOC, not the petitioner, should have to demonstrate why an oral hearing is not appropriate or warranted.

AFSA further asks that given the authority the Council Hearing Procedures grant the Hearing Clerk, FSOC provide additional details as to who can be appointed a Hearing Clerk and how such an appointment would occur. We also ask that Hearing Clerks only be senior level staff at FSOC. In addition, the Council Hearing Procedures imbue Hearing Clerks with the ability to limit the quantity of written materials and the duration of oral hearings. While we recognize the importance of facilitating "orderly and timely hearings before the Council or its representatives," it is also important to give petitioners adequate opportunity to present their information. Therefore, any limitations should be in extreme cases only, and FSOC or a Hearing Clerk should have to provide a petitioner with an explanation as to why their written or oral submissions must be limited.

§ 4 Written Hearing

Section 4 of the Council Hearing Procedures explains the process by which a petitioner company will "submit a written statement setting forth the reasons, legal and factual, for contesting the proposed determination or emergency waiver or modification" by FSOC. Furthermore, the Final SIFI Designation Rule provides that companies can submit written materials to FSOC to contest a proposed designation. While the Dodd-Frank Act seems to favor "written hearings" because it specifies that oral hearings can only be granted at the sole discretion of FSOC, the statutory language does not preclude FSOC from using said discretion to grant oral hearings to petitioners that request them.

AFSA believes that providing petitioners contesting a proposed designation with oral hearings would not be a significant burden for FSOC, given the Council's estimates that only 50 companies meet the quantitative thresholds in Stage 1 of the Determination Process.[3] Realistically, the number of companies requesting evidentiary hearings will be quite small. Conversely, the financial and compliance burden for designated companies is very significant. Companies should have every available opportunity to substantiate their petition, and therefore, AFSA suggests that FSOC should use its discretion in a broad manner to provide for oral

[3] *Ibid.*

evidentiary hearings, unless FSOC can demonstrate that such hearings are inappropriate or unnecessary.

This section also specifies that the Hearing Clerk shall issue an order specifying the date by which the petitioner shall submit written materials to FSOC, but does not specify how long the petitioner shall have to gather the material to be submitted. We ask that given the large amount of materials petitioners will likely need to submit, FSOC allow petitioners at least 45 days to submit written materials.

§ 5 Oral Hearing

The Council Hearing Procedures specify that FSOC may grant, at its sole discretion, an oral hearing upon the affirmative vote of a majority of the voting members then serving. The Dodd-Frank Act only requires that FSOC use its discretion when granting oral hearings; it does not specify the need for a majority vote. Again, AFSA strongly urges that FSOC provide oral hearings to each petitioner that chooses to contest a proposed determination. If FSOC maintains that an affirmative vote is necessary, we recommend that the affirmative vote of a sole FSOC member should be sufficient to grant an oral evidentiary hearing to a petitioner.

AFSA requests that before FSOC or Hearing Clerk appoints a date, time, and place at which the petitioner shall appear, the Hearing Clerk communicate with the petitioner to pick a date, time, and place which is convenient for both the petitioner, the Hearing Clerk, and FSOC.

We understand that the petitioner must submit the materials ten days prior to the date of the oral hearing. In order to have an acceptable amount of time in which to gather the materials, we ask that the FSOC or Hearing Clerk submit notice of the hearing at least 60 days before the hearing is scheduled to take place.

Additionally, we ask that the number of days that a petitioner has to submit written materials after a hearing be extended from seven to fifteen days.

§ 6 Confidentiality

AFSA appreciates that the Council Hearing Procedures specify that FSOC will maintain the confidentiality of any information or materials submitted or otherwise obtained during the course of any hearing conducted under the procedures, and that the FSOC final rule on the implementation of the Freedom of Information Act applies to any information submitted in a hearing. However, AFSA notes that the proposal does not discuss procedures by which FSOC would obtain information from a petitioner during the Determination Process before FSOC makes an official proposed designation. We hope that FSOC will provide formal guidance on that aspect of the Determination Process.

§ 7 Denial and Dismissal of a Hearing

Before a petitioner's right to a hearing is waived for failure to make a timely request, the FSOC or Hearing Clerk should verify that the petitioner did, in fact, receive the initial notice of proposed determination.

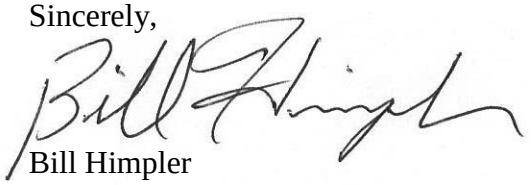
§ 8 Substantive Standards Not Affected, Variance From Procedures; Supplemental Rules

The Council Hearing Procedures allow FSOC to modify or set aside any provision for "good cause" and upon an affirmative vote of a majority of the voting members then serving. However, the Dodd-Frank Act states that FSOC can only waive or modify these Procedures if it determines, "by a vote of not fewer than 2/3 of the voting members then serving, including an affirmative vote by the Chairperson, that such waiver or modification is necessary or appropriate to prevent or mitigate threats posed by the nonbank financial company to the financial stability of the United States."[4] These two standards seem to differ significantly, and are concerned that the Council Hearing Procedures directly contradict the plain wording of the Dodd-Frank Act. While the hearing procedures also direct FSOC to notify a petitioner of any such action, they do not specify that the FSOC will also inform the petitioner as to the basis for such a decision. AFSA requests that FSOC provides the rationale behind the different approach taken from the statutory language, the types of "good cause" that can prompt these types of decisions, and the opportunity for companies to challenge any findings.

Conclusion

We look forward to working with FSOC on the hearing procedures. Please contact me by phone, 202-466-8616, or e-mail, bhimpler@afsamail.org, with any questions.

Sincerely,



Bill Himpler
Executive Vice President
American Financial Services Association

[4] See 12 U.S.C. 5323(f)(1).