American Bankers Association
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Financial Stability Oversight FSOC
c/o United States Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

Re: Comments regarding Financial Stability Oversight Council's Study & Recommendations Regarding Concentration Limits on Large Financial Companies

Dear Sir or Madam:

Section 622 of the Dodd-Frank Act amended the Bank Holding Company Act to limit the ability of a financial company to make acquisitions if, following the transaction, the total consolidated liabilities of the acquiring financial company would exceed more than 10 percent of the aggregate consolidated liabilities of all financial companies (the concentration limit). In addition, section 622 created a new section 14 of the Bank Holding Company Act that instructed the Financial Stability Oversight Council (FSOC) to study the concentration limit and granted authority to the FSOC to make modifications to it, which modifications are to be executed by the Federal Reserve Board through rulemaking. The American Bankers Association[1] appreciates the opportunity to comment on this issue.

On January 18, 2011, the FSOC issued its study and recommendations regarding the concentration limit. As required, the study considered the impact of the concentration limit on the competitiveness of United States financial firms and financial markets. The FSOC noted that the concentration limit as currently written would treat U.S. financial companies unequally as compared with foreign financial companies.

The FSOC has solicited comments on its recommendations, and in response to this request we are writing to urge the FSOC to expand its recommendations to include: (1) a modification to correct the inequality noted by the FSOC in the treatment of U.S. financial companies compared to foreign financial companies; and (2) the adoption of a definition for a term "de minimis."

Background

Section 622 was part of the "Volcker Rule" proposed by the U.S. Treasury Department in March 2010 and adopted by the Senate Banking Committee. Section 622 does not define its purpose, and the legislative history provides no explanation. Congress was quite specific,

[1] The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's $13 trillion banking industry and its 2 million employees. The majority of ABA's members are banks with less than $165 million in assets. Learn more at www.aba.com.

however, in granting the FSOC authority to modify section 14 and in identifying several factors to consider in exercising that authority, including "the extent to which the concentration limit…would affect financial stability, moral hazard in the financial system, the efficiency and ***competitiveness of United States financial firms and financial markets***, and the cost and availability of credit and other financial services to households and businesses in the United States"[2] (emphasis added).

Calculation of 10 Percent Limit

In order to determine whether a given financial company exceeds the 10 percent limit, section 14 divides that company's liabilities by the total liabilities of all financial companies. Liabilities are defined as the total risk-weighted assets of a company, less its total regulatory capital. For foreign financial companies, liabilities include only the risk-weighted assets of their U.S. operations. This structure presents an anomaly that creates an unintended advantage for foreign financial companies.

Unequal Treatment of U.S. Financial Companies

As section 14 is currently constructed, a foreign financial company would include in its numerator the risk-weighted assets of its U.S. operations (but not its overseas assets), and in its denominator the assets of all U.S. financial companies, including their overseas assets. However, a U.S. financial company must include in the numerator all of its risk-weighted assets – including assets held overseas – and can include in the denominator both the domestic and overseas assets of U.S. financial companies, but cannot include in the denominator the overseas assets of foreign financial companies operating in the United States. Thus, a foreign financial company could grow to hold significantly more than 10 percent of the U.S. market without violating the limit, but a U.S. financial company could not.

If the purpose of the test is to consider concentration on a global scale, then overseas assets should be included in both the numerator and the denominator. If the purpose of the test is to consider concentration in the U.S. market, then only U.S. assets should be considered in both the numerator and the denominator. The current treatment of section 14 works significantly to the detriment of a U.S. financial company by including its overseas assets in the numerator but excluding the overseas assets of its major foreign competitors from the denominator; a foreign financial company, conversely, can exclude its overseas assets from the numerator but include the overseas assets of U.S. financial companies in its denominator. The FSOC recognized this unequal treatment in its study:

> The concentration limit, as enacted, treats acquisitions by U.S-based firms and foreign-based firms unequally. The statutory concentration limit includes the global consolidated liabilities of U.S. financial companies but only the liabilities of the U.S. operations of foreign firms. As a result, a large, globally-active U.S. financial company–whose liabilities are measured on a global basis under section 622–could be prevented by the concentration limit from making any material acquisitions (U.S. or foreign), but a large foreign-based financial company with a relatively small U.S. presence may be able to acquire that same U.S. financial

[2] Section 622 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

> company because only the U.S. liabilities of the resulting company would be subject to the concentration limit. In addition, depending on the extent of its U.S. operations, the foreign-based company might be able to continue to acquire U.S. financial companies without running afoul of the concentration limit because, unlike a U.S.-based firm, the foreign operations of the foreign-based company are excluded from the concentration formula. Over time, this disparity could increase the degree to which the largest firms operating in the U.S. financial sector are foreign-based.[3]

It is difficult to imagine any possible rationale for treating U.S.-based firms and foreign-based firms unequally in this way. In fact, on March 1, 2011, the Senate Banking, Housing and Urban Affairs Committee held a hearing during which, in response to a question from Senator Schumer (D-NY), Federal Reserve Chairman Bernanke acknowledged that this unequal treatment of U.S. financial companies was a problem. Furthermore, Senator Schumer noted that the Dodd-Frank Act instructed the FSOC to take competitiveness of U.S. firms into account, and that the FSOC had sufficient discretion to recommend modification of the concentration limit to correct the unequal treatment of U.S. financial companies. Senator Schumer expressed a hope that Chairman Bernanke would exercise that discretion. It is also worth noting that no other country in the world is subject to a concentration limit such as that contained in section 14 (even though financial assets in other nations are far more concentrated than those in the United States), much less one that would apply a similar framework and provide some offsetting benefit to foreign financial companies.

Authority of the FSOC to Correct this Anomaly

Section 14 explicitly allows the FSOC to consider "the efficiency and competitiveness of U.S. financial firms" in deciding whether to recommend a modification to the statute. The competitive inequity of treating U.S.-based firms differently than foreign-based firms in calculating the concentration limit, which may well have been inadvertent, clearly mandates modification under this standard.

As suggested above, fair treatment for U.S. financial companies could be achieved through either of two modifications to how the test is calculated: (1) including the overseas assets of foreign financial companies operating in the United States, or (2) excluding the overseas assets of U.S. financial companies. Because section 14 specifically limits coverage of foreign financial companies to their U.S. operations, we believe that Congress envisioned section 14 through a U.S. lens, and therefore believe that option (2) is more consistent with the purpose of the statute.

Definition of "de minimis"

Section 14 allows acquisitions if they "would result only in a de minimis increase in the liabilities of the financial company." The statute does not define "de minimis," and the FSOC should recommend a definition to the Federal Reserve.

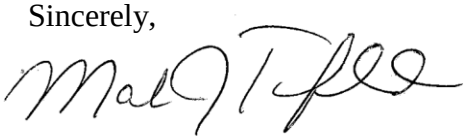
[3] Financial Stability Oversight FSOC "Study & Recommendations Regarding Concentration Limits on Large Financial Companies," January 2011, at page 12.

We believe that the most sensible and justifiable definition of "de minimis" would be an acquisition that did not increase the total liabilities of the acquirer by more than 5 percent. The Bank Holding Company Act uses the 5 percent threshold in other contexts. For example, acquisition of less than 5 percent of the voting shares of another company is presumed not to constitute an exercise of control.[4] As another example, a bank holding company may acquire up to 5 percent of the outstanding voting shares of any company without obtaining the Federal Reserve Board's prior approval.[5]

Conclusion

Thank you for your consideration of our views. We would welcome the opportunity to discuss these issues further. If you have any questions, please contact the undersigned at your convenience.

Sincerely,



Mark J. Tenhundfeld

cc: Ben Bernanke, Chairman
Board of Governors of the Federal Reserve System

[4] 12 U.S.C. §1841(a)(3)-(4); Regulation Y, 12 C.F.R. §225.31(e).
[5] 12 U.S.C. §1843(c)(6).