

Submitted via the Federal eRulemaking Portal, <http://www.regulations.gov>

May 26, 2011

Financial Stability Oversight Council  
United States Department of the Treasury  
Office of Domestic Finance  
1500 Pennsylvania Avenue, N.W.  
Washington, DC 20220

Re: Notice of Proposed Rulemaking: Authority to Designate Financial Market Utilities as Systemically Important, RIN 4030-AA01

Dear Sir or Madam:

The American Bankers Association (ABA)<sup>1</sup> appreciates the opportunity to comment on the Financial Stability Oversight Council (FSOC) Notice of Proposed Rulemaking<sup>2</sup> regarding the authority to designate financial market utilities (FMUs) as systemically important. Safety of the payments systems is essential to a productive economy and to ensure the confidence of the commercial entities and customers that rely on the system. The ABA recognizes the need to protect the payment systems in a prudent and effective fashion. Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (DFA) grants the FSOC broad powers to identify and designate FMUs that will be subject to enhanced oversight. It is vital that the FSOC in performing this task effectively reduces overall risk without creating additional and unwarranted regulatory burdens on FMUs, including FMUs that do not meet the criteria for being designated as systemically important.

FMUs are defined generally in the DFA as any person that manages or operates a multilateral payments system for the purpose of transferring, clearing, settling payments, securities, or other financial transactions among financial institutions or between financial institutions and that person. FMUs are essential because they reduce costs for market participants providing centralized payment services and reducing the need for each market participant to have an individual relationship in order to complete a transaction. Examples of FMUs include entities that facilitate bank wire transactions, paper check clearing organizations, Automated Clearing House (ACH) transactions, and credit and debit card networks.

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<sup>1</sup> 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](http://www.aba.com).

<sup>2</sup> [Federal Register](#) Vol.76 No. 59, March 28, 2011

ABA strongly believes that the two major wire systems, CHIPS and Fedwire, meet the threshold of a designated FMU (DFMU) based upon the five factors Title VIII lists to be considered by FSOC in making the determination. When analyzed using the criteria set forth in the law, the other payments systems should not be considered systemically important.

## **Background**

In December 2010, the FSOC published an Advance Notice of Proposed Rulemaking (ANPR)<sup>3</sup> asking for public comment to help shape the more formal rulemaking proposal that is the focus of this letter. The FSOC proposed, and ABA generally agreed, that the five statutory considerations contained in Title VIII were appropriate for identifying DFMUs. It is ABA's contention that a fair application of those criteria would exempt all payments systems except for the largest wire systems for which there is no substitute system offering similar qualities of speed and finality of settlement.

The most recent rulemaking proposal builds upon the five quantitative factors that must be taken into consideration and adds a second stage where a qualitative review of FMUs will be conducted to determine if they are systemically important.

We understand that the first stage in the analytical review will be data driven and based upon the five statutory factors:

1. The aggregate monetary value of the transactions processed by an FMU;
2. The aggregate exposure of the FMU to its counterparties;
3. The relationship, interdependencies, or other interactions of the FMU with other FMUs or payment, clearing, or settlement activities.
4. The effect that the failure of or a disruption to the FMU would have on critical markets, financial institutions, or the broader financial system; and
5. Any other factors the FSOC deems appropriate.

We understand that the second stage will go into greater detail from both a quantitative and qualitative perspective. Some of the factors that could be considered may be specific to that type of payment system or that FMU. Additional information may be requested from the FMUs' regulatory agency or the FMUs directly during this process, and they will be informed that it is subject to a second stage review. FMUs will be allowed to submit a written statement in support of or in opposition to being identified as a DFMU.

## **ABA Comments**

### *Applying the Statutory Factors*

The factors that the FSOC must apply when determining the systemic importance of an FMU remain the same as those outlined in the statute and the ANPR. These factors are meant to help identify FMUs that have the potential of spreading significant liquidity or credit risk among financial institutions or markets that thereby destabilizes

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<sup>3</sup> Federal Register, Vol. 75 No. 244, December 21, 2010

the financial system of the United States. Appropriately, few FMUs will meet this substantial threshold. The additional oversight of FMUs should be directed at those that pose the largest risk and should not be layered upon all FMUs, most of whom should not be designated as systemically important.

In general, wire systems process the largest volumes of any payment system in terms of dollar amount and amount per transaction. These are known as wholesale payments. There are two predominate FMUs engaged in the wire system space: CHIPS and Fedwire. In evaluating the characteristics of these two systems against the statutory factors, the magnitude of their footprint identifies them as uniquely critical FMUs. Consequently, the measures of volume of transactions, aggregate exposure to counterparty risk, interdependence of the market on their operations, and the impact of the disruption of their respective operations yield the appropriate types of information and level of threshold that constitute a DFMU.

It is important to note that wire systems are very different from other types of payment systems and provide benefits to their users that other payment systems are not able to provide. The most important is that these payments are made in real time and are final. Other payment types may be reversed after they are made and do not provide immediate funds availability. The combination of the dollar volume involved in these transactions, the special characteristics regarding real and final settlement of funds, and the reality that there is no easily found substitute for wire transactions if the system fails or is disrupted would indicate that these two FMUs are systemically important.

Consequently, these FMUs would be subject to the second stage of the FSOC review process for a more detailed review of their activities for a final determination that they are systemically important and meet the status of DFMU.

On the other hand, when an FMU's aggregate dollar volume amounts are percentage-wise relatively small, the payment and settlement process is not time critical, and there are alternative payment methods available, then those FMUs likely would not meet the statutory standard of being systemically important, nor warrant a Stage Two analysis. These are characteristics displayed by retail payment systems.

In comments submitted to the FSOC in January 2011, ABA made a similar recommendation that retail payment systems be excluded from consideration as DFMUs because they clearly do not meet the threshold outlined in the statutory factors. In the discussion of the proposed rule, the FSOC notes this recommendation but elects not to exclude retail payment systems in its quantitative stage one review of FMUs.

ABA recommends that this type of FMU should not be subject to a second stage review by the FSOC.

Further, ABA recommends that these low dollar volume retail payment systems not be subject to burdensome data collection processes associated with the first stage review described by the FSOC that could increase costs without providing a corresponding

improvement in risk management. The FSOC should take into consideration the expense of the FMU data collection process when it is making requests for information from retail FMUs. Increased costs are absorbed by all participants in a payments system and not just the FMU itself. The retail payments systems to which we refer include check, ACH, and debit and credit card networks.

#### *Procedures*

Many of the other aspects raised in the proposed rulemaking apply to the processes of FMUs providing information to the FSOC and the procedures and time frames allowed for the designation process. These procedural aspects of the review and designation process are best addressed by FMUs directly.

ABA does express concern that the professed limit for obtaining Stage One information from existing public sources or the relevant Federal agency (76 Fed. Reg. at 17056) is given little to no regulatory recognition in the proposed section 1320.20. From our reading, it appears that 1320.20(a) is the basis for obtaining both Stage One and Stage Two information. This unfairly places the onus on the FMU directly without regard for the public availability of the information. In addition, the FSOC's reliance on the Supervisory Agency as the exclusive source for non-public Stage One information is only limited to those occasions when the Supervisory Agency produces the requested information in 15 days. See, 1320.20(c). ABA believes this timetable is inappropriate for Stage One analysis. There is no evident exigency for this rapid turnaround to be the standard for obtaining Stage One information. In any case, this inadequate and contingent dependence on public and Supervisory Agency sources is a far cry from the unqualified pledge that Stage One analysis "will be informed by both publicly available information and information available to a Federal agency with jurisdiction over the FMU." See, 76 Fed. Reg. at 17056.

ABA recommends the FSOC re-draft 1320 to reflect the commitment expressed in the Overview of the Proposed Rule with respect to obtaining Stage One information without burdening all FMUs with direct information requests.

Thank you for the opportunity to comment on this proposed rule. If you have any questions or need additional information, please contact the undersigned at 202.663.5147 or via email at [skenneally@aba.com](mailto:skenneally@aba.com).

Sincerely,



Stephen K. Kenneally  
Vice President  
Center for Regulatory Compliance