



March 5, 2012

Submitted Electronically at <http://www.regulations.gov>

The Hon. Timothy F. Geithner
United States Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

**RE: 31 C.F.R. Part 150 – Assessment of Fees on Large Bank Holding Companies and Nonbank Financial Companies Supervised by the Federal Reserve Board to Cover the Expenses of the Financial Research Fund
RIN 1505-AC42**

Dear Secretary Geithner:

The American Financial Services Association (“AFSA”) welcomes the opportunity to comment on the proposed rule (the “Proposed Rule”)¹ issued by the United States Department of the Treasury (“Treasury”) to establish assessments under Section 155 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”).² Under the Dodd-Frank Act, Treasury is charged with establishing the assessments as a means of permanently funding the expenses of the Office of Financial Research (“OFR”) and the Financial Research Fund.³ OFR expenses include the combined expenses of the OFR, the Financial Stability Oversight Council (the “Council”)⁴ and the costs incurred by the Federal Deposit Insurance Corporation (“FDIC”) in implementing its orderly liquidation authority.⁵ As described by the Proposed Rule, Treasury intends to take these estimated budgeted expenses, including those expenses allocated from the Council and FDIC, and allocate them on a semi-annual basis across those bank holding companies with total consolidated assets in excess of \$50 billion and nonbank financial companies designated by the Council for supervision by the Board of Governors of the Federal Reserve System (the “Board”) under Section 113 of the Dodd-Frank Act.⁶ We greatly appreciate the opportunity to provide industry insight and comments on this important Proposed Rule and the very meaningful financial implications that will result for subject institutions.

By way of brief background, AFSA represents a broad cross-section of financial companies, including large bank holding companies and nonbank financial companies. AFSA’s

¹ Assessment of Fees on Large Bank Holding Companies and Nonbank Financial Companies Supervised by the Federal Reserve Board to Cover the Expenses of the Financial Research Fund, 77 Fed. Reg. 35 (Jan. 3, 2012) (to be codified at 31 C.F.R. pt. 150).

² Dodd-Frank Act, Pub. L. No. 111-203, § 155.

³ *Id.* at § 155(d).

⁴ *Id.* at § 118.

⁵ *See id.* at § 210(n)(10).

⁶ 77 Fed. Reg. 35.

members include leading consumer finance companies, automotive lenders and residential mortgage lenders, as well as bank holding companies and their non-depository affiliates. Some members are captive financing arms of larger manufacturing or retail companies, while other members are independent providers of financial products and services. AFSA believes that Treasury should consider and address the following comments prior to issuing a final rule on assessments for large bank holding companies and designated nonbank financial companies. As set forth more specifically below, Treasury's final rule must:

1. Provide detail and transparency for the process used to determine expenses of the respective regulators and offices that are subject to industry assessment, referred to in the Proposed Rule as the "assessment basis," including information and assumptions used to estimate the operating and capital expenses for the OFR and Council;
2. Explicitly define total assessable assets to *exclude* non-U.S. assets and those assets that are not financial in nature;
3. Take into consideration the statutory factors related to the complexity and risk associated with a given bank holding company or nonbank financial company, other than total consolidated assets; and
4. Establish a workable process for rebutting an assessment determination which includes sufficient time to establish and fund deposit accounts to pay the assessment.

Establishing the Assessment Basis.

The Proposed Rule establishes the calculation of the assessment basis for the initial assessment period and each of the subsequent assessment periods as the sum of the budgeted operating and capital expenses during a given assessment period for the OFR and Council, plus reasonable implementation expenses of the FDIC under its orderly liquidation authority.⁷ This assessment basis is then allocated at a set assessment fee rate calculated for the relevant assessment period among the larger bank holding companies and nonbank financial companies that will be designated by the Council to be subject to Board supervision.

Treasury proposes to determine the assessment fee rate by dividing the assessment basis of budgeted or estimated expenses by the aggregate of total assessable assets of assessed companies.⁸ We believe both (i) that Treasury should take other factors into consideration when establishing the denominator used to set the assessment fee rate; and (ii) that more clarity and transparency should be provided with respect to the data, information and assumptions used to generate the numerator. Failure to provide this vital information increases uncertainty regarding assessment legitimacy, increases the potential for arbitrary assessments and limits the ability of

⁷ See *id.* at 44 (the calculation of the assessment basis is set forth in the text of the Proposed Rule as 31 C.F.R. § 150.4).

⁸ For reasons set forth below, we believe that using total assessable assets as the denominator for determining the assessment fee rate is an overly simplistic formula and ignores important policy considerations mandated by Congress for Treasury to consider in establishing its assessments.

assessed companies to either project or budget for upcoming assessments or contest current assessments.

To ensure clarity, the scope of operating activities and projects giving rise to capital expenditures should be described in detail in a final rule. The Proposed Rule's discussion of these expenditures is relatively limited and provides a general reference that such expenses will be necessary or appropriate for the OFR and the Council as they carry out their responsibilities under the Dodd-Frank Act. Footnotes to the Proposed Rule further provide (i) that the capital expenses will include occupancy and information technology costs, (ii) operating expenses exclude capital expenses, and (iii) that the OFR and Council budgets will be a part of the President's annual budget submission.⁹ Such discussions are inadequate for purposes of ascertaining those expenses which are funded by the assessments. In terms of estimated amounts, the Proposed Rule merely states that the estimated annual assessments will exceed \$100 million,¹⁰ but it does not provide any additional guidance on the facts or assumptions used to establish that estimate. Additionally, without an operating history for the OFR, the Council or the FDIC's implementation of its resolution authority, there is no relevant control for determining what constitutes reasonable or appropriate expenses. Treasury's final rule must provide additional detail and transparency regarding the information, data and assumptions used to estimate and budget the assessment basis.

The Assessment Must Consider Factors Other Than Asset Size.

The Dodd-Frank Act explicitly provides Treasury with the authority, if not mandate, to consider a number of factors contained in Section 115 of the Dodd-Frank Act when determining the assessment fee assigned to a given bank holding company or nonbank financial company. These factors include, among other things, capital structure, riskiness, complexity, financial activities (including the financial activities of their subsidiaries), size and any other risk-related factors deemed appropriate. These are the same factors that the Council is required to consider in recommending enhanced prudential standards. Indeed, in its notice of proposed rulemaking on designating nonbank financial companies under Section 113 of the Dodd-Frank Act, the Council accurately discussed firm size as "an important factor, although not the exclusive factor, in assessing whether a company's failure could pose a threat to financial stability."¹¹ The legislative history to the Dodd-Frank Act clearly indicates that certain firms, such as nondepository captive finance companies, "do not pose the types of risks that warrant" designation under Section 113 and, by continuation, will not be assessed under Section 155.¹² Congress directed Treasury to consider multiple factors in designating and assessing nonbank financial companies because no single factor appropriately captures the complexity of a given firm. Further and by way of example, the FDIC's deposit insurance assessment rating system takes into account a number of factors, including the risk profile of the institution, when

⁹ 77 Fed. Reg. 37.

¹⁰ *Id.* at 41.

¹¹ Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 76 Fed. Reg. 4,555, 4,561 (Jan. 26, 2011).

¹² See 155 Cong. Rec. H14431 (daily ed. Dec. 9, 2009) (colloquy between Chairman Barney Frank and Rep. Mary Jo Kilroy regarding the scope of coverage for criteria the Council was to consider under H.R. 4173).

establishing assessment rates. Treasury could follow a similar system that considers the risks associated with a given company, using the factors outlined by Congress in Section 115 that Treasury is asked to consider when making assessments under Section 155.

Treasury further notes in the Proposed Rule that the methodology for determining the assessment fee for designated nonbank companies will be reviewed once the Council begins its designation process. Treasury should confirm in the final rule implementing Section 155 assessments that no nonbank financial company will be required to pay an assessment until the assessment rule has been reviewed and the particular characteristics of the designated nonbank financial company or companies are considered consistent with the factors outlined in Section 115. Moreover, without a bright-line asset test that allows nonbank financial companies to prepare and budget for implications of Council designation, the final rule should affirmatively confirm that any such company so-designated is not subject to an assessment until the first assessment determination date following designation by the Council, at the earliest. This will permit nonbank financial companies to prepare and budget accordingly.

Finally, the proposal is unclear on the appropriate treatment for non-public companies that may be designated as nonbank financial companies. Treasury's final rule should specifically detail how non-public companies would be treated under the rule and the manner in which information regarding such companies would need to be reported to Treasury for purposes of the assessments. To the extent that any information provided or related to the assessment process is non-public and exempt from public disclosure, Treasury should also make reference to the rules and regulations regarding the confidential treatment of such information.

Only Domestic Assets That Are Financial in Nature Should Be Assessable.

As noted, we believe that assessments should be based on considerations of factors other than solely total consolidated assets, though we recognize asset size as one relevant factor. We believe that Treasury's final rule should provide additional clarification regarding the types of assets that are considered in making an assessment determination.

First, only those assets determined to be related to a company's activities that are financial in nature, as defined by the Bank Holding Company Act of 1956, should be considered. In what we believe to be a rudimentary and over-simplified approach, the Proposed Rule notes Treasury's conclusion "that it would be reasonable to allocate the assessment basis among assessed companies by means of an assessment fee that is based on the asset size of each assessed company."¹³ We understand that Treasury evaluated other alternatives and confirmed that "complexity in the assessment design increases administrative burden to assessed companies, including planning for those assessments, and decreases transparency to the public."¹⁴ Treasury relies on both of these statements to justify reliance solely on total consolidated assets. While it may be less complex and less burdensome to adopt a rudimentary mechanism for determining assessable assets, such an approach is (i) not equitable in practice;

¹³ 77 Fed. Reg. 37.

¹⁴ *Id.* at 42.

(ii) not consistent with statutory directives of the Dodd-Frank Act; and (iii) not consistent with the functions or duties of the regulators and agencies whose expenses are funded through the assessment process. The OFR describes its role as improving “the quality of financial data available to policymakers and facilitat[ing] more robust and sophisticated analysis of the financial system.”¹⁵ Similarly, the Council defines its role as providing “comprehensive monitoring to ensure the stability of our nation's financial system.”¹⁶ With these missions, it is inconsistent to include activities, operations and assets of non-bank financial companies that are independent of the financial markets or financial functions of the OFR and Council. Designated nonbank financial companies should not be evaluated based on “total consolidated assets” but should rather be assessed based on the total consolidated assets that are financial in nature.

Second, only assets related to domestic U.S. operations should be considered for assessment purposes. Total consolidated assets should not include foreign affiliates that are consolidated for accounting and public reporting purposes. The final rule should clarify that only total assets of combined U.S. operations for U.S. companies with foreign affiliates would be assessable.

The Assessment and Payment Process Must Provide Additional Time to Comply.

The appeals process outlined in the Proposed Rule is inadequate considering the implications of receiving an assessment notice. Bank holding companies and designated nonbank financial companies need additional time beyond that allowed in the Proposed Rule to review a determination and obtain and provide relevant information to respond or object to an inappropriate assessment. We recommend that confirmation statements be delivered 60 business days before an assessment period begins and that companies have 30 business days to provide an appeal. While this may be difficult given the budget cycle and its implications for the assessment schedule, 30 and 14 calendar days, respectively, is not sufficient time. Additionally, as directed by the Dodd-Frank Act, we believe that factors other than total consolidated assets should be considered by Treasury in setting the assessment fee rates to be charged to the assessed companies. To the extent that Treasury adopts this position, we believe that additional time is even more appropriate to provide assessed companies with a sufficient opportunity to rebut an assessment determination.

The issue of timing for the confirmation statements is even more of a concern with respect to the establishment of deposit accounts for Treasury's electronic debit transactions to satisfy the assessment fee. A confirmation statement may arrive as late as 30 calendar days before an assessment period begins, and the final assessment billing notice may not be provided until as late as 14 calendar days before payment is due. This presumes (i) that companies will be in a position to allocate money to satisfy this potentially substantial fee in that period; and (ii) that all firms have access to sufficient liquidity without undue expense or costs associated with remitting an assessment fee. Given the difference in liquidity structures among companies, additional time and flexibility is necessary to comply with the assessment payment provisions.

¹⁵ <http://www.treasury.gov/initiatives/wsr/ofr/Pages/default.aspx>.

¹⁶ <http://www.treasury.gov/initiatives/fsoc/Pages/default.aspx>.

Secretary Geithner

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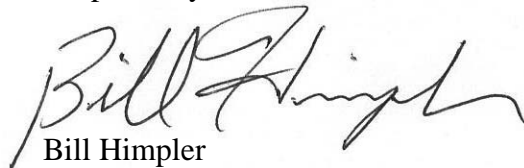
Page 6

Finally, the Proposed Rule notes that Treasury believes using a rolling four quarter average of total consolidated assets provides all parties with adequate notice of increasing asset sizes for designation purposes. This clearly applies to bank holding companies with a set threshold of \$50 billion. However, designation of a nonbank financial company is not tied to such a clear threshold and, while rolling averages may be useful for budget purposes, it is not correlated to designation as a nonbank financial company in the first instance. Accordingly, the final rule should provide additional lead time for internal budgeting purposes to give newly designated nonbank financial companies an opportunity to ensure sufficient liquidity to meet the assessment requirements.

Conclusion

AFSA appreciates the opportunity to comment on the Proposed Rule and welcomes the opportunity to discuss further any of the issues addressed in this response letter. If you have any questions or if we can provide any additional information, please feel free to contact me at (202) 296-5544, ext. 616 or bhimpler@afsamail.org.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Bill Himpler". The signature is fluid and cursive, with a long horizontal stroke at the end.

Bill Himpler

Executive Vice President

American Financial Services Association