



Mending the FSOC*

Jim Sivon

April, 2011

The Financial Stability Oversight Council (FSOC) has the potential to be one of the more important features of the Dodd-Frank Act. It is a forum where representatives of Federal and State financial regulatory agencies can meet to exchange information and coordinate policy actions. It is increasingly apparent, however, that if FSOC is to realize its potential some changes are needed in its design and operations.

Independence

One of the hallmarks of our financial regulatory system has been the independence of regulators from political pressures. FSOC is chaired by the Secretary of the Treasury, who is a member of the President's cabinet. This structure complicates the ability of FSOC to separate itself from the current political environment. Congress should amend the Dodd-Frank Act to provide for the appointment of an independent chair, subject to a set term.

Advisory Committees

The Dodd-Frank Act gives FSOC the authority to establish advisory committees, and exempts those committees from the Federal Advisory Committee Act. The Federal Reserve Board has used a similar authority to meet on a regular basis with industry leaders and exchange views on emerging issues. FSOC should take advantage of this authority and establish one or more advisory committees. An on-going dialogue with industry leaders that is outside the context of a specific rule-making process or an enforcement proceeding would give the members of FSOC insights into emerging market practices and activities.

*The information contained in this newsletter does not constitute legal advice. This newsletter is intended for educational and informational purposes only.

The Next Big Thing

A key objective for FSOC, and its data gathering arm, the Office of Financial Research, is to identify the “next big thing” that could jeopardize the financial stability of the U.S. While it is still early days for FSOC, there is no indication that the Council has focused attention on such matters. Instead, FSOC is occupied with implementing policy changes that address the last crisis. FSOC should establish a subcommittee that is devoted to looking over the horizon and should schedule time at each meeting to discuss emerging issues.

Confidential Information

The Dodd-Frank Act gives FSOC access to proprietary information about individual financial firms. For example, the Act requires that all “living wills” be provided to FSOC. At the same time, the Dodd-Frank Act subjects FSOC to the Freedom of Information Act and does not ensure the confidentiality of such information. FSOC should adopt a procedure to avoid the public disclosure of such information, or, if necessary, should ask Congress to amend the Dodd-Frank Act to avoid the public disclosure of such information.

Coordination Among Regulators

One FSOC’s statutory duties is to “facilitate information sharing and coordination among the member agencies and other Federal and State agencies regarding domestic financial services policy development, rulemaking, examinations, reporting requirements, and enforcement actions.” While the Dodd-Frank Act directs joint rulemaking by various agencies, it is far from clear that FSOC has helped to facilitate this process. It also appears that larger financial firms are facing overlapping data requests from various Federal agencies. The chair of FSOC should be more engaged in coordinating Dodd-Frank implementation and its related data burden. The Secretary’s apparent reluctance to do so may reflect the inherent conflict he faces in his dual capacity as a cabinet officer and the head of FSOC. This is just one more reason for the appointment of an independent chair for FSOC.

Annual Report

FSOC soon will issue an annual report to Congress on its activities. Among other matters, that report must make recommendations “to enhance

the integrity, efficiency, competitiveness, and stability” of U.S. financial markets. FSOC should use this report as an opportunity to address Dodd-Frank implementation. It is increasingly clear that Federal regulators will not be able to meet the statutory deadlines for some rules. The proposed risk retention rule is the latest example. It is equally clear that some parts of the Dodd-Frank Act require revisions. Indeed, all stakeholders seem to have a list of recommended revisions. In its annual report, FSOC should propose that Congress adopt a revised implementation schedule for some of the regulations required by the Dodd-Frank Act, and should recommend changes to the more obvious technical errors and policy inconsistencies in the Act.

Non-bank Designations

While FSOC meetings are open and the Council has taken a number of other steps to keep the public informed of its activities (e.g., the Treasury web page on FSOC), FSOC’s proposed rules governing the designation of systemic nonbank financial companies provide only minimal insight into the criteria and procedures FSOC will follow in making these designations. Indeed, the proposed rules are little more than a restatement of the relevant provisions in the Dodd-Frank Act. In its final rule, FSOC should provide greater transparency on designation criteria and process.

In summary, FSOC has the potential to play an important role in managing the implementation of the Dodd-Frank Act and ensuring that various Federal and State financial regulators are not only focused on the “next big thing,” but also operate in a coordinated fashion. Some changes in the structure and operations of FSOC are needed to help it fulfill this important role.

Jim Sivon is a partner with the law firm of Barnett Sivon & Natter, P.C.