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April 30, 2012

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Re: Enhanced Prudential Standards and Early Remediation Requirements for Covered Companies; FR Doc 1438 and RIN 7100-AD-86

Dear Ms. Johnson:

The U.S. Chamber of Commerce ("Chamber") is the world's largest business federation, representing over three million companies of every size, sector and region. The Chamber created the Center for Capital Markets Competitiveness ("CMCC") to promote a modern and efficient regulatory structure for capital markets to fully function in the 21st Century economy. The CMCC welcomes the opportunity to comment on the proposed rule regarding *Enhanced Prudential Standards and Early Remediation Requirements for Covered Companies* ("Proposal") published by the Board on January 5, 2012, regarding the supervision of large bank holding companies ("Large BHCs") and nonbank financial companies designated by the Financial Stability Oversight Council ("FSOC") for supervision by the Board as systemically important financial institutions ("SIFIs"). Large BHCs and SIFIs are also referred to collectively herein as "Covered Companies."

The CMCC supports the efforts to monitor and address systemic risk. However, the CMCC is deeply concerned that the Proposal has the potential to have serious disruptive and adverse effects on SIFIs, as well as on Large BHCs that provide credit and other financial services to the business community. Specifically, the Chamber is concerned that the proposal:

- Creates a one size fits all approach that fails to account for differing business models, particularly with SIFIs;

- The Proposal compels SIFIs to comment on the proposal in such a manner that creates legal uncertainty and may endanger legal rights;

- The Proposal fails to identify or consider special issues that may arise from a diverse set of SIFIs;

- The Proposal fails to provide a cost benefit analysis and in failing to do so does not allow commenters to understand the economic impacts of the Proposal or provide the Board of Governors of the Federal Reserve System ("Board") with informed comments;

- The Proposal is not ripe for consideration at this time as the "predominantly engaged in financial activities" rulemaking has not yet been completed; and

- The Proposal, in its current form, creates conditions that place domestic financial institutions at a competitive disadvantage in a global economy.

Because of these concerns the CCMC believes that the Proposal is not appropriately seasoned for consideration and that completion of the rule at this time could create harmful impacts upon lending for businesses needed for growth and job creation, as well as upon the operation of non-financial companies of all sizes. Accordingly, the CCMC recommends that the proposal:

- Be terminated at this time in relation to all SIFIs; and

- Be suspended at this time in relation to Large BHCs pending a resolution of issues that may cause harmful impacts upon the financial system and a competitive disadvantage for domestic financial institutions.

Our concerns are addressed in more detail below.

CONCERNS

A. Concerns Regarding the Treatment of Potential SIFIs under the Proposal

As relates to SIFIs, the Board's rulemaking proceeding to adopt rules implementing enhanced prudential standards and early remediation requirements ("Rules") under sections 165 and 166 of the Dodd-Frank Act ("Enhanced Standards") has several fundamental flaws that the Board must correct before adopting a final rule:

1. Section 165(b)(3)(D) of the Dodd-Frank Act ("DFA") requires the Board to consider differences among Large BHCs (*i.e.*, bank holding companies with total consolidated assets equal to or greater than $50 billion) and SIFIs when prescribing prudential standards for SIFIs and, among other things, to adapt the standards as appropriate in light of the predominant line of business of each SIFI. Notwithstanding this requirement, in the Proposal the Board would apply the standards that it has designed for Large BHCs to all SIFIs without modification and, therefore, fails to comply with this requirement. The Board's stated intention to "thoroughly assess the business model, capital structure, and risk profile of a company"[1] *after* its designation as a SIFI to determine how the Enhanced Standards should be applied to it does not provide legal justification for the Board to proceed with a formal rulemaking that would apply on its face as a matter of law to the entire class of SIFIs. The Board may not promulgate a rule that applies on its face to all SIFIs, acknowledge that it may be wholly inappropriate to apply the rule as written to SIFIs and then attempt to justify promulgating such an inadequate rule by stating that the Board has the authority, in effect, to determine at a later time to do whatever it thinks is appropriate with regard to SIFIs.

2. The Proposal compels potential SIFIs to comment on the Enhanced Standards without the benefit of knowing whether or how the Enhanced Standards may apply to them, or risk forfeiting their legal rights with respect to the future application of the Enhanced Standards to them. Potential SIFIs cannot determine *whether* the Enhanced Standards may apply to them before the Board issues a final rule regarding the definition of "predominantly engaged in financial activities," which is a prerequisite to defining the universe of "nonbank financial companies" to which the Rules may be applied. In that regard, the Board recently

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1 77 Fed. Reg. 594, 597 (Jan. 5, 2012) ("Proposal").

issued an amended notice of proposed rulemaking with regard to the definition with a comment period that remains open until May 25, 2012.[2] In addition, the FSOC recently issued a final rule regarding the process for designating SIFIs ("FSOC Final Rule"), which provides only limited interpretive guidance as to how the SIFIs will be identified.[3] Furthermore, as discussed above, potential SIFIs cannot determine *how* the Rules may apply to them because the Board has not tailored, or proposed a process for tailoring, the Enhanced Standards for SIFIs.

3. The Proposal is admittedly drafted from the perspective of how it would apply to Large BHCs, and the Board has not attempted to identify, consider or address the special issues that it presents in regard to the diverse set of potential SIFIs.[4]

4. The Proposal also fails to provide potential SIFIs and the public in general with a cost benefit analysis as called for in Executive Order 13563, with which the Board has pledged to comply.

It is essential for the Board to recognize the damage that would be inflicted on potential SIFIs and, in turn, on the financial services sector and the economy through such an irregular rulemaking proceeding. Nonbank financial companies should not be expected or required to provide meaningful comment on this complicated and far-reaching Proposal at a point when, as discussed above, they are not able to determine whether they may be designated as a SIFI and are not being told how the Rules might apply to them. Moreover, potential SIFIs may feel compelled to devote substantial resources to the possible application of the Enhanced Standards to their organizations, including by restructuring important aspects of their businesses, capital structure and relationships with customers and counterparties, notwithstanding that the Enhanced Standards were not evaluated or considered with regard to their application to them.

Accordingly, subject to our additional comments with respect to U.S.-based Large BHCs on page 4 of this letter, we respectfully request that the Board immediately announce that it is terminating this rulemaking proceeding with respect to all SIFIs, and expressly limit it to companies that qualify as Large BHCs under section 225.12(d)(2) of the Proposal.

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2 77 Fed. Reg. 21494 (April 10, 2012).

3 77 Fed. Reg. 21637 (April 11, 2012).

4 *Id.*

In order to satisfy the statutory requirements of section 165 of the DFA and the requirements of the Administrative Procedure Act ("APA") with regard to the right of the public to be afforded a meaningful opportunity to comment on proposed rules, and the obligation of an agency proposing a rule to publish a statement of basis and purpose for the rule,[5] the Board should undertake a separate rulemaking to establish a process for tailoring the application of the Enhanced Standards to SIFIs ("SIFI Rulemaking") that embodies the following principles:

1. The SIFI Rulemaking should not commence before (a) the Board has adopted a final rule defining the term "predominantly engaged in financial activities" under section 102(b) of the DFA , (b) the Board has adopted a final regulation under section 170 of the DFA setting forth criteria for exempting certain types and classes of nonbank financial companies from SIFI designation by the FSOC and (c) the operations of the FSOC under the FSOC Final Rule regarding the designation of SIFIs have advanced to a point where either significant nonbank financial companies have been designated as SIFIs or they know whether they are under serious consideration for designation.[6]

2. The Board should initiate the SIFI Rulemaking by issuing an advance notice of proposed rulemaking ("ANPR") that would allow potential SIFIs to provide meaningful comments regarding the process for tailoring Enhanced Standards for their special circumstances, as Congress intended. The Board's objective should be to create a logical, transparent process that includes (a) consulting with individual FSOC members that are the primary regulators of a proposed SIFI's subsidiaries, as required by section 165(b)(4) of the DFA, (b) considering recommendations from the FSOC regarding appropriate Enhanced Standards for SIFIs (assuming recommendations are made), as provided in section 165(b)(3)(C) of the DFA, and (c) soliciting and considering the views and explanations provided by SIFIs regarding the unique aspects of their capital structures, accounting practices, regulatory requirements and business operations. Input from these sources would provide critical information to the Board as it determines how the each SIFI's differences from a bank holding company should be addressed.

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5 5 U.S.C. § 553(b) and (c).

6 We strongly recommend that the FSOC not designate any nonbank financial companies as SIFIs until the proposed SIFI Rulemaking has been completed by the Board.

B. Concerns Regarding the Treatment of U.S.-Based Large BHCs Under the Proposal

In addition to our recommendations with respect to potential SIFIs, we are similarly concerned about the application of the Proposal to Large BHCs. Large BHCs operate in a highly competitive global marketplace. The Proposal in its current form would place them at a competitive disadvantage with comparable companies.

The Board notes that foreign banking organizations that have U.S. banking operations and that have global total consolidated assets of $50 billion or more are subject to sections 165 and 166 of the DFA.[7] However, the Board states that the current proposal would apply only to U.S.-based bank holding companies that are covered companies and to nonbank covered companies and would not apply to foreign banking organizations.[8] The Board states that determining how to apply Enhanced Standards to foreign banking organizations is difficult, and as a result, is not currently issuing a proposal explaining how Enhanced Standards would be applied to foreign banking organization.

Foreign banking organizations that qualify as Covered Companies actively compete with Large BHCs both in the U.S. and throughout the world for the same business opportunities and customers. We believe that, consistent with the mandate for due regard to the principle of national treatment and competitive opportunity set forth in section 165(b)(2)(A) of the DFA, it would be fundamentally inappropriate and unfair for U.S.-based Large BHCs to be subject to Enhanced Standards while their foreign banking organization competitors were not. Similar competitive equality concerns are presented for Large BHCs with respect to potential SIFIs, since the Proposal indicates that the Board will tailor the application of Enhanced Standards to individual SIFIs after their designation, in a process that may not involve notice and public comment in regard to amendments to the Rules.

Accordingly, we request that the Board suspend further action on the Proposal until it has issued a proposed rule that addresses the application of Enhanced Standards to foreign banking organizations that are Covered Companies and all

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7 Proposal, 77 Fed. Reg. at 598.

8 Proposal, 77 Fed. Reg. at 597-8.

parties, including U.S.-based Large BHCs have had an opportunity to review and comment on the proposed rules for foreign banking organizations.[9]

C. Concerns Regarding the Proposed Prudential Standards

Furthermore, as we will describe in Section II, we believe that elements of the Proposal would impose constraints on Covered Companies that are unnecessary, inflexible, and particularly in the case of the single counterparty credit limits provision, potentially damaging to the U.S. financial system and economy.

DISCUSSION

I. Any Final Rule Arising from the Proposal Should Not Apply to SIFIs

1. *It Is Premature to Engage in a Rulemaking Proceeding that Would Impose Significant Obligations and Burdens on SIFIs as a Class when the Universe of Potential SIFIs Has Not Been Defined and the Potential Members of the Class Lack a Basis to Determine Whether They Would Be Designated as SIFIs.*

The Proposal would impose Enhanced Standards on both Large BHCs and nonbank financial companies that are designated as SIFIs. Large BHCs are clearly able to identify themselves by reference to proposed section 225.12(d)(2). They have clear notice that they will be subject to the requirements in the Proposal. As a result, they are well positioned to provide informed comments on the Proposal.

SIFIs are in an entirely different position. The Board has recently issued an amended notice of proposed rulemaking regarding the definition of the term "predominantly engaged in financial activities," and nonbank companies cannot determine whether they will be deemed to be nonbank *financial* companies before a final rule to define the term is adopted.[10]

Although the Board is required by section 170 of the DIA to promulgate regulations "setting forth the criteria for exempting certain types or classes of U.S. nonbank financial companies or foreign nonbank financial companies from supervision" by the Board, it has taken no public action with regard to this

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9 The Board in the Proposal states that it "is actively developing a proposed framework for applying the Act's enhanced prudential standards and early remediation framework to foreign banking organizations, and expects to issue this framework for public comment shortly." Proposal, 77 Fed. Reg. at 598.

10 76 Fed. Reg. 7731 (Feb. 11, 2011).

requirement.[11] As a result, potential SIFIs do not have the benefit that Congress intended they have of knowing whether they are exempt from designation as a SIFI and thus would not be subject to the requirements imposed by the Proposal.

Moreover, the FSOC Final Rule does not provide clear guidance as to whether any particular nonbank financial company will be designated as a SIFI. The FSOC Final Rule contains interpretive guidance that sets forth certain quantitative screens, including a minimum asset size threshold, that would be used to select a company for initial evaluation in Stage 1 of a three-stage evaluation process. However, even the quantitative thresholds in Stage 1 create some ambiguity regarding their application.[12] Furthermore, Stages 2 and 3 of the interpretive guidance rely on increasingly non-quantitative criteria for determining whether any nonbank financial company should be designated as a SIFI. Indeed, the FSOC has stated that it "reserves the right, at its discretion, to subject any nonbank financial company to further review if the [FSOC] believes that further analysis of the company is warranted . . . irrespective of whether such company meets the thresholds in Stage 1."[13]

Under these circumstances, it is patently unfair, inappropriate and violative of the intention of the notice and comment requirements of the APA for the Board to request comments about and from potential SIFIs that do not know whether they will be subject to the Rules that have been proposed.

2. *The Proposal Is Administratively Defective in that It Is Not Designed or Structured to Address the Special Circumstances of SIFIs Notwithstanding that the Board Concedes that SIFIs Differ Significantly from Large BHCs.*

The Proposal devotes only a single paragraph to how the Enhanced Standards would relate to SIFIs. It states as follows:

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11 The Board's most recent Semiannual Regulatory Flexibility Agenda provides no indication that the Board is planning to issue the regulations required under section 170 of the DFA. 77 Fed. Reg. 8071 (Feb. 13, 2012).

12 For example, the discussion of the threshold for asset size in Stage 1 of the appendix refers to $50 billion in global consolidated assets. This metric would appear, appropriately to exclude assets under management. 77 Fed. Reg. at 21661. However, the FSOC has stated that it "may consider the aggregate risks posed by separate funds that are managed by the same adviser" and that its analysis "will *appropriately* reflect the distinct nature of assets under management compared to the asset manager's own assets." 77 Fed. Reg. at 21661 n.6, 21645 (emphasis added).

13 77 Fed. Reg. at 21642.

While this proposal was largely developed with large, complex bank holding companies in mind, some of the standards nonetheless provide sufficient flexibility to be readily implemented by covered companies that are not bank holding companies. In prescribing prudential standards under section 165(b)(1), the Board would [sic] to take into account the differences among bank holding companies and nonbank financial companies supervised by the Board. Following designation of a nonbank financial company by the Council, the Board would thoroughly assess the business model, capital structure, and risk profile of the designated company to determine how the proposed enhanced prudential standards and early remediation requirements should apply. The Board may, by order or regulation, tailor the application of the enhanced standards to designated nonbank companies on an individual basis or by category, as appropriate. [footnotes omitted][14]

This paragraph raises a series of important issues regarding the validity of this rulemaking proceeding with respect to SIFIs:

- Why is the Board seeking to apply the Enhanced Standards to a class of entities –SIFIs – that it apparently did not have in mind when it drafted the Proposal?
- What is the Board's rationale for not carefully considering the circumstances presented by nonbank financial companies that might be designated as SIFIs and to draft Enhanced Standards to address and accommodate the differences between SIFIs and Large BHCs?
- Has the Board considered and quantified the costs to potential SIFIs, the financial system and the economy of imposing Enhanced Standards designed for Large BHCs on SIFIs and of SIFIs revising their business models and investment strategies to comply with Large BHC-centric metrics that may be inappropriate, ineffective and even counter-productive for achieving increased systemic financial stability?
- Why has the Board not advised the public as to which specific standards it believes can be readily implemented by SIFIs and which it believes cannot?
- The Board appears to indicate that only after a SIFI is designated will it consider how the Rules should apply to it and that, depending on that review, the Board may amend the Rules or issue an order to tailor the application of the Rules to a particular SIFI or a category of SIFIs. Under this approach, how can anyone, including the FSOC, a potential

14 Proposal, 77 Fed. Reg. at 597.

> SIFI's functional regulators, the markets, or a potential SIFI itself, understand how the Rules would apply to it if it were to be designated? The Board's indicated approach would appear to ignore the assessment made of each SIFI by the FSOC in order to make its designation. Indeed, it would put the FSOC in the position of designating a SIFI without being able properly to consider how effectively or efficiently the Rules would operate to mitigate the perceived threat to financial stability posed by the company. The Board's attempt to maximize its reservation of discretion to deal with SIFIs is, therefore, not only fundamentally unfair to SIFIs but also destructive of the intended gate keeping function of the FSOC.

The Proposal would apply the Rules to both Large BHCs and SIFIs. As a result, it is incumbent on the Board to consider how the Rules would apply to both categories of institutions. Without providing commenters with a reasonable description of how the Rules would apply to the wide variety of unidentified companies that may be designated as SIFIs, the Board's approach does not satisfy the requirements of the APA. A core requirement of the APA is to give the public fair notice of and a meaningful opportunity for comment on a proposed rule. This enables the public to provide input that the promulgating agency is required to evaluate and incorporate into its final rulemaking, including in a statement of basis and purpose. Here, the Board acknowledges that it has not made any effort to craft the Rules with SIFIs in mind. As a result, a potential SIFI is subject to the risk that the Board will adopt Rules that may not appropriately apply to the company, but that nevertheless on their face would be applicable to critical aspects of the company's operations. The Rules provide no indication of whether or how they would be tailored to the actual situation and circumstances of a newly designated SIFI.

To take just one example, a potential SIFI may operate under a capital structure and regulatory capital requirements that do not meaningfully correlate with the capital standards to which Large BHCs have long been subject. In such a situation, the potential SIFI might not have sufficient capital to meet the capital requirements imposed under the Rules because of its organizational form, statutory or regulatory restrictions or long-standing business or operating considerations. If the company were to be designated as a SIFI and had inadequate capital under Large BHC-centric regulatory capital requirements, it could be subject to severe regulatory restrictions on its business under the early remediation structure established by the Rules.

If the Board proceeds on this course, it would place potential SIFIs in the very difficult position of being forced to speculate both on (i) whether it would ultimately be designated as a SIFI and (ii) how the Board might seek to tailor the application of the Large BHC-centric Rules to it.

During what could be an extended period of uncertainty, a potential SIFI would have to decide whether to proactively restructure its business operations, capital structure and strategic plan to seek to respond to a potentially inappropriate and inapplicable regulatory structure. To the extent that this situation holds the potential of significant harm to the company, including the prospect of adverse market valuation movements in response to public disclosures regarding the potential adverse impact of the Rules if applied to the company following its designation, it underscores the defective nature of the current rulemaking proceeding and presents a presumably unintended and wholly avoidable threat to financial stability and the economy. Moreover, restructuring or other actions taken by potential SIFIs to address the possible application of the Rules to them may have an adverse impact on financial markets and a destabilizing impact on U.S. financial stability.

A fundamental element of a rulemaking proceeding is the promulgating agency's obligation to support the policy and legal choices that it has made in light of the comments received. The statement of basis and purpose should lay out the agency's thought processes and evaluation of the arguments in the comments it received. If the Board continues on the path that it has outlined in the Proposal, it will not be able to meet this requirement and will not provide fair or transparent treatment to companies that are ultimately designated as SIFIs. Therefore, we recommend that the Board terminate this rulemaking proceeding with respect to SIFIs and expressly limit it to companies that qualify as Large BHCs under section 252.12(d)(2) of the Proposal. In addition, in order to satisfy the statutory requirements of section 165 of the DFA and the APA requirements regarding notice and comment and the statement of basis and purpose, the Board should undertake a separate SIFI Rulemaking that meets the principles enumerated above.

II. Comments on the Requirements of the Proposal

1. *If the Board Proceeds with the Rulemaking with Respect to SIFIs, It Should Extend the Timeframes for Compliance by SIFIs with Provisions of the Rules.*

As discussed above, the Proposal is Large BHC-centric. In that regard, Large BHCs, which are accustomed to this regulatory framework, are far better prepared

than SIFIs are to accommodate the relatively short time periods proposed for Covered Companies to come into compliance with the various provisions of the Rules. These changes will be incremental for Large BHCs, but SIFIs may be required to make wholesale changes, for which the proposed time periods for compliance will be inadequate. If the Board decides to proceed with applying the Rules to SIFIs, we request that the Board reconsider all the effective dates for various provisions of the Rules in order to provide adequate time for a newly designated SIFI to achieve compliance with the applicable requirements. In this regard, the Board should take note of the long implementation periods, some extending until 2019, for *banking organizations* to come into compliance with proposals of the Basel Committee on Banking Supervision, including capital requirements under Basel III.[15]

It also is noteworthy with regard to implementation of the Rules that section 113(d) of the DFA requires the FSOC to reevaluate each SIFI at least once each year to consider whether its designation should be rescinded. It would be consistent with this cautious approach to designation status that the Board revise the Rules to include (i) a probationary period during which a SIFI may seek to restructure or unwind that portion of its business that caused it to be designated and to have its designation rescinded by the FSOC and (ii) a corresponding extension of all the compliance periods in order to avoid possibly unnecessary disruptions of a newly designated SIFI's business model and business relationships.

We also request that the Board consider extending the compliance deadlines that would apply to Large BHCs. We believe that providing Large BHCs with additional time to attain compliance with the Enhanced Standards would avoid creating competitive disparities with banking organizations in other jurisdictions. It would also give Large BHCs and their customers and counterparties a better opportunity to adjust to changes that may result from the implementation of the Enhanced Standards and limit the potential for disruption to the financial system and the economy.

2. *Risk-Based Capital Requirements and Leverage Limits*

Under the Proposal, a SIFI will generally become subject within 180 days of its designation to the same risk-based capital requirements, leverage limits and capital plan-related and stress test-related capital requirements that apply to Large BHCs.

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15 Basel Committee on Banking Supervision, *Basel III: A Global Regulatory Framework for More Resilient Banks and Banking Systems* (June 2011).

This extremely short compliance period appears to ignore the issues that a newly designated SIFI would encounter.

SIFIs are unlikely to have operated under such requirements before their designation. They likely have not been subject to bank regulatory capital definitions, risk-based capital calculations, regulatory accounting practices or bank regulatory examination practices related to capital adequacy. Moreover, they do not have experience with the Board's stress test practices or capital planning requirements, which could result in higher capital requirements. The Proposal makes no accommodation whatsoever for this key difference between Large BHCs and SIFIs.

As a matter of administrative law and fundamental fairness, the Board must recognize that a SIFI may have to make a range of dynamic business changes to its existing capital structure, information technology systems, business operations and investments in order to comply with the Rules' capital requirements. It is essential that the Rules provide an adequate transition period for SIFIs so they are not put in a Catch-22 situation of being made subject to requirements to which they cannot conform in the allotted time.

In enacting section 165 of the DFA, Congress intended to give the Board broad flexibility to develop individualized capital requirements for a SIFI or category of SIFIs or to impose alternative risk control measures to be applied in place of capital requirements.[16] Specifically, section 165(b)(1)(A)(i) provides that the Board shall prescribe risk-based capital requirements and leverage limits, *unless* the Board, in consultation with the FSOC, determines such requirements are not appropriate for a company that is subject to more stringent prudential standards because of the activities of such company or structure, in which case, the Board shall apply *other standards* that result in similarly stringent risk controls.

Similarly, section 165(a)(2)(A) of the DFA provides that in prescribing more stringent prudential standards, the Board may, on its own or pursuant to a recommendation by the FSOC, "differentiate among companies on an individual basis or by category taking into account their *capital structure*, riskiness, complexity, financial activities . . ., size, and any other related factors the Board . . . deems

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16 The Board states that section 171 of the DFA calls for the Board to impose the same minimum risk-based and leverage capital requirements on Covered Companies as it imposes on insured depository institutions. Proposal, 77 Fed. Reg. at 597 n. 26. We believe that the applicable provisions of section 165 of the DFA provide clear superseding authority for the Board to establish alternative capital standards or other risk control measures for a SIFI or category of SIFIs, notwithstanding section 171.

appropriate" (emphasis added). Furthermore, section 165(b)(3) of the DFA provides that, in prescribing enhanced prudential standards, the Board *shall* take into account differences among SIFIs and Large BHCs, based on a range of specified factors. Finally, section 165(b)(4) of the DFA *requires* that before the Board imposes prudential standards that are likely to have a significant impact on a functionally regulated subsidiary of a SIFI it must consult with each member of the FSOC that primarily supervise any such subsidiary with respect to such standard. The Board has not acknowledged this statutory requirement or included any such process in the Rules.

Thus, the specific and general provisions of section 165 discussed above require the Board to determine, without any limitation by section 171, the capital requirements that would apply to a SIFI or category of SIFIs or whether alternative risk control measures should be applied in place of capital requirements.[17]

Accordingly, we recommend that the Board revise the proposed Rules to add a new section 252.13(b)(4) as follows:

> (4) Notwithstanding subsections (b)(1)-(3), the Board may issue an order with regard to a nonbank covered company or a category of nonbank covered companies, which may establish alternative minimum capital requirements or other risk control measures and specify the time period for which such alternative minimum capital requirements or other risk control measures shall apply.

In addition, the Board should provide a longer period for a SIFI to become subject to the capital requirements that are applicable to that SIFI. This could be accomplished by modifying proposed section 252.11(a) to provide as follows:

> (a) *Applicability.* A nonbank covered company is subject to the requirements of sections 252.13(b)(1) and (b)(2) or

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17 Many SIFIs may be subject to separate prudential oversight, which the Board should rely on to provide the basis for the enhanced standards that the Board may apply to them. For example, the Board has indicated that a savings and loan holding company ("SLHC") that has more than $10 billion of total consolidated assets, which is subject to internal stress test requirements under section 165(i)(2) of the DFA, will not be required to comply with the requirements of the Rules until the Board has established risk-based capital requirements for SLHCs in general. 77 Fed. Reg. at 631. The Board should adopt a similar approach with regard to the application of all enhanced standards to SIFIs in general and consider carefully the existing prudential standards applicable to each SIFI before applying any enhanced standards to a given company. It should also be noted that SLHCs are not subject to the capital requirements of section 171 of the DFA until July 2015. *See* DFA § 171(b)(4)(D).

> (b)(4) as of the first full quarter that occurs three years after the date the Council has determined under section 113 of the Dodd-Frank Act that the company shall be supervised by the Board, or such later date as the Board may determine on its own or in response to a request by a nonbank covered company to be appropriate.

A longer period for SIFIs to come into compliance would also be more consistent with the proposed timetable in Basel III for its capital requirements to be fully implemented and would be less disruptive of existing business and investment relationships.

3. *Liquidity Requirements*

3.1. *The Government Funding Preference Impacts the Economy.*

All Covered Companies must maintain a liquidity buffer of unencumbered, highly liquid assets in an amount sufficient to meet the company's projected net cash outflows in the face of the projected loss or impairment of its existing funding sources for a period of 30 days over a range of liquidity stress scenarios.[18] "Highly liquid assets" are defined to include only three categories of assets: (i) cash; (ii) securities issued or guaranteed by the U.S. government, a U.S. government agency or a U.S. government-sponsored entity (together, clauses (i) and (ii) are referred to as "Preapproved Assets"); and (iii) other assets that are demonstrated to the Board's satisfaction to (a) historically have low credit risk and low market risk, (b) be highly liquid, and (c) be a type of asset that has historically served as a haven when market liquidity is impaired (*i.e.*, during a flight to quality) ("Category 3 Assets").[19] The Proposal places the burden on a Covered Company to demonstrate to the satisfaction of the Board that an asset satisfies all the criteria to be a Category 3 Asset.

The lack of guidance regarding the identification of Category 3 Assets would establish, at least initially, a strong bias in favor of holding Preapproved Assets as a liquidity buffer and against holding private sector or state or local government instruments. There are no quantitative criteria, procedures or timetables for the Board to follow in making its determination. As a practical matter, the necessity of receiving prior Board approval under these conditions for a Category 3 Asset to be

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18 Proposal, 77 Fed. Reg. at 648, proposed 12 C.F.R. § 252.57(a).

19 Proposal, 77 Fed. Reg. at 646, proposed 12 C.F.R. § 252.51(g).

included in a liquidity buffer could be highly disruptive of state and local government and private financing efforts.

To avoid this outcome, we request that the Proposal be revised to include guidelines and procedures under which Covered Companies would be able to identify Category 3 Assets on their own with a high degree of confidence and would not be required to seek prior Board approval. The guidelines could include minimum standards or safe harbors regarding credit risk, market risk, and liquidity, as well as criteria for a "flight to quality" such as identifying benchmark securities or indices, margins above relevant benchmark prices or index levels and underwriting standards.

3.2. *Liquidity Risk Management Mandates Are Overly Prescriptive.*

In addition, the proposed liquidity risk management requirement is highly prescriptive regarding (i) the duties of the board of directors or the risk committee of a Covered Company to oversee its liquidity risk management, (ii) the elements of liquidity stress testing and (iii) the monitoring of pledged and unpledged assets, liquidity risk exposures and intraday liquidity requirements.[20] The boards of directors and senior management of individual companies that have distinct business models and risk profiles should have the latitude to use their judgment to institute policies and procedures that are best suited to obtaining the desired objectives. Accordingly, we request that the Board revise Subpart C of the Proposal to provide principles-based guidance for liquidity risk management that the board of directors, risk committee and senior management of a Covered Company should apply, and that directors and senior management be evaluated and held accountable on the basis of their achievement of the corresponding objectives and not be required to take narrowly defined actions regardless of whether those actions are the most effective or efficient means of achieving the desired objectives.

Furthermore, we believe that the Proposal should be less prescriptive about how companies can formulate liquidity and funding projections, as the type of cash flow projections described are not appropriate to all business models.[21]

4. *Single Counterparty Credit Exposure Limits*

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20 Proposal, 77 Fed. Reg. at 646-649, proposed 12 C.F.R. §§ 252.2(b), 252.56(b) and (c) and § 252.60.

21 Proposal, 77 Fed. Reg. at 647, proposed 12 C.F.R. § 252.55(c).

4.1. *The 10% of Capital and Surplus Limitation Is Arbitrary and May Be Highly Disruptive.*

The Chamber represents participants of all sizes in the capital markets. Its members are end users of risk mitigating instruments offered by BHCs with $500 billion or more of total consolidated assets and potential SIFIs (together these companies are referred to as "Specified Covered Companies"). We are concerned that the 10% limit, calculated using the methodologies in the proposal (which, as described further below, significantly overstate risks), will severely limit the ability of our members to hedge their risks with high credit quality counterparties. It will do so unnecessarily, based on a Current Exposure Method ("CEM)" methodology that both sophisticated market participants and the Board abandoned some time ago. The flaws in the methodology are detailed comprehensively in comment letters by other stakeholders and trade associations.

The use of the CEM[22] to calculate exposure, combined with the requirement that the risk be shifted to the credit protection provider under the substitution method in the proposal, results in a significant overstatement of risk, which will in turn cause many of the dealers in these instruments to be unduly constrained in transacting with other dealers. A study conducted by The Clearing House Association, based on data supplied by 13 BHCs with consolidated assets of $500 billion or more, concluded that if the current Proposal is adopted the average counterparty exposure for these excesses would be 248% of the applicable credit limit. If the dealers are constrained in laying off their risk with each other, because of faulty methodologies of measuring risk in the proposal, the availability of those will to take on risk will be reduced. The implications are that all derivative end users will have to compete for what availability there is, and the cost of doing business will increase for all. Non dealers, not subject to the 10% limit, may fill part of the gap. However, many may not have the infrastructure to take on the excess which would have to be shed by the affected Specified Covered Companies. Moreover, such substitute providers may not be of the credit quality required by our members. We illustrate these potential impacts in the following examples:

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22 The CEM does not give full credit to master netting agreements and collateral exchanged among counterparties; thus, the methodology overstates the counterparty risk associated with transactions that are collateralized and that could be offset against other like transactions under U.S. accounting rules. The CEM has been recognized as lacking in risk-sensitivity by U.S. and international regulators as they have introduced and encourage BHCs to use more sophisticated model-based risk measurement tools.

Example 1: If a mid-sized company were interested in raising debt funding, it would likely do so through a market-making Specified Covered Company. In order for the Specified Covered Company, as underwriter, to assume the risk of holding the company's bonds until they could be sold, the Specified Covered Company would need to hedge any bonds that its holds in inventory. The best hedge in this case likely would be a credit default swap (CDS) on the issuer's name that the underwriter would buy from a Specified Covered Company. If the underwriter is unable to face the Specified Covered Company, it will need to find a smaller counterparty with which to hedge the trade. Given smaller counterparties have smaller inventories of CDS, the available hedges may be weaker or more expensive. This will increase the transaction costs as it will be passed on to the mid-sized issuer.

Example 2: If a U.S. company were contemplating the purchase of a Philippine company, it may wish to hedge their currency exposure by purchasing an option on the PHP/USD exchange rate. If the Specified Covered Company providing a price for the hedge is counterparty constrained in terms of who in the market it can hedge with, the price for the option to the U.S. company would likely increase, increasing the cost of the transaction.

The higher costs resulting from unnecessary constraints among Specified Covered Companies will likely result in competitive disadvantages for U.S. financial firms, as analogous large exposure regimes in other parts of the world allow for the use of more advanced, risk-sensitive measures of counterparty exposures.[23]

Section 165(e)(2) of the DFA authorizes the Board to impose a more stringent limit on credit exposure among covered institutions as is "necessary to mitigate risks to the financial stability of the United States." However, the Board has not provided any evidence that size alone, or $500 billion in assets specifically, is a sufficient factor to make this distinction, nor that the more stringent 10% test is "necessary" to mitigate risks to financial stability. We urge the Board to conduct a study of the "necessity" of the 10% limit for financial stability, and the impact such a limit would have on the markets.

The Proposal's application of the 10% limit to SIFIs of any size assumes that all SIFIs, regardless of their size or any other features they may possess, pose the same risk to U.S. financial stability as BHCs that qualify as Specified Covered Companies.

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23 Further, these regimes apply a 25 percent exposure limit to all counterparties, and the UK and EU large exposure regimes, in particular, allow exemptions for central counterparties, certain sovereigns, and assets used to meet minimum liquidity requirements.

Again, the Board has made no effort to explain this presumed equivalence. Under the FSOC's SIFI designation rule, a nonbank financial company with as little as $50 billion of total consolidated assets may qualify for Stage 1 evaluation for possible designation.[24] It is not clear why a SIFI that may be less than one-tenth the size of a BHC that qualifies as a Specified Covered Company should be subject to the identical percentage restriction on its single counterparty credit exposure. It also is not clear why SIFIs, as a group, that engage in credit transactions with BHCs that qualify as Specified Covered Companies or other SIFIs should be subject to a drastically smaller credit exposure limit than are Large BHCs that do not qualify as Specified Covered Companies and that engage in the identical credit transactions with the identical parties.

It is also worth noting that while other nations have adopted single counterparty credit limits, we are not aware of any country using the methodology proposed by the Board. U.S. financial services firms will be put at a competitive disadvantage – and an unnecessary one, given that the proposed methodology misstates and exaggerates risk.

If the Board chooses to retain the 10% limit, we request that the Board republish the Proposal with a statement, upon which the public may provide informed comment, discussing (i) why SIFIs, as a group, should be subject to this requirement, (ii) what the costs of this requirement are in terms of the reduction or disruption of credit relationships that it may entail and (iii) why the Board determined to set the reduced limit at 10 percent of capital and surplus as distinguished from some other percentage level.

4.2 *The Government Funding Preference Should Be Eliminated; High Quality Non-U.S. Sovereigns Should Be Exempted as Counterparties.*

Direct claims on, and the portions of claims that are directly and fully guaranteed as to principal and interest by, the U.S. and its agencies are exempt from the proposed single counterparty credit exposure limits.[25] In addition, direct claims on, and the portions of claims that are directly and fully guaranteed as to principal and interest by, Fannie Mae and Freddie Mac while they remain in conservatorship and any additional obligations issued by a U.S. government-sponsored entity, as determined by the Board, are also exempt from the credit exposure limits.[26] This

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24 77 Fed. Reg. at 21661.

25 Proposal, 77 Fed. Reg. at 654, proposed 12 C.F.R. § 252.97(a)(1).

26 *Id.*, proposed 12 C.F.R. § 252.97(a)(2).

approach has the same effect as the liquidity buffer requirements discussed above of creating a government funding preference. To avoid an unintended and unwarranted adverse impact on private sector financing, we request that the exemption from the counterparty credit exposure limits be expanded to include any assets that are determined to be Category 3 Assets for purposes of the liquidity buffer requirement under proposed section 252.51(g).

Moreover, we are concerned that undue constraints on Specified Covered Companies could limit their ability to play crucial roles as market makers in the event of a sovereign crisis. In this regard, we request that the Board modify the Proposal to exempt credit exposure to high quality non-U.S. sovereigns and high quality state and local obligations, designated from time to time by Board, from the single counterparty credit exposure limits.

4.3 *Recordkeeping Requirements Are Substantial and Require Additional Time for Compliance by SIFIs.*

In order to comply with the proposed single counterparty credit exposure limits, a Covered Company must engage in complex and extensive recordkeeping on a daily basis for itself and all of its subsidiaries.[27] The required monitoring and calculation is not unlike the measures that a banking organization must take to observe loan-to-one-borrower limitations; however, the infrastructure, compliance, IT systems and overall resources needed to continuously monitor credit exposures as proposed in the NPR, would involve very significant build outs for many firms. Furthermore, potential SIFIs that do not conduct banking businesses are not ordinarily subject to limitations and compliance and recordkeeping requirements of this nature. The establishment and testing of policies and procedures to perform such complicated compliance activities and the training of compliance and other employees regarding the new requirements would be a major undertaking for any newly designated SIFI. Accordingly, we request that the Board amend the proposed Rules to provide that SIFIs will have until the later of October 1, 2014 or the date that is two years after the date the company is designated as a SIFI, or such later date as the Board may determine on its own or in response to a request by a SIFI to be appropriate, to comply with the single counterparty credit exposure requirements.

4.4. *Existing Credit Transactions Should Be Grandfathered.*

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27 *Id.*, proposed 12 C.F.R. § 252.96(a).

Nonbank financial companies may not be generally subject to single counterparty credit exposure limits, and, even if such limits may apply from time to time, they would not necessarily include rules for aggregating credit exposure that are nearly as sweeping as those proposed as part of the Rules. As a result, the proposed credit exposure limits may be disruptive of stable, long-term and highly beneficial credit relationships relied on by potential SIFIs and their clients and customers. However, the Proposal does not include any discussion of how a newly designated SIFI would be treated if its credit exposure to an unaffiliated counterparty exceeded the limitation at the time the credit exposure provision became applicable to the SIFI. Under the Proposal, the requirement would generally become applicable to a newly designated SIFI beginning on the first day of the fifth quarter following the date on which the company becomes a Covered Company.[28] SIFIs and their counterparties should not be subject to new restrictions that could disrupt pre-existing and potentially long-term, legally binding credit exposure transactions or existing credit exposure positions, including securities holdings.

Accordingly, we request that the Board revise Subpart D of the Rules to "grandfather" all credit exposures of a SIFI to an unaffiliated party (including legally binding commitments) that are outstanding or in effect at the time of its final designation as a SIFI by the FSOC (or as of another appropriate date). If the Board were to determine not to provide such grandfather treatment, we request that it provide other relief. Such relief might include, without limitation, an extension of the time period for achieving compliance or a procedure to request such an extension; phased-in compliance over an extended period of time; individualized treatment of various categories of credit relationships based on their duration, purpose, legal status or other relevant features; and, as called for by section 165(b)(3) of the DFA, a detailed procedure for the Board, on its own initiative or at the request of a newly designated SIFI, to "tailor" the application of the credit exposure limits to the individual features and circumstances of the company.

4.5. *The Counterparty Credit Exposure of a Noncontrolled Investment Fund Should Not Be Aggregated with the Counterparty Credit Exposure of Its Sponsor or Adviser.*

Under the Proposal, a fund or vehicle that is sponsored or advised by a Covered Company (together a "Fund"), including a registered investment company,

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28 Proposal, 77 Fed. Reg. at 649, proposed 12 C.F.R. § 252.91(a)(1).

would not be considered to be a subsidiary of the Covered Company and thus would not be aggregated for purposes of calculating the Covered Company's credit exposure if the Covered Company was not deemed to "control" the Fund under the applicable definition of control.[29] We agree with the Board's Proposal in this regard.

The Board seeks comment on whether the counterparty credit exposure of money market mutual funds ("MMMFs") and "certain other funds or vehicles" that are sponsored or advised by a Covered Company should be included as part of the Covered Company's counterparty credit exposure for purposes of calculating its aggregate counterparty credit exposure.[30] We believe that aggregating the credit exposures of MMMFs and other funds or vehicles with their sponsors or advisers for purposes of the credit exposure restrictions would be inappropriate for many reasons, including that it would present an inaccurate view of credit exposure and be operationally very difficult to implement.

MMMFs in particular are highly regulated by the Securities and Exchange Commission ("SEC") and are subject to a regulatory regime that was recently strengthened in order to increase their ability to withstand extreme economic stresses and to reduce the risks of large, sudden redemptions by their shareholders. With regard to registered investment companies more generally, the Investment Company Act of 1940, the Investment Advisers Act of 1940 and regulations adopted thereunder by the SEC establish governance, reporting, recordkeeping, custodial and other requirements that serve to maintain the independence of registered investment companies from their advisers and, in turn, limit the exposure of investment advisers to the credit, market, liquidity, reputational and other risks that the funds they manage may encounter or that may arise from their role as sponsors or advisers.

Moreover, a Covered Company that sponsors or advises an MMMF is responsible for managing the assets in a MMMF on behalf of the MMMF's shareholders. As with other Funds, the shareholders, not the Covered Company, own the assets. We believe the Proposal appropriately reflects this critical point.

The Board's approach is further supported by the operational challenges that Covered Companies that sponsor or advise, but do not control, Funds would face in

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29 Proposal, 77 Fed. Reg. at 614. A Covered Company would not be deemed to control a Fund that it sponsored or advised if (i) it did not own or control more than 25 percent of the voting securities or total equity of the Fund and (ii) the Fund would not be consolidated with the Covered Company for financial reporting purposes. Proposal, 77 Fed. Reg at 649, proposed 12 C.F.R. § 252.92(i).

30 Proposal, 77 Fed. Reg. at 614-615.

attempting to calculate their credit exposure, given the number of Funds that might be involved and the composition and turnover of their portfolios. Any decision by the Board to pursue this alternative approach should only be pursued after the publication of a thorough cost benefit analysis in regard to such an alternative.

5. *Risk Management and Risk Committee Requirements*

The Proposal requires (i) all Covered Companies and (ii) all bank holding companies ("BHCs") that are publicly traded and have $10 billion or more of total consolidated assets but are not Large BHCs to maintain an enterprise-wide risk management committee of the company's board of directors.[31] Among other requirements, the risk committee must have an independent director and at least one member with risk management experience commensurate with the company's risk-related factors.[32] It also must have a formal, written charter pursuant to which it oversees the operation of the company's risk management framework, including appropriate risk limits, policies and procedures, monitoring and reporting systems, and methods of compliance.[33]

The DFA directs the Board to impose risk committee requirements only on Covered Companies that are publicly traded.[34] The Board, in fact, acknowledges this point in the Proposal.[35] Nevertheless, the Board has expanded this requirement to apply to all Covered Companies, both those that are publicly traded and those that are not, without indicating any basis or any authority for doing so. Indeed, while the DFA specifically provides the Board with discretion to impose risk committee requirements more broadly to cover publicly traded BHCs that have less than $10 billion of total consolidated assets, it grants no authority to the Board to engage in discretionary rulemaking to apply risk committee requirements to SIFIs that are not publicly traded. Under established rules of statutory interpretation, the grant of authority to the Board with respect to a specifically described group of companies – *i.e.*, publicly traded BHCs that have less than $10 billion of total consolidated assets – indicates that Congress intended to withhold such authority from the Board with respect to SIFIs that are not publicly traded.[36]

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31 Proposal, 77 Fed. Reg. at 656, proposed 12 C.F.R. § 252.126(a).

32 *Id.*, proposed 12 C.F.R. § 252.126(b)(2).

33 *Id.* proposed 12 C.F.R. § 252.126(b)(1) and (c).

34 12 U.S.C. § 5365(h)(1).

35 Proposal, 77 Fed. Reg. at 623.

36 *See, e.g., Independent Insurance Agents of America, Inc. v. Hawke*, 211 F. 3d 638 (D.C. Cir. 2000) (applying the doctrine *expressio unius est exclusio alterius* and the presumption against surplusage in

We request that the Board revise the Proposal to clearly provide that the risk committee and other risk management requirements of proposed section 252.126 do not apply to SIFIs that are not publicly traded. The DFA also has no prescriptive requirements regarding the performance by a risk committee of its responsibilities.[37] As discussed above with respect to liquidity risk management, overly prescriptive requirements interfere with the ability of directors to apply their judgment and exercise their discretion as to how a Covered Company can best address the risk management issues it encounters. Diversity among the approaches to risk management is also more likely to result in greater stability and faster evolution of best practices than would be the case if homogenized risk management practices were prescribed as proposed. We request that the Board revise the Proposal to set forth principles-based guidance regarding the objectives of the risk committee and to make the board of directors accountable for the risk committee's results, without dictating the specific methods to be used or actions to be taken.

Furthermore, we request that the Proposal be revised to remove the dual-reporting requirement for the chief risk officer; while this individual should have ready access to both the chief executive officer and the risk committee, we do not believe it is necessary that the rules mandate a specific organizational structure. The Proposal also should be revised to clarify that a risk committee is not required to have more than one independent director, and that a risk committee does not assume any responsibility for the day-to-day operations of the Covered Company.

6. *Stress Test Requirements*

6.1. *Public Disclosure Requirements Are Excessive.*

The Proposal provides for the Board to conduct an annual supervisory stress test of the ability of each Covered Company to absorb losses in adverse economic and financial conditions. Each Covered Company also must conduct two internal stress tests each year. Within 90 days of submitting a report to the Board of the results of its internal stress tests, each Covered Company must publicly disclose the results of its

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legislative language, the express statutory authority granted to national banks to engage in insurance sales in towns with a population of 5,000 persons or less did not permit the Office of the Comptroller of the Currency to authorize the sale of limited types of insurance by national banks outside such locations).

37 12 U.S.C. § 5365(h)(3).

internal stress tests.[38] The public disclosure must include, at a minimum, a description of the types of risks included in the stress test, a "high-level description" of the stress test scenarios, a general description of the methodologies used to conduct the stress test, and the result of the stress test with regard to aggregate losses, pre-provision net revenue, allowance for loan losses, net income, and pro forma capital levels and capital ratios across the planning horizon of the stress test under each stress test scenario.[39]

The extent of the proposed public disclosure of the results of each internal stress test is overly broad. It includes projections and pro forma information that may be proprietary, speculative and, except as required by the Proposal, would be confidential and would not be publicly disclosed. The amount and specificity of the data to be disclosed is troubling because it may cause the data to be mistakenly viewed as "hard" data and to be relied on as the basis of unwarranted conclusions, speculation and reaction in financial markets. The data also may be used to attempt to "reverse engineer" other undisclosed information regarding a company's financial condition or performance. To guard against this danger, we request that the Board revise the Proposal to permit Covered Companies to provide a general description or summary of their internal stress test results, similar to the disclosures that the Board is required to make of the results of its annual supervisory stress tests. Under no circumstances should a Covered Company be required to disclose base case scenario results, which would be akin to providing earnings guidance. The Proposal also should be revised to require the Board to tailor the stress test scenarios to the characteristics of the various classes of companies covered by the stress test requirements.

6.2. *The Conflict between the Update Requirement in the Proposal and the Requirement of the Board's Regulation QQ Should Be Eliminated.*

The Proposal also requires that each Covered Company take into account the results of its annual supervisory stress test in updating its plan for rapid and orderly resolution. This update is to be completed within 90 days of the Board's publication of the summary results of the Covered Company's supervisory stress test.[40] The Proposal does not provide a timetable for the conduct of the annual supervisory stress tests. However, in the preamble of the Proposal, Table 2 indicates that the Board

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38 Proposal, 77 Fed. Reg. at 659 and 660, proposed 12 C.F.R. § 252.146(a) and § 252.148(a).

39 Proposal, 77 Fed. Reg. 660, proposed 12 C.F.R. § 252.148(b).

40 Proposal, 77 Fed. Reg. at 657-658, proposed 12 C.F.R. § 252.136(b).

expects to publish the summary results by early April of each year.[41] Based on this timetable, all Covered Companies would be required to update their resolution plans by approximately early July of each year.

The timing of this update requirement is not coordinated with the final rule that has been jointly adopted by the Board and the Federal Deposit Insurance Corporation ("FDIC") governing resolution plans. That rule provides that a Covered Company should submit an annual update of its resolution plan on or before the anniversary date of its initial plan filing.[42] The anniversary date will be December 31 for all Covered Companies with less than $100 billion of total nonbank assets (or, in the case of a foreign-based company, less than $100 billion of total U.S. nonbank assets), and it will fall on various dates for all Covered Companies that become subject to resolution plan requirements after November 30, 2011.[43] Outside of its annual update, a Covered Company is not required to revise its resolution plan except upon receiving a joint written request from the Board and the FDIC specifying the portions or aspects of its resolution plan that are to be updated.[44] Thus, for all but the largest BHCs and for most companies that become subject to resolution plan requirements after November 30, 2011, the requirement in the Proposal to automatically update its resolution plan on or about July 1 of each year in response to the release of annual supervisory stress test results conflicts with the Board's Regulation QQ, which requires the Board and the FDIC jointly to make a specific written request to a Covered Company to update its resolution plan at any time other than the plan's anniversary date. We request that that FRB revise section 252.136(b) of the Proposal to eliminate this conflict.

7. *Covered Companies Should Be Able to Request Additional Time to Comply with Debt-to-Equity Limits.*

The Proposal provides that the FSOC, after determining that a Covered Company poses a grave threat to U.S. financial stability and that the prescribed action is necessary to mitigate such risk, may require the company to maintain a debt-to-equity ratio of not more than 15-to-1, beginning not later than 180 days after the company is so notified.[45] Upon request by the company, and upon a determination

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41 Proposal, 77 Fed. Reg. at 628.

42 12 C.F.R. § 243.3(a)(3). 76 Fed. Reg. 67323, 67335 (Nov. 1, 2011). The FRB and the FDIC may jointly determine to set a different filing date. 12 C.F.R. § 243.3(a)(4).

43 12 C.F.R. § 243.3(a)(1) and (2).

44 12 C.F.R. § 243.3(b)(1).

45 Proposal, 77 Fed. Reg. at 660, proposed 12 C.F.R. § 252.152(a).

that it has made good faith efforts to comply and that it would be in the public interest to do so, the Board may extend the compliance period for up to two additional 90-day periods.[46] We request that the Board provide for the possibility of granting additional extensions. As noted in the Proposal, an extension must be in the public interest. This may occur, for example, when more rapid efforts to achieve full compliance may cause a "fire sale" of assets that would disrupt financial markets and cause harm to other owners of the same or comparable assets. The Proposal should be revised to give the Board more latitude to deal with such circumstances.

8. *The Board's Discretion to Impose Early Remediation Should Be More Restricted.*

The Proposal sets forth a number of early remediation requirements that the Board is required to impose on a Covered Company based on the presence of any one of several trigger conditions. Based on the severity of the trigger conditions, the remediation may extend from Level 1 (heightened supervisory review) to Level 2 (restrictions on capital distributions, asset growth, acquisitions and activities), Level 3 (prohibitions on capital distributions, asset growth, acquisitions and activities) and Level 4 (assessment for resolution under Title II of the Dodd-Frank Act).[47]

The application of this remediation matrix is highly discretionary on the part of the Board. A table in the preamble of the Proposal indicates that a Covered Company that meets all quantitative requirements to be considered well capitalized would nevertheless be subject to heightened supervisory review if it "demonstrated capital structure or capital planning weaknesses."[48] If, upon completion of Level 1 review, the distress or weakness of a company indicated that "further decline of the covered company is probable," the Proposal states that the company must be assigned to Level 2 remediation.[49] These standards provide few discernible limits to the Board's exercise of its discretion to impose significant restrictions and requirements based on subjective conclusions. We request that the Board revise proposed section 252.162(a) to provide more detailed guidelines regarding Level 1 triggering events, such as to require a minimum of more than one triggering condition.

We also have concerns about the use of market indicators and stress test results as triggers. Market indicators are subject to manipulation and have the potential to rapidly exacerbate a company's distress. Separately, stress test results are

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46 *Id.*, proposed 12 C.F.R. § 252.152(b).

47 Proposal, 77 Fed. Reg. at 662, proposed 12 C.F.R. § 252.162.

48 Proposal, 77 Fed. Reg. at 635.

49 Proposal, 77 Fed. Reg. at 662, proposed 12 C.F.R. § 252.162(a).

inappropriate triggers of remediation actions given that they are based on extreme, hypothetical future scenarios, and a single outlier quarter's results is not necessarily an indicator of distress today.

9. *The Proposal Does Not Comply with the Paperwork Reduction Act.*

Under the Paperwork Reduction Act, the Board is required to set forth a description of the likely respondents to the information collection activities under the Proposal and an estimate of the burden that would result from the collection of information. Although the Board clearly intends that the Rules would apply to SIFIs, the Paperwork Reduction Act notice in the Proposal does not include any SIFIs within its listing of respondents and therefore does not include any estimate of the annual reporting burden for SIFIs under the Rules.[50] The Board does not give any explanation for why it omitted any reference to the impact of the paperwork burden on SIFIs. For example, the Board has indicated that it will publish information regarding the reporting requirements of Large BHCs with respect to risk-based capital requirements and leverage limits.[51] It has provided no information regarding the reporting requirements for SIFIs in this regard.

The Board should reconsider the application of the Paperwork Reduction Act to SIFIs that would be subject to the Rules and publish the required paperwork reduction notice addressing the burden that the Rules would place on SIFIs.

10. *The Proposal Does Not Contain a Cost Benefit Analysis.*

Under Executive Order 13579, the Administration urged independent regulatory agencies, including the Board, to comply with Executive Order 13563 ("EO 13563"),[52] which sets forth principles to guide federal rulemaking activities by executive agencies. Those principles include: proposing or adopting a regulation only upon a reasoned determination that its benefits justify its costs, tailoring regulations to impose the least burden on society, consistent with regulatory objectives, and choosing among alternative regulatory approaches those approaches that maximize net benefits.

In a letter dated November 8, 2011, Board Chairman Ben Bernanke advised Cass Sunstein, Administrator of the Office of Information and Regulatory Affairs of

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50 Proposal, 77 Fed. Reg. at 643.

51 Proposal, 77 Fed. Reg. at 642.

52 76 Fed. Reg. 3821 (Jan. 21, 2011).

the Office of Management and Budget, that the Board had reviewed EO 13563 and, while it did not apply to independent agencies such as the Board, the Board had nevertheless tried to abide by the principles described therein and to believe that the Board's regulatory efforts should be designed to minimize regulatory burden.

Notwithstanding Chairman Bernanke's statement, the Proposal does not contain any discussion of whether the Board has conducted the cost benefit analysis for the Proposal that is a central element of EO 13563, or, if it has done so, what the details of that cost benefit analysis are, in order that the public can provide comment on that analysis as provided for in EO 13563. The entire Proposal is certain to impose significant costs, not just on Covered Companies but also on the financial system and the economy in general. The Board, however, has provided no information regarding its calculation of costs and benefits to enable Covered Companies or other members of the public to comment thereon or make their own determination. Furthermore, as the Board acknowledges, the special issues raised by the application of the Rules to SIFIs raise very significant concerns about the choices the Board makes in regard to the relative burdens that would be imposed on BHCs and SIFIs by alternative forms of regulation. In our view, regardless of whether the Board seeks to apply the Rules to SIFIs as described in the Proposal, it is essential that it publish a cost benefit analysis that clearly describes the costs and benefits that the Board expects the Proposal to generate so that Covered Companies and the public may consider them and have a meaningful opportunity to comment thereon.

The Board's decision not to address cost benefit analysis considerations in the Proposal is particularly surprising in light of the fact that the Board joined with other independent regulatory agencies in publishing an extensive, 13-page cost benefit analysis in the proposed rule to implement the Volcker Rule.[53] Clearly, if a company or bank is deemed to be systemically important and supervised for systemic risk purposes, there is an economic impact that must be assessed and studied.

CONCLUSION

As discussed above, we believe that the proposal is not ripe for further consideration, much less completion. We also believe that when the Board undertakes a SIFI Rulemaking, it must fully incorporate the cost benefit analysis and

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53 76 Fed. Reg. 68846, 68924-68936 (Nov. 7, 2011).

other principles of EO 13563 into that rulemaking and publish its cost benefit analysis of the SIFI Rulemaking for public comment.

We agree that there is a need to monitor and regulate systemic risk. However, we must also recognize that risk is necessary for a free enterprise system to operate efficiently and for businesses to expand and create jobs. Overly broad and vague attempts to regulate that will deter normal and expected risk-taking is economically harmful. We appreciate and value the comment process to help spur a dialogue to create informed and even-handed regulations that strike a balance in preventing harm and spurring growth. Such goals are not mutually exclusive.

Unfortunately, we believe that the Proposal does not strike that balance and in its current form will cause more harm than good. Accordingly, we respectfully request that the Board immediately terminate this rulemaking with respect to SIFIs, and suspend the rulemaking with respect to U.S.-based Large BHCs until the Board publishes a proposed rule applying the Enhanced Standards to foreign banking organizations that are Covered Companies.

Sincerely,

David Hirschmann
President and CEO
Center for Capital Markets Competitiveness