

# DechertOnPoint

## Dechert Issues Comment Letter Regarding Financial Stability Oversight Council's Proposed Rule Regarding the Designation of Systemically Important Financial Companies

by Thomas P. Vartanian

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February 2011

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February 24, 2011

Submitted electronically through the  
Federal eRulemaking Portal

The Honorable Timothy F. Geithner  
Secretary, United States Department of the Treasury  
Chairman, Financial Stability Oversight Council  
1500 Pennsylvania Avenue, N.W.  
Washington, D.C. 20220

Re: Docket RIN 4030-AA00; Authority to Require Supervision and  
Regulation of Certain Nonbank Financial Companies

Dear Secretary Geithner:

We represent a number of large nonbank financial services companies and appreciate the opportunity to submit this comment to the Financial Stability Oversight Council ("Council") in response to its captioned request for comments on its proposed rule ("SIFI Designation Rule") regarding the designation of systemically important nonbank financial companies ("SIFIs") under Title I of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("DFA").

1. Summary

The SIFI Designation Rule proceeding is entirely defective and should be withdrawn for two fundamental reasons: (1) neither Title I nor any other title of the DFA authorizes the Council to promulgate substantive rules with regard to the designation of SIFIs; and (2) even if Congress had delegated such authority to the Council, the Council has not allowed for any meaningful comment by, or provided any meaningful guidance to the public, financial markets or potentially impacted companies because it has not provided any analysis, information, insights or advice with regard to how the Council

will actually exercise the SIFI designation authority under Title I of the DFA. This unauthorized rulemaking is seriously flawed and should therefore be abandoned by the Council. The consequences of proceeding are costly and inconsistent with sound government regulation.

Any rulemaking regarding the designation of SIFIs should be initiated anew by the Federal Reserve Board (“FRB”). The FRB should conduct it with full transparency, public engagement and the objective of exposing for comment the extraordinary nature of the authority to treat a nonbank substantially as if it were a bank. Equally as significant for public debate are the specific extraordinary circumstances in which the exercise of such authority is justified.

## 2. The Council Lacks the Authority to Adopt the SIFI Designation Rule

In order to promulgate rules that bind the public and that have the force and effect of law, a federal entity must act “pursuant to authority Congress has delegated” to it.<sup>1</sup> Indeed, if Congress has not delegated such authority to a federal entity, any rule that entity enacts will not have the force of law and will not receive the same deference granted to a rule adopted pursuant to Congressional authority.<sup>2</sup> There is no language in the DFA providing the Council rulemaking authority with regard to the designation of SIFIs, which, as discussed below, the Council intends to be a substantive rule that carries the force and effect of law.

Federal law is replete with examples of how a Congressional delegation of rulemaking authority is effectuated.<sup>3</sup> No such language confers substantive rulemaking

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<sup>1</sup> *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) (citing *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)).

<sup>2</sup> *See Mead Corp.*, 533 U.S. at 234-35.

<sup>3</sup> For example, the laws governing the rulemaking authority of constituent members of the Council demonstrate how Congress creates that authority. The National Bank Act delegates rulemaking authority to the Comptroller of the Currency (“*prescribe rules and regulations to carry out the responsibilities of the office*,” 12 U.S.C. § 93a (emphasis added)), the Federal Deposit Insurance Act provides rulemaking authority to the Federal Deposit Insurance Corporation (“*prescribe regulations to carry out this chapter*,” 12 U.S.C. § 1820(g)(1) (emphasis added)) and the Bank Holding Company Act contains clear rulemaking authorization for the FRB (“*issue such*

authority on the Council in regard to Title I of the DFA. This is in stark contrast to Congress's use of familiar language to delegate to the Council the authority to issue rules under Title VIII of the DFA.

Title VIII, among other things, concerns the designation by the Council of certain entities engaged in the clearing, payments and settlement process for special regulation because of their significance to the U.S. economy. Section 810 provides as follows:

#### **Sec. 810. RULEMAKING**

The Board of Governors, the Supervisory Agencies, and the Council are authorized to prescribe such rules and issue such orders as may be necessary to administer and carry out their respective authorities and duties granted under this title and prevent evasions thereof.

This language makes plain that Congress knew how to delegate rulemaking authority to the Council when it wanted to do so. The absence of any similar language in Title I of the DFA demonstrates that Congress did not intend to delegate to the Council the authority to make substantive rules implementing Title I.<sup>4</sup>

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*regulations and orders as may be necessary to enable it to administer and carry out the purposes of this chapter,"* 12 U.S.C. § 1844(b) (emphasis added)).

Perhaps most closely analogous to the Council in this regard was the establishment in 1980 of the Depository Institutions Deregulation Committee ("DIDC") pursuant to the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA"). Pub. L. No. 96-221, 94 Stat. 132 (1980). Section 203 of DIDMCA delegated to the DIDC the authority to "prescribe rules governing the payment of interest and dividends and the establishment of classes of deposits or accounts, including limitations on the maximum rates of interest and dividends which may be paid on deposits and accounts." *Id.* § 203(a) (repealed 1985).

<sup>4</sup> See, e.g., *Gonzales*, 546 U.S. at 258-64 (holding that an express delegation of authority to the Attorney General to implement one part of the Controlled Substances Act demonstrated that Congress did not intend to delegate to the Attorney General the authority to issue rules implementing other portions of the statute); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990), *superseded by statute*, Migrant and Seasonal Agricultural Workers' Compensation, Pub. L. No. 104-49, 109 Stat. 432 (reaching a similar conclusion with respect to the Department of Labor's rulemaking authority under the Migrant and Seasonal Agricultural Worker Protection Act).

Furthermore, the substantive criteria and material obligations and requirements created by the SIFI Designation Rule would materially affect the rights of, and clearly have adverse consequences for, nonbanks that have not previously been regulated on a consolidated basis pursuant to the bank holding company model, let alone subjected to the more stringent regulatory requirements mandated by Title I of the DFA (*see, e.g.*, Sections 115 and 165). The SIFI Designation Rule conspicuously fails to include a citation to any statute that even suggests that the Council has the authority to promulgate such a rule. The text of the proposed rule states as authority for its issuance the following:

**§ 1310.1 Authority and purpose**

(a) *Authority.* This part is issued by the Financial Stability Oversight Council (Council) under sections 111, 112 and 113 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) (12 U.S.C. 5321, 5322 and 5323).<sup>5</sup>

The only statutes cited in this provision are Sections 111, 112 and 113 of the DFA. Section 111 establishes the Council. Section 112 lists the functions that the Council is required to undertake. Section 113 provides for the designation by the Council of a SIFI. None of these sections grants substantive rulemaking authority to the Council.

Section 111(e)(2) of the DFA grants the Council the authority to adopt internal rules for the conduct of its business. In this regard, Section 111(e)(2) expressly states that any rules promulgated pursuant to this authority “shall be *rules of agency organization, procedure or practice*” (emphasis added) under the Administrative Procedure Act (“APA”). The APA requires that substantive rules of general applicability be promulgated only after the public has received notice of the proposed rule and had an opportunity to comment on it.<sup>6</sup> In contrast, federal agencies and instrumentalities may adopt internal *rules of agency organization, procedure or practice* without notice and

<sup>5</sup> Similarly, the authority citation in the heading of the proposed regulation is as follows: “**Authority:** 12 U.S.C. 5321; 12 U.S.C. 5322; 12 U.S.C. 5323.”

<sup>6</sup> *See* 5 U.S.C. § 553.

comment.<sup>7</sup> Unlike rules that bind the public and have the force of law, these organizational rules merely govern an agency's internal administrative workings; they do not alter the substantive rights or obligations of external entities.<sup>8</sup> Thus, this limited authority does not authorize the Council to promulgate a binding, substantive rule of general applicability, such as the SIFI Designation Rule.

The fact that the Council published the SIFI Designation Rule for notice and comment demonstrates that the Council does not view and does not intend the Rule to be a rule of "agency organization, procedure or practice" because, as discussed above, such rules are exempt from notice and comment under the APA.<sup>9</sup> Moreover, the SIFI Designation Rule is written as a rule that creates substantive obligations and rights that impact the public and commercial organizations doing business in the United States. In addition, the preamble to the proposal states that it has been determined that the SIFI Designation Rule is a significant regulatory action as defined in Section 3 of Executive

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<sup>7</sup> See *id.* § 553(b)(3)(A).

<sup>8</sup> See, e.g., *Chrysler Corp. v. Brown*, 441 U.S. 281, 313-14 (1979); *Pub. Citizen v. Dep't of State*, 276 F.3d 634, 641 (D.C. Cir. 2002); *Nat'l Ass'n of Waterfront Employers. v. Solis*, 665 F. Supp. 2d 10, 16-17 (D.D.C. 2009).

At its initial meeting on October 1, 2010, the Council utilized its authority under Section 111(e)(2) of the DFA to adopt the Council's bylaws, which are titled "Rules of Organization of the Financial Stability Oversight Council" ("Council Organization Rules"). Section XXX.1(a) of the Council Organization Rules discusses the authority for their issuance:

(a) These rules of organization ("rules") are adopted by the Financial Stability Oversight Council (the "Council"), which was established July 21, 2010, pursuant to section 111(e)(2) of the [DFA]. These rules, which shall be rules of agency organization, procedure or practice for purposes of section 553 of title 5, United States Code, describe the Council's authorities, organizational structure, and the rules by which the Council takes actions. (Act § 111(e)(2)).

A copy of the Council Organization Rules is attached as Appendix A. The Council Organization Rules, among other internal matters, address the duties and staff of the Council, meetings and actions of the Council, and access to and treatment of information.

<sup>9</sup> See 5 U.S.C. § 553(b)(3)(A).

Order 12866 (“EO 12866”).<sup>10</sup> Under Section 3(e) of EO 12866, a “regulatory action” is “any substantive action by an agency . . . that promulgates or is expected to lead to the promulgation of a final rule or regulation, including . . . notices of proposed rulemaking.” Under Section 3(d) of EO 12866 a “rule or regulation” is defined as follows:

[A]n agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency.

The determination that the SIFI Designation Rule is a significant regulatory action for purposes of EO 12866 is an express acknowledgement by the Council that the SIFI Designation Rule is a substantive rule of general applicability, and not a rule of agency organization, procedure or practice. As a result, the Council cannot rely on Section 111(e)(2) of the DFA as legal authority for the promulgation of the SIFI Designation Rule.

Not only did Congress not provide the Council with rulemaking authority with regard to Title I of the DFA, in fact, it expressly granted general rulemaking authority under the applicable provisions of Title I to a different federal entity – namely the FRB. Section 168 of Title I provides:

#### **Sec. 168. REGULATIONS**

The Board of Governors shall have authority to issue regulations to implement subtitles A and C and the amendments made thereunder. Except as otherwise specified in subtitle A or C, not later than 18 months after the effective date of this Act, the Board of Governors shall

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<sup>10</sup> 58 Fed. Reg. 51735 (Oct. 4, 1993).

issue final regulations to implement subtitle A and C, and the amendments made thereunder.<sup>11</sup>

Subtitle A of Title I consists of Sections 111 through 123 of the DFA, which includes the three sections that the Council cites as its authority for issuing the SIFI Designation Rule.

In the face of the clear words of the statute, there can be no doubt that Congress did not authorize the Council to promulgate substantive regulations under Title I of the Act.

3. The Council's Lack of Transparency Undermines the Public Comment Process by Not Providing Meaningful Guidance to, or Allowing for Meaningful Comments by, the Public

Assuming for the sake of argument that the Council has rulemaking authority to promulgate the SIFI Designation Rule, the approach that it took in the proposal is

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<sup>11</sup> Section 121(d) of the DFA, which is contained in subtitle A of the DFA, expressly authorizes the FRB to prescribe regulations regarding the application of Section 121, which concerns the mitigation of risks to U.S. financial stability potentially created by certain foreign entities.

Further, Section 170(a) of the DFA provides that the FRB “shall promulgate regulations on behalf of, and in consultation with, the Council setting forth the criteria for exempting certain types or classes of” nonbank financial companies from supervision by the FRB. Section 170(b) specifies the criteria that the FRB is to consider in connection with the regulations to be issued under Section 170(a). Finally, Section 170(d) provides that the FRB, in consultation with the Council, shall review the regulations issued under Section 170(a) not less frequently than every five years and based upon such review the FRB “may revise such regulations on behalf of, and in consultation with, the Council to update as necessary the criteria set forth in such regulations.”

Section 170 further demonstrates that Congress understood and recognized that it had not provided the Council with rulemaking authority under Title I of the DFA and as a result provided for the FRB to issue rules “on behalf of” the Council with regard to the matters addressed in Section 170.

Finally, while Section 168 grants rulemaking authority to the FRB for subtitles A and C of Title I of the DFA, Congress granted rulemaking authority with respect to specified sections of subtitle B of Title I to the Office of Financial Research. See DFA §§ 153(c)(1), 154(b)(1)(C).

remarkably opaque, leaving interested parties to guess what it is thinking and how it will actually apply rules that do no more than restate the statute. This approach is contrary to modern principles of administrative law, the policies articulated in President Obama's recent Executive Order and basic notions of fairness. It is wholly inappropriate for a new systemic regulatory scheme, which will serve as a cornerstone of financial services regulation in the future, to be installed by a regulation that does not fairly develop and comprehensively articulate its standards.

The normal agency practice when a substantive rule is promulgated includes a good faith expression of agency thought and analysis, so that interested parties have the necessary information to contribute to or criticize the proposed rule. Where, as the Council has done here, an agency (i) seeks and receives extensive and thoughtful public input in response to an advance notice of proposed rulemaking, but in the proposed rule merely summarizes the comments without including any analysis of what it thinks about those comments and how it will apply the terms of the proposed regulation in relation to the comments, and (ii) in the text of the proposed regulation simply recites the statute, one must conclude that the agency is not serious about having the public and interested parties participate in a transparent process.

Modern administrative law has evolved over the years toward the goal of ensuring that a rulemaking proceeding is a fair and balanced process in which interested parties are given a reasonable opportunity to engage the agency and provide their views. The agency is then supposed to take those views into account when developing the final rule, and explain how it adopted, modified or rejected them. In that way, the public and other stakeholders affected by the rule have the information necessary to understand its impact and applications. That process is frustrated in the extreme when an agency conducts itself as the Council has in this case and provides no meaningful interpretation of the statute, no specific guidance regarding the planned exercise of its authority and no assessment of the merits of public comments received.

In the Council's advance notice of proposed rulemaking ("ANPR") that preceded the current proposal, the Council set forth 15 categories of questions for commenters to address.<sup>12</sup> The Council gave the clear impression that these comments would be used to

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<sup>12</sup> Advance Notice of Proposed Rulemaking Regarding Authority To Require Supervision and Regulation of Certain Nonbank Financial Companies, 75 Fed. Reg. 61653 (Oct. 6, 2010).

develop a proposed regulation regarding the designation of a SIFI that would be informative to the public, the financial markets and potential designees as well as be used to channel any designation evaluation undertaken by the Council. In this regard, the Council stated that:

Through this ANPR the Council is seeking to gather information as it begins to develop the specific criteria and analytical framework by which it will designate nonbank financial companies for enhanced supervision under the DFA.<sup>13</sup>

Contrary to the clear implication in the ANPR, the language in Section 1310.10(c) of the proposed regulation does not give any indication of the specific criteria and analytical framework that the Council intends to use. Instead, Section 1310.10(c) simply restates the same eleven criteria set forth in Section 113(a)(2) of the DFA. This approach is an abdication of any responsibility of the Council to provide meaningful guidance to the public, financial markets generally and nonbank financial companies specifically regarding whether their activities, operations, assets, liability structure and relationships with other parties or other company-specific factors make them more or less likely to be designated as SIFIs by the Council.

Regrettably, the preamble to the proposed rule does not provide any meaningfully greater insight into the Council's thinking, and this rulemaking proceeding yields no insight as to how the Council will evaluate, measure or weigh individual factors, nor as to what relative weight the Council will give to a range of factors. Put plainly, despite numerous well-articulated comments on how particular factors should be considered, the Council has given no indication as to whether it agreed or disagreed with the positions taken by commenters. Thus, commenters and potential designees have no idea about where they may stand in the designation process. Furthermore, the public and Congress have no idea how a massive grant of regulatory authority will be used, even though it is intended to be a key component of the new regulatory regime that is meant to protect the U.S. economy.

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*Id.* (citation omitted).

The law and basic fairness require agencies to be forthcoming with their analysis. In that regard, the APA requires that each final rule be accompanied by a statement of basis and purpose that explains how the agency came to its final conclusions and how public comments were either reflected in the final regulation or rejected.<sup>14</sup> When an agency does not explain its position during the proposal phase of a rulemaking proceeding, the public cannot comment in a meaningful manner and, therefore, the final rule and its preamble cannot reflect the comments that would have been received had the agency been more transparent. Moreover, even if an agency wishes to reverse course and provide meaningful guidance in a final rule, this approach is severely constrained because a final rule is subject to challenge if it deviates significantly from what was presented to the public in the proposed rule.<sup>15</sup>

The approach taken by the Council in the proposal also runs directly contrary to the guidance provided to federal agencies in President Obama's January 18, 2011 Executive Order on Improving Regulation and Regulatory Review ("Order").<sup>16</sup> The Order directs that "to the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment . . . on any proposed regulation."<sup>17</sup> The Order states that "regulations shall be based . . . on the open exchange of information and

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<sup>14</sup> See 5 U.S.C. § 553(c) ("After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise statement of their basis and purpose."); *Reyblatt v. U.S. Nuclear Regulatory Comm'n*, 105 F.3d 715, 722 (D.C. Cir. 1997) (explaining that the "basis and purpose statement is inextricably intertwined with the receipt of comments" and that "[a]n agency need not address every comment, but it must respond in a reasoned manner to those that raise significant problems").

<sup>15</sup> See, e.g., *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 94-95 (D.C. Cir. 2010) (citing *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005)) (explaining that a final rule may deviate from a proposed rule "only if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period").

<sup>16</sup> See Improving Regulation and Regulatory Review – Executive Order (Jan. 18, 2011), <http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order>.

<sup>17</sup> *Id.* § 2(b).

perspectives among . . . the public as a whole.”<sup>18</sup> As discussed above, by failing to address the comments in response to the ANPR on their merits and failing to provide a meaningful indication of how the Council will decide whether to designate a company as a SIFI, the Council has not provided the “meaningful opportunity for comment” called for by the Order.

A second principle contained in the Order is that regulation “must promote predictability and reduce uncertainty.”<sup>19</sup> The proposed rule does not meet this directive because it leaves the public generally and financial markets and nonbank financial companies in particular without either predictability or certainty as to possible designations of SIFIs.

4. The Consequences of Defective Rulemaking Are Costly and Inconsistent with Sound Government Regulation

When an agency conducts a rulemaking proceeding as the Council has done with the SIFI Designation Rule, interested parties are disenfranchised and damaged in many ways. Indeed, the group of interested parties extends beyond nonbanks that could potentially be designated to include financial markets and the public as a whole. However, the direct impact on designated firms is clear and a logical place to begin to discuss the costs of such designation.

Companies that the Council eventually designates as SIFIs will be subject to a wide range of new regulatory requirements and restraints. Since those companies are facing the prospect of significant additional operating costs, diminished returns and other competitive disadvantages, they deserve the right to engage with the relevant agency in a meaningful fashion. Such an engagement would enable them to understand how the new rules could eventually be applied to them, analyze the likely costs of their application and weigh them against actions they could take to restructure their business and operations so as to lower their systemic risk profiles and thereby avoid designation in a manner that enhances financial stability.

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<sup>18</sup> *Id.* § 2(a).

<sup>19</sup> *Id.* § 1(a).

For example, Section 165 of the DFA mandates that SIFIs be subjected to, among other things, enhanced capital requirements,<sup>20</sup> new liquidity requirements,<sup>21</sup> new concentration limits,<sup>22</sup> and the requirement to submit an acceptable resolution plan,<sup>23</sup> which if not satisfied could result in, among things, restrictions on certain activities or a requirement to divest certain assets or operations.<sup>24</sup>

SIFIs, along with large bank holding companies that will also be subject to Section 165, are likely to have to increase their capital levels and may experience reduced earnings. As a consequence, these companies are likely to reduce or eliminate dividends, thereby adversely impacting the expectations of shareholders. Shareholders, creditors, counterparties and customers and potential customers of such companies could all be affected by the impact of enhanced regulation under Section 165 and other related provisions of Title I. Without a meaningful open discussion of how and when these things may happen with respect to a nonbank financial services company, these parties have no real opportunity to impact the process, protect their interests or modify their activities or structure in ways that would mitigate systemic risk and the threat of designation.

Beyond nonbanks that could be directly impacted by this rule, the stakeholders include all participants in and beneficiaries of the U.S. economy. In fact, the centrality of this authority to the DFA and its potential impact on the economy as a whole are widely acknowledged and cannot be overstated. For example, in their recent paper, Douglas J. Elliott and Robert E. Litan conclude that “[g]iven that much of the financial crisis and the subsequent Dodd-Frank legislation centered around SIFIs, the designation of such

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<sup>20</sup> DFA § 165(b)(1)(A)(i).

<sup>21</sup> DFA § 165(b)(1)(A)(ii).

<sup>22</sup> DFA § 165(b)(1)(A)(v).

<sup>23</sup> DFA § 165(b)(1)(A)(iv).

<sup>24</sup> DFA § 165(d)(5).

institutions under the new law will have critically important effects not only on the designated institutions but on entire industries and indeed on the economy.”<sup>25</sup>

Secondly, without a substantial disclosure of how the regulation will be implemented, companies cannot create reliable long-term strategic plans to grow their businesses and thereby promote economic activity and job creation. Significantly, Elliott and Litan also describe the costs associated with the designation of nonbanks as systemically important and argue that “the key is to strike the right balance, allowing financial institutions to respond as they see fit to market forces and customer demands, except where there is a true public interest in constraining that response.”<sup>26</sup> However, a defective, opaque rulemaking process creates uncertainties that will materially impair nonbanks’ abilities to analyze the costs and benefits of responding to market forces and customer demands.

Thirdly, an opaque rule will create investor confusion and uncertainty in regard to nonbank financial services companies that might be subject to designation as a SIFI. For example, erroneous conclusions about the likelihood of designation could create higher (or lower, relatively) costs of capital and borrowing for such companies as well as other market distortions. These distortions could create additional systemic risk.

Fourthly, the uncertainty created by an inadequate and opaque rulemaking proceeding will persist after any designation decision, since it will increase the likelihood that the Council’s actions may be overturned as arbitrary and capricious.

These are not the indicia of good governance or fair rulemaking, and the direct and indirect inefficiencies and costs that attend such actions will be substantial.

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<sup>25</sup> See Douglas J. Elliott & Robert E. Litan, Identifying and Regulating Systemically Important Financial Institutions: The Risk of Under and Over Identification and Regulation 16 (2011), [http://www.brookings.edu/~media/Files/rc/papers/2011/0116\\_regulating\\_sifis\\_elliott\\_litan/0116\\_regulating\\_sifis\\_elliott\\_litan.pdf](http://www.brookings.edu/~media/Files/rc/papers/2011/0116_regulating_sifis_elliott_litan/0116_regulating_sifis_elliott_litan.pdf).

<sup>26</sup> *Id.* at 1.

5. Conclusion

Although Congress clearly decided to give the Council rulemaking authority under Title VIII of the DFA, it just as clearly decided *not* to give the Council rulemaking authority under subtitle A of Title I of the DFA. The DFA contains no express delegation of rulemaking authority to the Council that would support the promulgation of the SIFI Designation Rule, and the text and structure of the DFA as a whole clearly demonstrate that Congress did not intend for the Council to have the authority to promulgate such a rule.<sup>27</sup> Thus, the Council does not have the legal authority to promulgate a substantive rule such as the SIFI Designation Rule. Even assuming that the Council had been given such authority, it has utterly failed to initiate a fair and transparent rulemaking proceeding, as required by the law applicable to rulemaking agencies. In light of these glaring defects, we respectfully request that the Council promptly announce that it is withdrawing the proposed rule.

We appreciate your consideration of our comments.

Sincerely,



Thomas P. Vartanian

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<sup>27</sup> See *Tafas v. Dudas*, 541 F. Supp. 2d 805, 817 (E.D. Va. 2008) (vacating a substantive rule because the agency only had the authority to promulgate procedural rules), *appeal dismissed and motion to vacate judgment denied*, 586 F.3d 1369, 1371 (Fed. Cir. 2009) (*en banc*); see also *Nat'l Mining Ass'n v. Slater*, 167 F. Supp. 2d 265, 289 (D.D.C. 2001) (declaring invalid an attempt by the Advisory Council on Historic Preservation to promulgate rules imposing substantive requirements because Congress delegated to it only the power to impose procedural requirements), *rev'd in part on other grounds*, 324 F.3d 752, 760 (D.C. Cir. 2003).

**RULES OF ORGANIZATION OF  
THE FINANCIAL STABILITY OVERSIGHT COUNCIL**

**§ XXX.1 Purpose and Definitions and Duties.**

(a) These rules of organization (“rules”) are adopted by the Financial Stability Oversight Council (the “Council”), which was established July 21, 2010, pursuant to section 111(e)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, (the “Act”). These rules, which shall be rules of agency organization, procedure, or practice for purposes of section 553 of title 5, United States Code, describe the Council's authorities, organizational structure, and the rules by which the Council takes actions. (Act, § 111(e)(2)). To the extent that any of these rules conflict with the Act, the Act shall be controlling.

(b) The purposes of the Council are to identify risks to the financial stability of the United States that could arise from the material financial distress or failure, or ongoing activities, of large, interconnected bank holding companies or nonbank financial companies, or that could arise outside the financial services marketplace; to promote market discipline, by eliminating expectations on the part of shareholders, creditors, and counterparties of such companies that the Government will shield them from losses in the event of failure; and to respond to emerging threats to the stability of the United States financial system. (Act, § 112(a)(1)).

(c) The duties of the Council are set forth in the Act. (Act, § 112(a)(2)).

(d) Terms used herein that are not defined by these rules shall have the meanings set forth in §§ 2 and 102 of the Act, as applicable.

**§ XXX.2 Composition of the Council.**

(a) Voting Members.—The members of the Council, who shall each have one vote on the Council, are—

(1) the Secretary of the Treasury, who shall serve as Chairperson of the Council (the “Chairperson”);

(2) the Chairman of the Board of Governors of the Federal Reserve System (the “Board of Governors”);

(3) the Comptroller of the Currency (the “Comptroller”);

(4) the Director of the Bureau of Consumer Financial Protection (the “Bureau”);

(5) the Chairman of the Securities and Exchange Commission (the “Commission”);

(6) the Chairperson of the Federal Deposit Insurance Corporation (the “Corporation”);

(7) the Chairperson of the Commodity Futures Trading Commission (the “CFTC”);

(8) the Director of the Federal Housing Finance Agency (the “FHFA”);

(9) the Chairman of the National Credit Union Administration Board (the “NCUA”); and

(10) an independent member having insurance expertise (the “independent voting member”) appointed by the President, by and with the advice and consent of the Senate. (Act, § 111(b)(1)).

(b) Nonvoting Members.—The nonvoting members of the Council, who shall each serve in an advisory capacity, are—

(1) the Director of the Office of Financial Research (the “OFR”);

(2) the Director of the Federal Insurance Office (the “FIO”);

(3) a designated State insurance commissioner (selected by the State insurance commissioners);

(4) a designated State banking supervisor (selected by the State banking supervisors); and

(5) a designated State securities commissioner or officer performing like functions (selected by the State securities commissioners). (Act, § 111(b)(2)).

(c) Term.—The independent voting member shall serve for a term of 6 years. The designated State insurance commissioner, designated State banking supervisor, and designated State securities commissioner shall each serve for a term of 2 years, which term shall begin on the date of appointment which shall be the date the Secretary of the Treasury receives written notice of the appointment. (Act, § 111(c)(1)).

(d) Vacancy.—Any vacancy on the Council shall be filled in the manner in which the original appointment was made. (Act, § 111(c)(2)).

(e) Acting Officials and Delegations.—

(1) Acting Officials.— In the event of a vacancy in the office of the head of a member agency or department, and pending the appointment of a successor, or during the absence or disability of the head of a member agency or department, the acting head of the member agency or department shall serve as a member of the Council in the place of that agency or department head. (Act, § 111(c)(3)).

(2) Delegations.—Except as provided in § XXX.6(c), the Secretary of the Treasury; the Chairman of the Board of Governors; the Comptroller; the Director of the

Bureau; the Chairman of the Commission; the Chairperson of the Corporation; the Chairperson of the CFTC; the Director of the FHFA; and the Chairman of the NCUA may each, in accordance with applicable law, delegate their individual authority under the Act to another officer or employee of their respective agencies. In view of the important nature of matters being considered by the Council, each of these voting members will make all reasonable efforts not to delegate their individual authority as provided for above.

(3) The Director of the OFR and the Director of the FIO may only delegate their authority as advisory, nonvoting members of the Council to another officer or employee of their respective offices who is serving as a deputy director.

(4) The State insurance commissioners, the State banking supervisors, and the State securities commissioners may designate an alternate for the designated State insurance commissioner, designated State banking supervisor, and designated State securities commissioner, respectively. Such designated alternate may only attend meetings of the Council if the designated State insurance commissioner, designated State banking supervisor, or designated State securities commissioner will not participate, unless the alternate is attending in another capacity otherwise permitted under the rules adopted by the Council.

(5) A written notice of delegation or alternate designation under paragraphs (2), (3), or (4) shall be delivered to the Chairperson or the Secretary of the Council and, to the extent practicable, such written notice shall be delivered in advance of the next meeting of the Council.

(6) An officer or employee acting for the Secretary of the Treasury pursuant to subsection (e) (1) or (2) shall also act as the Chairperson of the Council. Unless otherwise specified by the Act, such officer or employee shall possess the powers and duties that the Chairperson possesses under these rules.

### § XXX.3 Duties and Staff.

#### (a) Duties of the Chairperson.—

(1) In general.—To facilitate the conduct of business by the Council, the Chairperson shall preside over meetings and carry out the routine administrative functions and business affairs of the Council. The Chairperson may call meetings of the Council, may prepare plans and agendas for meetings of the Council, and shall ensure that the Council meets not less frequently than quarterly. The Chairperson shall regularly consult with the members of the Council in performing the responsibilities of the Chairperson of the Council.

(2) Council staff.— Subject to Council oversight, the Chairperson shall direct and manage the activities of the Council staff. The Chairperson may delegate responsibility for carrying out the routine administrative functions and business affairs of the Council

and directing and managing the activities of the Council staff to the Executive Director of the Council. The Chairperson may—

(A) designate or hire individuals to serve as Executive Director of the Council, Legal Counsel of the Council, and Secretary of the Council, subject to the Council approving by a majority vote of the voting members then serving the appointment of an individual to serve as Executive Director or Legal Counsel;

(B) in consultation with the Council, coordinate the process by which member agency employees and Federal government employees are detailed to the Council;

(C) designate or hire such additional staff as may be needed in carrying out the functions of the Council; and

(D) coordinate, through the direction of Council staff, the execution of any authority exercised by the Council that may require such ongoing coordination and staff support.

(3) Review of the expenses and approval of the budget of the Council.—

(A) Expenses.—The Council shall periodically review the expenses of the Council. To facilitate a review of the expenses, the Chairperson shall provide periodic reports to the Council and a report of expenses to the Council no later than September 1 of each year beginning September 1, 2011.

(B) Budget.—

(i) Initial budget.—For the fiscal year ending September 30, 2011, the Chairperson shall propose an annual budget for the Council no later than November 30, 2010, which upon an affirmative vote of a majority of the voting members then serving shall be adopted as the annual budget of the Council.

(ii) Annual budget.—For the fiscal year beginning October 1, 2012, and for each fiscal year thereafter, the Chairperson shall propose an annual budget for the Council no later than 1 month before the beginning of the fiscal year, which upon an affirmative vote of a majority of the voting members then serving shall be adopted as the annual budget of the Council.

(4) Coordination of Council studies.—On behalf of the Council, the Chairperson shall coordinate the Council's efforts in conducting any studies required to be conducted by the Council. (See, e.g., Act, §115(c)(1); §215; §619; §622).

(5) Coordination of Council reports.—On behalf of the Council, the Chairperson shall coordinate the Council's efforts in preparing any Council report to Congress. (See, e.g., Act, §112(a)(2)(N); §113(c)(2); §115(c)(2); §117(c)(2)(A); §120(d); §202(g)(4); §215).

(6) Testimony before Congress.—After consulting with the Council on the testimony to be given, the Chairperson shall appear before the Congress after the Council’s annual report is submitted (Act, §112(a)(2)(N); §112(c)) to testify on the report, and the efforts, activities, objectives, and plans of the Council. The Chairperson shall also be responsible for giving testimony before Congress, on behalf of the Council, on other matters that either require or permit Council testimony before Congress.

(7) Coordination with the OFR.—The Chairperson shall consult with the OFR as provided in the Act to facilitate the OFR’s mission of providing support to the Council.

(b) Duties of the Executive Director of the Council.—The Executive Director shall advise and assist the Council in carrying out its responsibilities under the Act, assist in providing general direction with respect to the administration of the Council’s actions, assist in directing the activities of the staff, and perform such other duties as the Chairperson may require. The Executive Director may delegate his or her duties to an employee of the Council.

(c) Duties of the Legal Counsel of the Council.—The Legal Counsel shall provide legal advice relating to the responsibilities of the Council, advise and assist the Council in carrying out its responsibilities under the Act, and perform such other duties as the Chairperson or Executive Director may require. The Legal Counsel may delegate his or her duties to an employee of the Council who is a member of the legal staff supporting the Council.

(d) Duties of the Secretary of the Council.—The Secretary of the Council shall prepare minutes of all meetings, maintain a complete record of all votes and actions taken by the Council, retain custody of all records of the Council, and perform such other duties as the Chairperson or Executive Director may require. The Secretary of the Council may delegate his or her duties to an employee of the Council.

(e) Statements by Voting Members.—When the Council submits its annual report to Congress, each voting member of the Council shall—

(1) If such member believes that the Council, the Government, and the private sector are taking all reasonable steps to ensure financial stability and to mitigate systemic risk that would negatively affect the economy, submit a signed statement to Congress stating such belief; or

(2) If such member does not believe that all reasonable steps described under paragraph (1) are being taken, submit a signed statement to Congress stating what actions such member believes need to be taken in order to ensure that all reasonable steps described under paragraph (1) are taken. (Act, §112(b)).

#### § XXX.4 Information Collection and Sharing.

(a) Information Collection from the OFR, Member Agencies, the FIO, and Other Federal

and State Financial Regulatory Agencies.—The Council shall collect any data or information from member agencies and the FIO as necessary to carry out the duties of the Council under the Act, including monitoring the financial services marketplace to identify and assess risks to the United States financial system. Notwithstanding any other provision of law, the OFR, member agencies and the FIO are authorized to provide such data and information to the Council. The Council shall also collect information from other Federal and State financial regulatory agencies to assess risks to the United States financial system. (Act, §112(a)(2) and (d)).

(b) Information Collection from Nonbank Financial Companies and Bank Holding Companies.—In addition to collecting or directing the collection of other information as authorized by the Act—

(1) The Council shall, to the extent the Council determines appropriate, direct the OFR to collect information from nonbank financial companies and bank holding companies for the purpose of assessing risks to the U.S. financial system and the extent to which a financial activity or financial market in which the nonbank financial company or bank holding company participates, or the nonbank financial company or bank holding company itself, poses a threat to the financial stability of the United States. (Act, §112(a)(2) and (d)(3)).

(2) The Council, acting through the OFR, may require a bank holding company with total consolidated assets of \$50,000,000,000 or greater or a nonbank financial company supervised by the Board of Governors, and any subsidiary thereof, to submit certified reports to keep the Council informed as to the financial condition of the company; systems for monitoring and controlling financial, operating, and other risks; transactions with any subsidiary that is a depository institution; and the extent to which the activities and the operations of the company and any subsidiary thereof, could, under adverse circumstances, have the potential to disrupt financial markets or affect the overall financial stability of the United States. (Act, §116(a)).

(c) Coordination of Information Collection.— On behalf of the Council, the Chairperson shall coordinate such collection and distribution of information across agencies, and shall coordinate such direction of the OFR as described in § XXX.4(a) and (b).

(1) Coordination with member agencies and primary financial regulatory agencies.—Before requiring the submission of reports from any nonbank financial company or bank holding company that is regulated by a member agency or a primary financial regulatory agency, the Council, acting through the OFR, shall coordinate with such agencies and rely whenever possible on information available from the OFR or such agencies. (Act, §112(d)(3)(B)).

(2) Coordination with foreign regulators.—Before requiring the submission of reports from a foreign nonbank financial company or a foreign-based bank holding company, the Council, acting through the OFR, shall consult with the appropriate foreign regulator of such company and whenever possible rely on information being collected by such regulator. (Act, §112(d)(3)(C)). The Council, acting through the OFR, may also

facilitate information sharing and coordination with foreign regulators as appropriate to further efforts to collect information from such regulators.

§ XXX.5 Offices.

The principal offices of the Council are at 1500 Pennsylvania Avenue, N.W., Washington, D.C. 20220, unless the Chairperson advises the Council members otherwise.

§ XXX.6 Meetings and actions of the Council.

(a) Frequency and Place.—The Council shall meet at the call of the Chairperson or a majority of the voting members then serving, but not less frequently than quarterly. The location of all meetings shall be 1500 Pennsylvania Avenue, N.W., Washington, D.C., unless the Chairperson advises the Council members of an alternate location. Such meetings shall be held in conformity with the Council's transparency policy as adopted under § XXX.8(c).

(b) Quorum.—A majority of the voting members of the Council then serving shall constitute a quorum for the conduct of Council business.

(c) Limitation on Delegations of Authority.—The Council may not delegate its authority, and the Secretary of the Treasury; the Chairman of the Board of Governors; the Comptroller; the Director of the Bureau; the Chairman of the Commission; the Chairperson of the Corporation; the Chairperson of the CFTC; the Director of the FHFA; and the Chairman of the NCUA may not delegate their individual voting authority on the following matters—

(1) Determinations that a U.S. nonbank financial company shall be supervised by the Board of Governors and shall be subject to prudential standards (Act, §113(a)(1));

(2) Determinations that a foreign nonbank financial company shall be supervised by the Board of Governors and shall be subject to prudential standards (Act, §113(b)(1));

(3) Determinations that a company shall be supervised by the Board of Governors and shall be subject to prudential standards, in order to prevent the company from evading title I of the Act (Act, §113(c)(1));

(4) Rescissions of determinations that U.S. nonbank financial companies or foreign nonbank financial companies designated for supervision by the Board of Governors no longer require the supervision of the Board of Governors (Act, §113(d));

(5) Determinations to waive or modify the notice and opportunity for hearing relating to designations of U.S. nonbank financial companies, foreign nonbank financial companies, financial market utilities, or payment, clearing, or settlement activities (Act, §113(f) and §804(c)(3));

(6) Recommendations concerning the establishment and refinement of prudential standards and reporting and disclosure requirements applicable to certain nonbank

financial companies and large, interconnected bank holding companies (Act, §115(a), (c), (d), (e), (f), and (g));

(7) Recommendations for resolution of supervisory jurisdictional disputes among two or more member agencies (Act, §119);

(8) Decisions resolving supervisory jurisdictional disputes among two or more member agencies (Act, §803(8)(B));

(9) Recommendations that a primary financial regulatory agency apply new or heightened standards and safeguards for a financial activity or practice (Act, §120);

(10) Approvals of mitigatory actions to be taken by the Board of Governors with regard to certain systemically important financial companies that pose a grave threat to the financial stability of the United States (Act, §121(a));

(11) Resolution of disputes between the Commission and the CFTC regarding joint rulemakings (Act, §712(d)(3));

(12) Determinations that, when other provisions established by the Act are insufficient to effectively mitigate systemic risk and protect taxpayers, swaps entities may no longer access Federal assistance with respect to any swap, security-based swap, or other activity of the swaps entity, which shall be made on an institution-by-institution basis (Act, §716(l));

(13) Designations of financial market utilities or payment, clearing, or settlement activities that are determined to be, or that are determined to be likely to become, systemically important (Act, §804(a)(1));

(14) Rescissions of designations of systemic importance for designated financial market utilities or designated payment, clearing, or settlement activities (Act, §804(b)(1));

(15) Determinations of the sufficiency of responses by the CFTC or the Commission to the Board of Governors' determinations that existing prudential requirements with respect to designated clearing entities and financial institutions engaged in designated payment, clearing, or settlement activities for which the CFTC or the Commission is the Supervisory Agency or the appropriate financial regulator are insufficient to prevent or mitigate significant liquidity, credit, operational, or other risks to the financial markets or to the financial stability of the United States (Act, §805(a)(2)(E));

(16) Votes authorizing or requiring examinations of or enforcement actions against designated financial market utilities and financial institutions engaged in designated activities (Act, §807(e)(4); §807(f)(1); §808(e)(2)(A)(v) and (B)(iv));

(17) Decisions to stay or set aside a regulation of the Bureau or any provision

thereof (Act, §1023(c)(3)); and

(18) Decisions to establish special advisory, technical, professional, or interagency staff committees and appoint the chairpersons for such committees (Act, § 111(d)) and decisions to delegate certain actions not required by the Act to be taken by the Council pursuant to § XXX.6(i), including the decision to appoint the chairperson of committees composed of members of the Council.

(d) Notice.—There shall be at least one week notice prior to meetings of the Council, unless the Chairperson or a majority of the voting members determines that exigent circumstances require a meeting with less notice.

(e) Agenda of Meetings.— To the extent practicable, an agenda, information, and materials shall be distributed to Council members at least 48 hours in advance of each meeting.

(f) Minutes.—The Secretary of the Council shall keep minutes of each Council meeting and of action taken without a meeting, a draft of which is to be distributed to each Council member as soon as practicable after each meeting or action. To the extent practicable, the minutes of a Council meeting shall be corrected and approved in advance of the next meeting of the Council. The minutes will be made public subject to redaction in accordance with the transparency policy as adopted under § XXX.8(c).

(g) Use of Conference Call Communications Equipment.—Subject to the consent of the Chairperson and to the arrangement of appropriate security measures, a Council member may participate in a meeting of the Council through the use of conference call, telephone, or other communications equipment that allows persons to be heard by and to hear others in the meeting. Any member so participating in a meeting shall be deemed present for all purposes.

(h) Action between Meetings.—Any action that may be taken by the Council at a meeting may be acted on by the Council at other times through the communication of voting member votes to the Secretary of the Council, in writing, and any action approved in this manner shall have the same effect as an action taken at a meeting.

(i) Council Delegations of Authority.—Except as provided in § XXX.6(c), the Council may delegate authority to the Chairperson, a committee composed of members of the Council, the Executive Director, the Legal Counsel, the Secretary of the Council, other designated staff of the Council, the OFR, or a member agency to take certain actions not required by the Act to be taken by the Council. The Council may not delegate to a subcommittee, other entity, or person the authority to approve any report or recommendation transmitted to the Congress on behalf of the Council. All delegations shall be made pursuant to resolutions of the Council and recorded in writing, whether in the minutes of a meeting or otherwise. Any action taken pursuant to delegated authority has the effect of an action taken by the Council. Any voting member of the Council may request full Council review of any action taken pursuant to delegated authority.

(j) Voting.—Votes of the Council shall be recorded in the minutes. No votes may be cast via proxy.

§ XXX.7 Deputies, Special Advisory, Technical, and Professional Committees.

(a) Deputies Committee.—The Council may establish a Deputies Committee as may be useful to assist the Council in carrying out its functions. The members of the Deputies Committee shall be a senior official from each member agency. The duties of the Deputies Committee shall include coordinating and overseeing the work of interagency staff committees, coordinating the Council's agenda, and any other work assigned by the Council.

(b) Special Advisory, Technical, and Professional Committees.—The Council may appoint such special advisory, technical, or professional committees as may be useful in carrying out the functions of the Council, including an advisory committee consisting of State regulators. The members of such committees may be members of the Council, or other persons, or both.

§ XXX.8 Freedom of Information Act and Delivery of Process.

(a) FOIA.—The Freedom of Information Act, section 552 of title 5, United States Code, including the exceptions thereunder, shall apply to any data or information submitted by or to the Council.

(b) Delivery of Process.— Service of process will be received by the Legal Counsel of the Council or the delegate of such official and shall be delivered to the following location: Legal Counsel, Financial Stability Oversight Council, 1500 Pennsylvania Avenue, N.W., Washington, DC 20220.

(c) Transparency.—The Council will develop and implement a transparency policy.

§ XXX.9 Disqualification.

(a) Federal *Ex Officio* and Federally Appointed Council Members.—Any Council member listed in § XXX.2(a), the Director of OFR, and the Director of FIO shall disqualify himself or herself from participation in a Council discussion or action on any matter as required by applicable law.

(b) State Designated Council Members.—Any other Council member shall disqualify himself or herself from participation in a Council discussion or action on any matter if the Council member has, or may appear to have, a financial conflict of interest or appearance of partiality. For purposes of this subsection, the following definitions shall apply—

(1) Financial conflict of interest.—A financial conflict of interest arises when the Council member participates personally and substantially in an official capacity in any particular matter that has a direct and predictable effect on the Council member's own financial interests or the financial interests of the Council member's spouse; minor child;

outside employer; any person or entity that the Council member is negotiating with or has an arrangement concerning future employment; or any person or entity that the Council member serves as an officer, director, trustee, or general partner.

(2) Appearance of partiality.—An appearance of partiality may arise when a Council member participates in an official capacity in a particular matter involving specific parties that has a financial effect on a member of the Council member's household or in a matter involving a party or representative of a party who is a person or entity with whom the Council member has a covered relationship.

(3) Definition of covered relationship.—For purposes of paragraph (2), covered relationships include a member of the Council member's household; a relative the Council member is close to; any person or entity for whom the Council member's spouse, parent, or dependent child serves or seeks to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee; any person or entity the Council member serves or has served in the previous year as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee; any person or entity with whom the Council member seeks to have a business relationship; or any organization other than a political party in which the Council member is an active participant.

(c) Notice of Disqualification.—A disqualified Council member shall notify the other Council members and the Secretary of the Council, in writing, of any such disqualification.

(d) Replacement of Disqualified Council Members.—In the event that—

(1) a member of one of the agencies or departments listed in § XXX.2(a) has disqualified himself or herself under subsection (a), the replacement for such individual, with respect to the matter that is the basis for the disqualification, shall be in accordance with the statute, regulations, or directives of that agency or department;

(2) the Director of OFR or the Director of FIO has disqualified himself or herself under subsection (a), the replacement for such individual, with respect to the matter which is the basis for the disqualification, shall be the officer or employee of the respective office who is serving as deputy director of OFR or FIO, respectively; or

(3) the designated State insurance commissioner, the designated State banking supervisor, or the designated State securities commissioner has disqualified himself or herself under subsection (b), the replacement for such individual, with respect to the matter which is the basis for disqualification, shall be the designated alternate for each official, if such an alternate has been designated.

(e) Duties and Obligations of Replacement Council Members.—Any replacement under subsection (d) shall be subject, with respect to the matter which is the basis for the disqualification, to all the duties and obligations to which the Council member would be subject but for the disqualification.

(f) Legal Consultation.—Council members covered under subsection (a) shall consult with their own agency ethics officials concerning potential disqualifications (and appropriate remedies) or other ethics issues. Council members covered under subsection (b) shall consult with the Council’s Legal Counsel concerning potential disqualifications (and appropriate remedies) or other ethics issues. The agency ethics official for the Council member described in § XXX.2(a)(10) shall be the Legal Counsel of the Council.

§ XXX.10 Confidentiality and Protection and Access to Information.

(a) Confidentiality.—The Council, the OFR, and the other voting and nonvoting member agencies shall maintain the confidentiality of any data, information, and reports submitted or available to them in accordance with the Act, other applicable law, and any memorandum of understanding.

(b) Protection of information.—The submission of any non-public data or information under the Act and other applicable law shall be protected and maintained in a confidential manner so that all applicable privileges are preserved.

(c) Participation and Sharing of Certain Information with Council Members.—

(1) Participation.—Nonvoting members of the Council shall not be excluded from any of the proceedings, meetings, discussions, or deliberations of the Council, except that the Chairperson may, upon an affirmative vote of the member agencies, exclude the nonvoting members from any of the proceedings, meetings, discussions, or deliberations of the Council when necessary to safeguard and promote the free exchange of confidential supervisory information.

(2) Sharing of Information.—To safeguard and promote the free exchange of confidential supervisory information, confidential commercial or financial information, and other similar non-public information, the Chairperson may, in the Chairperson’s discretion and with the approval of the Council, enter into memoranda of understanding or other similar agreements with nonvoting members and, as necessary, with voting members regarding the specific treatment and protection of such information.

(d) Access to Council Staff and Books and Records.—

(1) Any voting member of the Council may request information and briefings from the staff of the Council and shall have access to all books, records, and data of the Council.

(2) Any nonvoting member of the Council may request information and briefings from the staff of the Council.

(3) Any nonvoting member of the Council who has entered into appropriate

memoranda of understanding or other similar agreements with the Council under subsection (c) shall have access to all books, records, and data of the Council.

§ XXX.11 Rules or Procedures.

The Council has the authority to adopt, in addition to these rules, such rules or procedures as may be necessary for the conduct of the business of the Council. Such rules shall be rules of agency organization, procedure, or practice for purposes of section 553 of title 5, United States Code.

§ XXX.12 Amendments.

These rules may be adopted or amended, and additional rules or procedures may be adopted, only by a majority of the voting members then serving, on a nondelegable basis.