

FINANCIAL STABILITY OVERSIGHT COUNCIL

12 CFR Part 1310

Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies

Agency: Financial Stability Oversight Council

Action: Notification of proposed interpretive guidance; request for public comment.

Summary

This proposed interpretive guidance, which would replace the Financial Stability Oversight Council's existing interpretive guidance on nonbank financial company determinations and its analytic framework for financial stability risks, describes the approach the Council intends to take in prioritizing its work to identify and address potential risks to U.S. financial stability using an activities-based approach, and enhancing the Council's analytical rigor and transparency.

DATES: *Comment due date:* [INSERT DATE 45 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]

ADDRESSES:

Electronic Submission of Comments: You may submit comments electronically through the Federal eRulemaking Portal at <https://www.regulations.gov>. All submissions must refer to the document title and RIN 4030-[XXXX]. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt, and enables the Council to make them available to the public. Comments submitted electronically through the <https://www.regulations.gov> website can be viewed by other commenters and interested

members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

All properly submitted comments will be available for inspection and downloading at <https://www.regulations.gov>.

In general, comments received, including attachments and other supporting materials, are part of the public record and are available to the public. Do not submit any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

FOR FURTHER INFORMATION CONTACT: Eric Froman, Office of the General Counsel, Treasury, at (202) 622-1942, or FSOCPublicComments@treasury.gov.

SUPPLEMENTARY INFORMATION:

I. Background

Section 111 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5321) (the “Dodd-Frank Act”) established the Financial Stability Oversight Council. The purposes of the Council under section 112 of the Dodd-Frank Act (12 U.S.C. 5322) are “(A) to identify risks to the financial stability of the United States that could arise from the material financial distress or failure, or ongoing activities, of large, interconnected bank holding companies or nonbank financial companies, or that could arise outside the financial services marketplace; (B) to promote market discipline, by eliminating expectations on the part of shareholders, creditors, and counterparties of such companies that the Government will shield them from losses in the event of failure; and (C) to respond to emerging threats to the stability of the United States financial system.”

The Dodd-Frank Act gives the Council broad discretion to determine how to respond to potential threats to U.S. financial stability, including collecting information from regulators, requesting data and analyses from the Office of Financial Research, monitoring the financial services marketplace and financial regulatory developments, facilitating information sharing and coordination among regulators, recommending to the Council member agencies general supervisory priorities and principles, identifying regulatory gaps, making recommendations to the Board of Governors of the Federal Reserve System (“Federal Reserve”) or other primary financial regulatory agencies,¹ and designating certain entities or payment, clearing, and settlement activities for additional regulation.

Section 113 of the Dodd-Frank Act authorizes the Council to determine that a nonbank financial company will be subject to supervision by the Federal Reserve and prudential standards. Under section 165 of the Dodd-Frank Act, the Federal Reserve is responsible for establishing the prudential standards that will be applicable to a nonbank financial company subject to a Council designation² under section 113.

The Council has previously issued rules, guidance, and other public statements regarding its process for evaluating nonbank financial companies for a potential designation.³ On April 11, 2012, the Council issued a final rule at 12 CFR 1310.1–23 (the “2012 Rule”) setting forth certain procedures related to designations under section 113 of the Dodd-Frank Act. Attached to the 2012 Rule as Appendix A was interpretive guidance (the “2012 Interpretive Guidance”) setting

¹ “Primary financial regulatory agency” is defined in section 2(12) of the Dodd-Frank Act, 12 U.S.C. 5301(12).

² Section 113 of the Dodd-Frank Act, 12 U.S.C. 5323, refers to a Council “determination” regarding a nonbank financial company. This proposal refers to “determination” and “designation” interchangeably for ease of reading.

³ On May 22, 2012, the Council approved hearing procedures relating to the conduct of hearings before the Council in connection with proposed determinations regarding nonbank financial companies and financial market utilities and related emergency waivers or modifications under sections 113 and 804 of the Dodd-Frank Act, 12 U.S.C. 5323, 5463; 77 FR 31,855 (May 30, 2012). The hearing procedures were amended in 2013, 78 FR 22,546 (April 16, 2013), and 2018, 83 FR 12,010 (March 19, 2018). This proposed guidance would not amend the Council’s hearing procedures.

forth additional information regarding the manner in which the Council made determinations under section 113 (together with the 2012 Rule, the “2012 Rule and Guidance”). On February 4, 2015, the Council adopted supplemental procedures (the “2015 Supplemental Procedures”) to the 2012 Rule and Guidance.⁴ On March 13, 2019, the Council amended the 2012 Rule by adding a new provision at 12 CFR 1310.3.⁵ On December 30, 2019, the Council replaced the 2012 Interpretive Guidance with revised interpretive guidance (the “2019 Interpretive Guidance”).⁶ In connection with the adoption of the 2019 Interpretive Guidance, the Council rescinded the 2015 Supplemental Procedures.

On November 14, 2023, the Council approved revised guidance (the “2023 Interpretive Guidance”)⁷ that replaced the 2019 Interpretive Guidance and published an analytic framework to describe the approach that the Council expected to take in identifying, assessing, and responding to certain potential risks to U.S. financial stability (the “2023 Analytic Framework”).⁸

The Council is proposing this interpretive guidance (the “Proposed Guidance”) to revise and update the 2023 Interpretive Guidance. If the Council issues final interpretive guidance based on this proposal, the final interpretive guidance will replace the 2023 Interpretive Guidance found at Appendix A to 12 CFR part 1310, in its entirety, but will not modify the rules

⁴ Financial Stability Oversight Council Supplemental Procedures Relating to Nonbank Financial Company Determinations (Feb. 4, 2015), available at <https://home.treasury.gov/system/files/261/Supplemental%20Procedures%20Related%20to%20Nonbank%20Financial%20Company%20Determinations%20%20%28February%204%2C%202015%29.pdf>. In addition, in June 2015, the Council published staff guidance with details regarding certain methodologies used in connection with the determination process under section 113. See Council, Staff Guidance Methodologies Relating to Stage 1 Thresholds (June 8, 2015), available at <https://home.treasury.gov/system/files/261/Staff%20Guidance%20Methodologies%20Relating%20to%20Stage%201%20Thresholds.pdf>.

⁵ 84 FR 8,958 (March 13, 2019).

⁶ 84 FR 71,740 (Dec. 30, 2019).

⁷ 88 FR 80,110 (Nov. 17, 2023).

⁸ 88 FR 78,026 (Nov. 14, 2023).

at 12 CFR 1310.1–23. In addition, if the Council issues final interpretive guidance based on this proposal, it intends to rescind the 2023 Analytic Framework.

II. Overview of Proposed Guidance

The Proposed Guidance would help ensure that the Council’s work is clear, transparent, and analytically rigorous, and enhance the Council’s engagement with companies, regulators, and other stakeholders. By issuing clear and transparent guidance, the Council seeks to provide the public with sufficient information to understand the Council’s concerns regarding risks to U.S. financial stability, while appropriately protecting information submitted by companies and regulators to the Council.

A. Overview of Changes From 2023 Interpretive Guidance

The Proposed Guidance would make a number of key changes and other modifications to the Council’s existing procedures. Following are high-level descriptions of several of the most important changes, along with other modifications, which are explained in greater detail below.

First, under the Proposed Guidance, the Council would update its analytic methodologies, including a new list of types of vulnerabilities that most commonly contribute to potential risks to U.S. financial stability. In addition, the Proposed Guidance explains that the Council would consider impediments to economic growth and economic security when identifying potential risks to U.S. financial stability. The Proposed Guidance notes that the Council works with member agencies to consider whether elements of the U.S. financial regulatory framework are fit for purpose or impose undue burdens that could constrain economic growth, thereby posing a potential risk to U.S. financial stability. The Council recognizes that economic growth provides the strongest foundation for financial stability, and that economic security, in turn, supports

economic growth. The Council understands economic security as our nation's ability to preserve fiscal capacity, productive dynamism, and access to critical resources and markets.

Second, under the Proposed Guidance, the Council would prioritize its efforts to identify, assess, and respond to potential risks to U.S. financial stability through a process that begins with an activities-based approach. This approach generally reproduces the activities-based approach introduced by the 2019 Interpretive Guidance. It is consistent with the Council's priority of identifying potential risks to U.S. financial stability on a system-wide basis. The Council would pursue entity-specific determinations under section 113 of the Dodd-Frank Act only if a potential risk to U.S. financial stability cannot be, or is not, adequately addressed through an activities-based approach.

Third, under the Proposed Guidance, the Council would merge the descriptions of its nonbank financial company designation process and its analytic methodologies for financial stability risks into a single document, reproducing the structure of the 2019 Interpretive Guidance. If the Council issues final interpretive guidance based on the Proposed Guidance, it intends to rescind the 2023 Analytic Framework.

Fourth, in the event the Council considers a nonbank financial company for a potential determination under section 113, the Council would perform a cost-benefit analysis prior to making a determination, similar to the 2019 Interpretive Guidance. The Council would make a determination under section 113 only if the expected benefits to financial stability from Federal Reserve supervision and prudential standards justify the expected costs that the determination would impose. As part of an assessment of the benefits of a designation, the Council would assess the likelihood of a nonbank financial company's material financial distress, in order to evaluate the extent to which a designation may promote U.S. financial stability, along with the

extent to which material financial distress at the nonbank financial company could pose a threat to the financial stability of the United States. This approach reproduces and clarifies the assessment of the likelihood of a nonbank financial company’s material financial distress introduced by the 2019 Interpretive Guidance, which was eliminated in the 2023 Interpretive Guidance.

Fifth, the Council would add to the activities-based approach by providing for the Council, in certain cases, to commence a process for Council member agencies to act to address a potential risk to U.S. financial stability. In these cases, the Council would notify an existing financial regulatory agency in writing of the potential risk to U.S. financial stability and would request a written response from the agency within a specified period regarding the actions the agency proposes to take to address the potential risk.

Sixth, the Council would modify its interpretation of the term “threat to the financial stability of the United States,” for purposes of section 113 of the Dodd-Frank Act,⁹ to mean, consistent with its interpretation of the term in the 2019 Interpretive Guidance, the threat of an impairment of financial intermediation or of financial market functioning to a degree that would be sufficient to inflict severe damage on the broader U.S. economy. This interpretation would represent a higher threshold than the one set forth in the 2023 Analytic Framework, which interpreted this term to mean “events or conditions that could ‘substantially impair’ the financial system’s ability to support economic activity.”

⁹ Under section 113 of the Dodd-Frank Act, the Council may determine, by a vote of not fewer than two-thirds of the voting members of the Council then serving, including an affirmative vote by the Chairperson of the Council, that a nonbank financial company will be supervised by the Federal Reserve and be subject to prudential standards if the Council determines that (1) material financial distress at the nonbank financial company could pose a threat to the financial stability of the United States or (2) the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the nonbank financial company could pose a threat to the financial stability of the United States. See Dodd-Frank Act section 113(a)(1), 12 U.S.C. 5323(a)(1).

Seventh, the Council would add a new procedural step to its administrative process for nonbank financial company determinations. Based on the Council's preliminary evaluation of a nonbank financial company, the Proposed Guidance states that the Council intends to identify steps a nonbank financial company or financial regulatory agencies could take to address a potential threat to U.S. financial stability.

The following sections outline the changes described above in greater detail.

B. *Changes to Analytic Methodologies*

The Council would update its analytic methodologies, including a new list of types of vulnerabilities that most commonly contribute to potential risks to U.S. financial stability. These changes are intended to improve the effectiveness of the Council's methodologies by making them more analytically rigorous and transparent. The Council would employ these analytic methodologies in both the designation and non-designation contexts.

Under the Proposed Guidance, the Council would consider impediments to economic growth and economic security when identifying potential risks to U.S. financial stability. The Council would work with member agencies to consider whether elements of the U.S. financial regulatory framework are fit for purpose or impose undue burdens that could constrain economic growth, thereby posing a potential risk to U.S. financial stability. The Proposed Guidance notes that the Council may also make recommendations in the Council's annual report, which is required by the Dodd-Frank Act to include recommendations (1) to enhance the integrity, efficiency, competitiveness, and stability of U.S. financial markets; (2) to promote market discipline; and (3) to maintain investor confidence. The Proposed Guidance explains that economic security requires that the U.S. financial system reliably provide the resources necessary to grow the real economy. It notes that economic security and financial stability can

both be bolstered by encouraging technological innovation in the financial system and by modernizing financial regulation to ensure it is efficient, effective, and forward-looking.

In addition, the Council would add asset valuations to the list of vulnerabilities that it would consider. The Proposed Guidance notes that sharp reductions in the valuations of particular assets or classes of assets can result in significant losses for financial market participants that hold or are otherwise exposed to those assets, and explains that this risk can be exacerbated by concentrated portfolios, or mitigated by hedging or other risk-management strategies. The Council would remove destabilizing activities, which appeared in the 2023 Analytic Framework, from the list of vulnerabilities that it would consider. The Council proposes to remove destabilizing activities because it believes that this vulnerability was not clearly defined and relied on circular reasoning.

The Proposed Guidance further explains that complexity and opacity of a market, activity, or firm can make it more difficult for regulators, counterparties, and other stakeholders to assess potential risks to U.S. financial stability, which may reduce the effectiveness of market discipline. It states that risks may also be aggravated by obstacles to the rapid and orderly resolution of market participants, and it notes that a risk may be exacerbated if it is conducted without effective risk-management practices, including the absence of appropriate regulatory authority and requirements. In contrast, the Proposed Guidance notes that existing regulatory requirements or market practices may reduce risks by, for example, limiting exposures or leverage, increasing capital and liquidity, enhancing risk-management practices, restricting excessive risk-taking, providing consolidated prudential regulation and supervision, or increasing regulatory or public transparency; the Council would expect to take into account such factors to the extent relevant in its analyses of potential risks to U.S. financial stability.

Questions for Comment

1. What specific factors impacting economic growth and economic security should the Council focus on in an effort to identify potential risks to U.S. financial stability?
2. The Proposed Guidance adds asset valuations to the list of vulnerabilities that the Council would consider when identifying and assessing potential risks to U.S. financial stability, while removing destabilizing activities, a vulnerability that appeared in the 2023 Analytic Framework. Are these changes appropriate, and should additional modifications be made to the list of vulnerabilities that the Council would consider?

C. *Activities-Based Approach*

The 2019 Interpretive Guidance stated that the Council will prioritize its efforts to identify, assess, and address potential risks and threats to U.S. financial stability through a process that begins with an activities-based approach, and will pursue entity-specific determinations under section 113 of the Dodd-Frank Act only if a potential risk or threat cannot be, or is not, adequately addressed through an activities-based approach. It stated further that the Council anticipates it would consider a nonbank financial company for a potential determination under section 113 only in rare instances, such as if the products, activities, or practices of a company that pose a potential threat to U.S. financial stability are outside the jurisdiction or authority of financial regulatory agencies. The 2019 Interpretive Guidance stated that this approach reflects two priorities: (1) identifying and addressing, in consultation with relevant financial regulatory agencies, potential risks and emerging threats on a system-wide basis and to reduce the potential for competitive distortions among financial companies and in markets that could arise from entity-specific determinations, and (2) allowing relevant financial regulatory agencies, which generally possess greater information and expertise with respect to company, product, and market risks, to address potential risks, rather than subjecting the companies to new regulatory authorities.

The 2023 Interpretive Guidance, by contrast, eliminated the statement in the 2019 Interpretive Guidance that the Council would use an activities-based approach before considering a designation under section 113. The preamble to the 2023 Interpretive Guidance stated that the Council believed that rescinding the prioritization of an activities-based approach will better enable the Council to respond to threats to financial stability irrespective of their source.

The Proposed Guidance generally reproduces the activities-based approach introduced by the 2019 Interpretive Guidance. The Council believes that the prioritization of a process that begins with an activities-based approach would enhance the analytical rigor of the Council's activities and facilitate its efforts to consider impediments to economic growth and economic security when identifying potential risks to U.S. financial stability. The Proposed Guidance notes that the Dodd-Frank Act gives the Council broad discretion in determining how to respond to potential risks to U.S. financial stability. Under the Proposed Guidance, the Council would prioritize its efforts to identify, assess, and respond to potential risks to U.S. financial stability through a process that begins with an activities-based approach. The Council would pursue entity-specific determinations under section 113 of the Dodd-Frank Act only if a potential risk to U.S. financial stability cannot be, or is not, adequately addressed through an activities-based approach.

The Proposed Guidance establishes a two-step process for the Council's activities-based approach. In the first step, in an effort to identify potential risks to U.S. financial stability, the Council intends to monitor, consistent with its statutory purposes, diverse financial markets and market developments on a system-wide basis, in consultation with relevant financial regulatory

agencies, to identify products, activities, or practices that could pose risks to financial stability.¹⁰ If the Council’s monitoring of markets and market developments identifies a potential risk to U.S. financial stability, the Council would assess the potential risk to determine whether it merits further review or action. The Proposed Guidance considers a “risk to U.S. financial stability” to mean the potential for an event, act, or development that could impair financial intermediation or financial market functioning to a degree that would be sufficient to inflict significant damage on the broader U.S. economy. By referencing an “event, act, or development” in the interpretation of “risk to U.S. financial stability,” the Proposed Guidance seeks to clarify the Council’s understanding of the sources of potential risk to U.S. financial stability, distinct from the vulnerabilities through which such risks may propagate. Risks may arise not only from unintentional events and economic and financial developments, but also from deliberate actions by state or non-state actors that affect the functioning of financial markets, institutions, or critical channels. By identifying an “event, act, or development” as analytically distinct sources of potential risk, the Proposed Guidance contemplates the diverse types of origins of a risk to U.S. financial stability. This distinction is intended to improve the Council’s analytic precision.

The Council’s analysis in the first step of the activities-based approach would generally focus on four framing questions, which analyze: (1) what shocks or other developments could trigger the potential risk to U.S. financial stability (for example, sharp reductions in the valuation of particular classes of financial assets or significant credit losses), and what vulnerabilities could be implicated; (2) how adverse effects of the potential risk to U.S. financial stability may be transmitted to financial markets or market participants (for example, through direct or indirect exposures in financial markets to the potential risk or funding or trading pressures that may result

¹⁰ The Council has a statutory duty to monitor the financial services marketplace in order to identify potential threats to U.S. financial stability. See Dodd-Frank Act section 112(a)(2)(C), 12 U.S.C. 5322(a)(2)(C).

from associated declines in asset prices); (3) the effects the potential risk to U.S. financial stability could have on the U.S. financial system (for example, the scale and magnitude of adverse effects on other companies and markets, and whether such effects could be concentrated or diffused among market participants); and (4) whether the adverse effects of the potential risk to U.S. financial stability could impair financial intermediation or financial market functioning to a degree that would be sufficient to inflict significant damage on the broader U.S. economy (for example, through curtailed or interrupted provision of credit to non-financial companies).

If the Council’s analysis identifies a potential risk to U.S. financial stability that merits action, the Council generally would work with the relevant financial regulatory agencies at the federal and state levels to respond to the potential risk.¹¹ The Council would coordinate among its members and member agencies and would follow up on supervisory or regulatory actions to ensure the potential risk is adequately addressed. The goal of this step is for existing regulators to take appropriate action, such as modifying their regulation or supervision of companies or markets under their jurisdiction in order to mitigate potential risks to U.S. financial stability identified by the Council. The Council would seek to take advantage of existing regulators’ expertise and regulatory authorities to address the potential risk identified by the Council.

The Council anticipates that appropriate measures it may take to address an identified potential risk would typically take the form of relatively informal actions, such as information sharing among regulators, but as deemed appropriate could also include more formal measures, such as the proposed new process for Council member agencies to act to address potential risks

¹¹ The Council has a statutory duty to “recommend to the member agencies general supervisory priorities and principles reflecting the outcome of discussions among the member agencies” and to “make recommendations to primary financial regulatory agencies to apply new or heightened standards and safeguards for financial activities or practices that could create or increase risks of significant liquidity, credit, or other problems spreading among bank holding companies, nonbank financial companies, and United States financial markets.” See Dodd-Frank Act section 112(a)(2)(F), (K), 12 U.S.C. 5322(a)(2)(F), (K).

to U.S. financial stability described in section G below, or the Council’s public issuance of recommendations to regulators or the public. Such recommendations could be made in the Council’s annual report, which includes the Council’s recommendations to enhance the integrity, efficiency, competitiveness, and stability of U.S. financial markets, to promote market discipline, and to maintain investor confidence.

The Council expects that much of its initial identification and assessment of risks, and engagement with regulators, would be informal and nonpublic in nature. The staffs of Council members and member agencies would likely be responsible for much of the market monitoring, risk identification, information sharing, and analysis in the activities-based approach. This engagement may yield a range of diverse outcomes, including the sharing of data, research, and analysis among the Council and regulators, or the public issuance of recommendations by the Council in its annual report. Potential risks that merit further attention may be raised at meetings of the Council members or with other stakeholders, and, as appropriate, may result in public statements or recommendations by the Council, as described above.

Questions for Comment

General Questions:

1. Does the Council’s proposal described above to prioritize its efforts to identify, assess, and address potential risks to U.S. financial stability through a process that begins with an activities-based approach, first introduced under the 2019 Interpretive Guidance, enable the Council to achieve its statutory purposes? Should the Council’s proposed approach to the activities-based approach be modified for other considerations?
2. When undertaking the activities-based approach, are there specific categories of risks to U.S. financial stability that should be examined by the Council, or specific macroeconomic considerations or metrics that the Council should consider when assessing such risks?
3. Does the Council’s approach under the 2023 Interpretive Guidance, in which it stated that it would not prioritize an activities-based approach but instead respond to a particular risk to financial stability depending on the nature of the risk, better enable the Council to respond to threats to U.S. financial stability than prioritizing an activities-based approach as contemplated by the Proposed Guidance?

Step One of the Activities-Based Approach: Identifying and Assessing Potential Risks to U.S. Financial Stability:

1. What specific, consistent analyses should the Council perform to monitor markets generally or specific types of markets?
2. Are the four framing questions described in the Proposed Guidance for evaluating potential risks appropriate?

Step Two of the Activities-Based Approach: Working with Regulators to Respond to Potential Risks to U.S. Financial Stability:

1. Should the Council make any changes to step two of the activities-based approach, as described in the Proposed Guidance?

D. *Consolidation of Interpretive Guidance and Analytic Methodologies*

As noted above, the Proposed Guidance would merge the descriptions of its nonbank financial company designation process and its analytic methodologies for financial stability risks into a single document, reproducing the structure of the 2019 Interpretive Guidance. The Council believes that consolidating this information in a single document is more administratively efficient and accessible to stakeholders and the public. If the Council issues final interpretive guidance based on the Proposed Guidance, it intends to rescind the 2023 Analytic Framework.

Questions for Comment

1. Will the consolidation of the Council's nonbank financial company designation guidance and analytic methodologies in a single document create a more efficient and accessible document?

E. *Cost-Benefit Analysis*

The 2019 Interpretive Guidance stated that determining whether the expected benefits of a potential Council determination justify the expected costs is necessary to ensure that the Council's actions are expected to provide a net benefit to U.S. financial stability and are consistent with thoughtful decision-making. It stated further that the Council will make a

determination under section 113 only if the expected benefits to financial stability from Federal Reserve supervision and prudential standards justify the expected costs that the determination would impose. The 2023 Interpretive Guidance, by contrast, eliminated the commitment to conduct a cost-benefit analysis.

The Council believes that rigorous cost-benefit analysis is an important element of thoughtful decision-making. The Proposed Guidance therefore generally reproduces the cost-benefit analysis introduced by the 2019 Interpretive Guidance. Under the Proposed Guidance, the Council would perform a cost-benefit analysis before making any designation under section 113. The Council proposes to make a designation under section 113 only if the expected benefits justify the expected costs that the determination would impose. The Council would quantify reasonably estimable benefits and costs (using ranges, as appropriate), and would also consider non-quantified benefits and costs, in assessing the net benefits and costs of a designation. The Council would conduct this analysis in cases where the Council is concluding that the company meets one of the standards for a determination by the Council under section 113 of the Dodd-Frank Act.

Under the Proposed Guidance, the Council would consider the benefits of a designation to the U.S. financial system, long-term economic growth, economic security, and the nonbank financial company. When evaluating potential benefits to the U.S. financial system and the U.S. economy arising from a designation, the Council may consider whether the designation enhances financial stability and improves the functioning of markets by reducing the likelihood or severity of a potential financial crisis, among other factors.

Under the Proposed Guidance, when evaluating the costs of a designation, the Council would consider not only the cost to the nonbank financial company from anticipated new or

increased regulatory requirements in connection with a designation, but also costs to the U.S. economy, including potential impacts on economic growth and economic security. When evaluating such costs, the Council will consider both cumulative and marginal costs to the nonbank financial company and to the U.S. economy. Relevant costs to the company could include costs related to risk-management requirements, supervision and examination, and liquidity requirements, and potentially higher capital costs or a negative impact on the company's ability to innovate. When evaluating the costs of a determination to the U.S. economy, the Council would assess the impact of the determination on the availability and cost of credit or financial products in relevant U.S. markets, among other factors.

Questions for Comment

1. Is the proposed framework for assessing the benefits and costs of a potential determination appropriate? How should the Council assess benefits and costs that are difficult to monetize or quantify?
2. Should the Council consider other benefits or costs than those proposed in section IV of the Proposed Guidance?
3. How should the Council estimate the costs of any new regulatory requirements that would result from the Council's designation? What sources should the Council rely upon when estimating such costs?
4. Should the Council consider additional factors when considering the benefits or costs of a designation to the U.S. economy?
5. Should the Council consider any additional benefits to the company subject to a designation, or additional benefits to the U.S. financial system and the U.S. economy arising from a Council designation other than those listed in section IV of the Proposed Guidance? How should the Council quantify any such benefits? What sources should the Council rely upon when estimating such benefits?
6. How should the Council address uncertainty (for example, using alternate baselines or sensitivity analyses)?
7. Are there additional approaches the Council should consider when measuring potential threats to U.S. financial stability in order to assess any improvement in financial stability following a determination?

F. *Likelihood of Material Financial Distress*

The 2019 Interpretive Guidance stated that as part of the assessment of the benefits of a Council determination for any company under review under the First Determination Standard (as

defined below), the Council will assess the likelihood of the company's material financial distress. It stated that this assessment may rely upon historical examples regarding the characteristics of financial companies that have experienced financial distress, but may also consider other risks that do not have historical precedent. The 2023 Interpretive Guidance, however, removed this "likelihood assessment" from the Council's designation procedures.

The Proposed Guidance reproduces the assessment of the likelihood of a nonbank financial company's material financial distress introduced by the 2019 Interpretive Guidance. The Council would therefore assess the likelihood of a company's material financial distress, applying qualitative and quantitative factors, when evaluating the impact of a Council designation for any company under review under the First Determination Standard. To assess the risk of material financial distress, the Council may consider a range of factors, including market-based measures (e.g., distance-to-default measures), accounting-based measures (e.g., statistical models using capital adequacy), and market- and accounting-based measures (e.g., academic models). The Council's analysis of the likelihood of a nonbank financial company's material financial distress would be conducted taking into account a period of overall stress in the financial services industry and a weak macroeconomic environment. When possible, the Council would attempt to quantify the likelihood of material financial distress; as an alternative, when doing so is not possible with respect to a specific firm, the Council would generally consider quantitative and qualitative factors related to the types of market-based or accounting-based measures noted above, and historical examples regarding the characteristics of financial companies that have experienced financial distress. The Council would consult with the company's primary financial regulatory agency (if any) when assessing the company, including

regarding the company's resolvability, complexity, and the likelihood of its material financial distress.

The Proposed Guidance also clarifies that in light of the unpredictability of the failure of financial companies, the Council would not seek to determine that a nonbank financial company's material financial distress is reasonably likely, but instead would use this analysis to evaluate the factors that could cause such distress as part of the assessment of benefits of a designation.

Questions for Comment

1. Is the proposed framework for assessing the likelihood of material financial distress, as part of an assessment of the benefits of a designation, appropriate?
2. What metrics or factors should the Council consider when attempting to quantify the likelihood of a company's material financial distress? If such quantification is not possible with respect to a specific company, what additional factors should the Council consider? What are the appropriate methodologies or models (including appropriate time horizons and assumptions) to assess the likelihood of a nonbank financial company's material financial distress?
3. After the Council assesses the likelihood of a company's material financial distress, what should be the threshold for the Council taking further action regarding a potential determination with respect to the company?

G. *Process for Member Agencies to Address Potential Risks*

Under the Proposed Guidance, the Council would add to the activities-based approach by providing for the Council, in certain cases, to commence a process for Council member agencies to act to address a potential risk to U.S. financial stability. In these cases, the Council would notify an existing financial regulatory agency in writing of the potential risk to U.S. financial stability and would request a written response from the agency within a specified period regarding the actions the agency proposes to take to address the potential risk. The agency would be expected to provide detailed information to the Council regarding its proposed actions, their anticipated effects, and the expected timeline for implementation. While the Council may

determine to undertake this new procedure before exercising its authority under section 120,¹² the two approaches are not necessarily sequential, and the Council could determine to undertake either or both in any order.

Question for Comment

1. Will the proposed new process described above for making recommendations to agencies enable the Council to respond to potential risks to U.S. financial stability in a timely and effective manner?

H. *Interpretation of Threat to Financial Stability*

Under the Proposed Guidance, the Council would modify its interpretation of the term “threat to the financial stability of the United States,” a term used in the Dodd-Frank Act but not defined in the statute. The 2023 Analytic Framework interpreted this term to mean “events or conditions that could ‘substantially impair’ the financial system’s ability to support economic activity.” For purposes of section 113 of the Dodd-Frank Act, the Council would consider a “threat to the financial stability of the United States” to mean, consistent with its interpretation of the term in the 2019 Interpretive Guidance, the threat of an impairment of financial intermediation or of financial market functioning to a degree that would be sufficient to inflict severe damage on the broader U.S. economy. This proposed interpretation would represent a higher threshold than the one established in the 2023 Analytic Framework. The Council believes that this is the appropriate threshold for any potential use of the Council’s designation authority, given the number of other authorities and tools available to the Council to respond to potential risks to U.S. financial stability, including the activities-based approach described above.

Question for Comment

¹² Under section 120, the Council has authority to “provide for more stringent regulation of a financial activity” by publicly issuing nonbinding recommendations to primary financial regulatory agencies to apply new or heightened standards and safeguards for a financial activity or practice conducted by certain financial companies. See Dodd-Frank Act section 120, 12 U.S.C. 5330.

1. The Proposed Guidance defines “threat to the financial stability of the United States” to mean the threat of an impairment of financial intermediation or of financial market functioning to a degree that would be sufficient to inflict severe damage on the broader U.S. economy. Is this an appropriate definition of a “threat to the financial stability of the United States”? What criteria or metrics should the Council consider when evaluating whether a threat is sufficient to inflict “severe” damage on the broader U.S. economy?

I. *Administrative Process for Nonbank Financial Company Determinations*

With respect to the Council’s procedures for nonbank financial company designations and annual reevaluations of designations, the Proposed Guidance would generally remain consistent with the procedures included in the 2019 Interpretive Guidance and the 2023 Interpretive Guidance. Among other things, the Proposed Guidance continues to provide for significant engagement and communication between the Council and a nonbank financial company under review for potential designation, and with the company’s primary financial regulatory agency or home-country supervisor. In addition to these existing features, the Council would add a new procedural step to its administrative process for nonbank financial company determinations. Based on the Council’s preliminary evaluation of a nonbank financial company, the Proposed Guidance states that the Council intends to identify steps a nonbank financial company or financial regulatory agencies could take to address a potential threat to U.S. financial stability. Subject to any necessary administrative procedures required to remediate the risk, the Council generally expects material risks to U.S. financial stability to be addressed within 180 days. The Council believes that under these procedures, the designation process would be rigorous and transparent.¹³

Questions for Comment

¹³ In accordance with the Council’s bylaws, the Council may delegate authority, including to its Deputies Committee, to implement and take any actions under the guidance, except with respect to actions that are expressly nondelegable under the Dodd-Frank Act, the Council’s bylaws, or the guidance.

1. Will the new procedural step proposed to be added to the Council’s administrative process for nonbank financial company determinations provide a nonbank financial company or financial regulatory agencies sufficient opportunity to undertake steps to address a potential threat to U.S. financial stability?
2. Would any other changes to the designation process be appropriate in helping the Council satisfy its statutory requirements?
3. Should any aspect of the Proposed Guidance described in this section II be modified for other considerations?

III. Legal Authority of Council and Status of Proposed Guidance

The Council has numerous authorities and tools under the Dodd-Frank Act to carry out its statutory purposes.¹⁴ The Council expects that its response to any potential risk or threat to U.S. financial stability would be based on an assessment of the circumstances. As the agency charged by Congress with broad-ranging responsibilities under sections 112 and 113 of the Dodd-Frank Act, the Council has the inherent authority to promulgate interpretive guidance under those provisions that explains and interprets the steps the Council will take when undertaking the determination process.¹⁵ The Council also has authority to issue procedural rules¹⁶ and policy statements.¹⁷ The Proposed Guidance provides transparency to the public as to how the Council intends to exercise its statutory grant of discretionary authority. Except to the extent that the Proposed Guidance sets forth rules of agency organization, procedure, or practice, the Council has concluded that the Proposed Guidance does not have binding effect; does not impose duties on, or alter the rights or interests of, any person; does not change the statutory standards for the

¹⁴ See, for example, Dodd-Frank Act sections 112(a)(2), 113, 115, 120, 804, 12 U.S.C. 5322(a)(2), 5323, 5325, 5330, 5463.

¹⁵ Courts have recognized that “an agency charged with a duty to enforce or administer a statute has inherent authority to issue interpretive rules informing the public of the procedures and standards it intends to apply in exercising its discretion.” See, for example, *Production Tool v. Employment & Training Administration*, 688 F.2d 1161, 1166 (7th Cir. 1982). The Supreme Court has acknowledged that “whether or not they enjoy any express delegation of authority on a particular question, agencies charged with applying a statute necessarily make all sorts of interpretive choices.” See *U.S. v. Mead*, 533 U.S. 218, 227 (2001).

¹⁶ See Dodd-Frank Act section 111(e)(2), 12 U.S.C. 5321(e)(2).

¹⁷ See *Association of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710 (D.C. Cir. 2015).

Council’s decision making; and does not relieve the Council of the need to make entity-specific determinations in accordance with section 113 of the Dodd-Frank Act. The Proposed Guidance also does not limit the ability of the Council to take emergency action under section 113(f) of the Dodd-Frank Act if the Council determines that such action is necessary or appropriate to prevent or mitigate threats posed by a nonbank financial company to U.S. financial stability. As a result, the Council has concluded that the notice and comment requirements of the Administrative Procedure Act would not apply.¹⁸ However, under the Council’s rule in 12 CFR 1310.3, the Council voluntarily committed that it would not amend or rescind Appendix A to part 1310 without providing the public with notice and an opportunity to comment in accordance with the procedures applicable to legislative rules under 5 U.S.C. 553.¹⁹ The Council invites interested persons to submit comments regarding the Proposed Guidance.

IV. Paperwork Reduction Act

The Proposed Guidance is not expected to alter the collections of information previously reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1505–0244. Nonetheless, the Council provides the estimated burdens of the information collections associated with the Proposed Guidance and invites comments below. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

¹⁸ See 5 U.S.C. 553(b)(A); 12 CFR 1310.3.

¹⁹ Section 1310.3 does not apply to the Council’s issuance of rules, guidance, procedures, or other documents that do not amend or rescind Appendix A. Thus, other Council materials, and documents that are referred to in but are not a part of the Proposed Guidance, such as the Council’s separately issued 2023 Analytic Framework, hearing procedures, bylaws, and committee charters, are not subject to section 1310.3’s requirements.

The collection of information under the Proposed Guidance is found in 12 CFR 1310.20–23.

The hours and costs associated with preparing data, information, and reports for submission to the Council constitute reporting and cost burdens imposed by the collection of information. The estimated total annual reporting burden associated with the collection of information in the Proposed Guidance is 20 hours, based on an estimate of 1 respondent.

In addition, in determining this estimate, the Council considered its obligation under 12 CFR 1310.20(b) to, whenever possible, rely on information available from the Office of Financial Research or any Council member agency or primary financial regulatory agency that regulates a nonbank financial company before requiring the submission of reports from such nonbank financial company. The Council expects that its collection of information under the Proposed Guidance would be performed in a manner that attempts to minimize burdens for affected financial companies. The aggregate burden will be subject to the number of financial companies that are evaluated in the determination process, the extent of information regarding such companies that is available to the Council through existing public and regulatory sources, and the amount and types of information that financial companies provide to the Council.

Interested persons are invited to submit comments regarding the estimates provided in this section. Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Financial Stability Oversight Council, Office of Information and Regulatory Affairs, Washington, D.C. 20503, with copies to Dennis Lee, Department of the Treasury, Washington, D.C. 20220. Comments on the collection of information must be received by [INSERT DATE 45 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

Comments are specifically requested concerning:

1. Whether the proposed collection of information is necessary for the proper performance of the functions of the Council, including whether the information will have practical utility;
2. The accuracy of the estimated burden associated with the proposed collection of information;
3. How the quality, utility, and clarity of information to be collected may be enhanced;
4. How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and
5. Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

V. Executive Orders 12866, 13563, and 14192

Executive Orders 12866 and 13563 direct certain agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Pursuant to section 3(f) of Executive Order 12866, the Office of Information and Regulatory Affairs within the Office of Management and Budget has determined that the Proposed Guidance is a “significant regulatory action.” Accordingly, the Proposed Guidance has been reviewed by the Office of Management and Budget. The Proposed Guidance is anticipated to be a deregulatory action under Executive Order 14192.

A. Baseline for Economic Analysis Under Executive Orders 12866 and 13563

This economic analysis, undertaken in response to Executive Orders 12866 and 13563, addresses the incremental economic rationale for certain key changes discussed in the Proposed Guidance, as compared to the 2023 Interpretive Guidance and 2023 Analytic Framework.

As discussed in section II above, the Proposed Guidance would help ensure that the Council’s work is clear, transparent, and analytically rigorous, and enhance the Council’s

engagement with companies, regulators, and other stakeholders. By issuing clear and transparent guidance, the Council seeks to provide the public with sufficient information to understand the Council's concerns regarding risks to U.S. financial stability, while appropriately protecting information submitted by companies and regulators to the Council.

B. *Economic Analysis of Certain Proposed Changes*

1. *Changes to Analytic Methodologies*

Section II.B. above discusses how the Council proposes to update its analytic methodologies, including by considering impediments to economic growth and economic security when identifying potential risks to U.S. financial stability. By proposing to update its analytic methodologies, the Council intends to more effectively implement the goals of financial stability policy, which seeks to reduce the probability and severity of disruptions that can impose large costs on households and businesses, while also recognizing that overly burdensome interventions can impair intermediation, raise the cost of credit, or reduce the availability of financial products. The Proposed Guidance, by proposing a more explicit consideration of these factors, seeks to facilitate a balanced analysis of tradeoffs, and reduce the risk that interventions create fragility by constraining the system's capacity to provide key financial services.

2. *Activities-Based Approach*

Section II.C. above discusses how the Council would prioritize its efforts to identify, assess, and respond to potential risks to U.S. financial stability through a process that begins with an activities-based approach. The Council believes that this change would improve its ability to respond to such risks when they arise from a systemic externality, in which the private incentives of market participants do not fully account for spillovers to the broader financial system and real economy. An activities-based approach is better positioned to address risks that arise across

multiple firms engaging in similar practices, which can reduce risk migration from more to less regulated sectors of the economy and support more uniform application of safeguards to comparable activity.

In addition, the Council believes that an activities-based approach can mitigate competitive distortions by reducing disparate regulatory burdens across firms engaged in comparable activity, particularly where firms offer substitutable products or services. Where similarly situated entities face materially different expected regulatory burdens solely because one firm is evaluated for designation and another is not, market shares and pricing may shift for reasons unrelated to efficiency or product quality. The Council believes that prioritizing system-wide engagement with relevant regulators can help mitigate such distortions and promote efficient risk management by more effectively aligning incentives. A key tradeoff is that, if efforts to address a potential risk would involve coordination among multiple agencies, prioritizing an activities-based approach may be less targeted than an entity-specific approach. Under the Proposed Guidance, the Council would maintain the ability to evaluate a nonbank financial company for potential designation in the event that a potential risk or threat to U.S. financial stability is not adequately addressed through an activities-based approach.

3. Cost-Benefit Analysis and Likelihood of Material Financial Distress

Section II.E. above discusses how the Council would perform a cost-benefit analysis before making any designation under section 113. The Council proposes to make a designation under section 113 only if the expected benefits justify the expected costs that the determination would impose, with the goal of avoiding the imposition of unnecessary costs in circumstances where an activities-based approach or other Council tool could adequately address a potential risk.

Section II.F. above discusses how the Council would assess the likelihood of a company's material financial distress, applying qualitative and quantitative factors, when evaluating the impact of a Council designation for any company under review under the First Determination Standard. This assessment would improve the accuracy of the designation review process by enabling the Council to better distinguish between scenarios where distress is a plausible pathway for systemic transmission and scenarios where distress is highly remote. At the same time, the Council recognizes that financial crises can arise from combinations of shocks and vulnerabilities without clear historical analogues. By assessing the likelihood of a company's material financial distress, the Council seeks to avoid both over-designation, which can impose costs where benefits are speculative, and under-designation, which can result in a failure to act where probability-weighted harms are substantial.

4. Process for Member Agencies to Address Potential Risks

Section II.G. above discusses how the Council would add to the activities-based approach by providing for the Council, in certain cases, to commence a process for Council member agencies to act to address a potential risk to U.S. financial stability. This proposal is intended to mitigate coordination and collective-action problems that could arise when potential risks span the regulatory jurisdictions of multiple agencies. This structured mechanism is intended to improve the ability of Council member agencies to quickly and efficiently address potential risks, which may reduce the likelihood of more intrusive interventions and the associated higher compliance costs.

5. Interpretation of Threat to Financial Stability

Section II.H. above discusses how the Council would modify its interpretation of the term "threat to the financial stability of the United States," for purposes of section 113 of the Dodd-

Frank Act, to mean the threat of an impairment of financial intermediation or of financial market functioning to a degree that would be sufficient to inflict severe damage on the broader U.S. economy. This interpretation would represent a higher threshold than the one set forth in the 2023 Analytic Framework. By raising the threshold for its interpretation of this term, the Council seeks to focus its designation evaluation on situations where the magnitude of potential economic harm is greatest and where the marginal value of applying Federal Reserve supervision and prudential standards is expected to be highest. This proposal is intended to reduce the likelihood that the Council undertakes designation, and imposes related costs, in circumstances where the benefits are uncertain or limited.

6. Administrative Process for Nonbank Financial Company Determinations

Section II.I. above discusses how the Council would add a new procedural step to its administrative process for nonbank financial company determinations. Based on the Council's preliminary evaluation of a nonbank financial company, the Proposed Guidance states that the Council intends to identify steps a nonbank financial company or financial regulatory agencies could take to address a potential threat to U.S. financial stability. By identifying targeted remediation steps at a preliminary stage, the Council seeks to address potential threats without incurring the potentially greater compliance costs and market impacts associated with designation. This proposal may also reduce the potential for market overreaction and lead to less costly pricing of uncertainty. At the same time, the proposal could increase costs if the nonbank financial company does not fully implement remediation steps or if regulatory or administrative actions take longer than anticipated. The Council may take additional steps to address a potential threat to U.S. financial stability if it is not adequately addressed through this proposed procedural step.

C. *Alternatives Considered*

An alternative to the Proposed Guidance would be to maintain the 2023 Interpretive Guidance and 2023 Analytic Framework. As compared to this alternative, the Proposed Guidance emphasizes system-wide mitigation, improved analytical rigor, and more transparent methodologies and procedural steps that are intended to improve predictability and reduce unnecessary costs, while maintaining the ability of the Council to take additional actions in the event that a potential risk or threat is not adequately addressed.

D. *Benefits, Costs, and Uncertainty*

The principal anticipated economic benefit of the Proposed Guidance relative to the 2023 Interpretive Guidance and 2023 Analytic Framework is a reduction in the likelihood or severity of financial instability by improving how the Council would identify, prioritize, and address potential risks. The proposal aims to increase the probability that system-wide vulnerabilities are mitigated through appropriately tailored actions; reduce distortions associated with entity-specific actions in circumstances where an activities-based approach would be sufficient; and improve the rigor, transparency, and predictability of any decision to use the Council's designation authority.

The principal anticipated economic cost of the Proposed Guidance relative to the 2023 Interpretive Guidance and 2023 Analytic Framework is that prioritizing an activities-based approach and performing a cost-benefit analysis may delay efforts to address a potential threat to U.S. financial stability that could be addressed more effectively by the designation of a nonbank financial company. A further anticipated economic cost is the additional uncertainty for market participants that may be associated with a change by the Council to its approach to identify and address potential risks to U.S. financial stability.

The Proposed Guidance involves uncertainty arising from the fact that financial stability policy is difficult to quantify because it depends on low-frequency tail events, endogenous behavioral responses, and evolving market structure, among other unpredictable factors.

Considering this analysis, the Council believes that the anticipated economic benefits of the Proposed Guidance would justify the anticipated economic costs.

List of Subjects in 12 CFR Part 1310

Brokers, Investments, Securities

The Financial Stability Oversight Council proposes to amend 12 CFR part 1310 as follows:

PART 1310—AUTHORITY TO REQUIRE SUPERVISION AND REGULATION OF CERTAIN NONBANK FINANCIAL COMPANIES

1. The authority citation for part 1310 continues to read as follows:

Authority: 12 U.S.C. 5321; 12 U.S.C. 5322; 12 U.S.C. 5323.

Appendix A to 12 C.F.R. Part 1310 -- Financial Stability Oversight Council Guidance for Nonbank Financial Company Determinations

I. Introduction

This document describes the approach the Financial Stability Oversight Council (the “Council”) expects to take in identifying, assessing, and responding to certain potential risks to U.S. financial stability.

The Council’s practices set forth in this document are among the methods the Council uses to satisfy its statutory purposes: (1) to identify risks to U.S. financial stability that could arise from the material financial distress or failure, or ongoing activities, of large, interconnected bank holding companies or nonbank financial companies, or that could arise outside the financial services marketplace; (2) to promote market discipline, by eliminating expectations on the part of shareholders, creditors, and counterparties of such companies that the government will shield them from losses in the event of failure; and (3) to respond to emerging threats to the stability of the U.S. financial system.¹ The Council’s specific statutory duties include monitoring the financial services marketplace in order to identify potential threats to U.S. financial stability, identifying gaps in regulation that could pose risks to U.S. financial stability, and recommending to the Council member agencies general supervisory priorities and principles.²

Section II of this document describes the Council’s analytic approach for identifying and assessing potential risks to U.S. financial stability. Section III describes the approach the Council intends to take in prioritizing its work to identify and respond to potential risks to U.S. financial stability using an activities-based approach, reflecting the Council’s priority of identifying potential risks to U.S. financial stability on a system-wide basis. Section IV outlines the Council’s approach when determining whether to subject a nonbank financial company to Federal Reserve supervision and prudential standards under section 113 of the Dodd-Frank Act.

This document is not a binding rule, but is intended to help market participants, stakeholders, and other members of the public better understand how the Council expects to perform certain of its duties. The Council may consider factors relevant to the assessment of a potential risk to U.S. financial stability on a case-by-case basis, subject to applicable statutory

¹ Dodd-Frank Act Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) section 112(a)(1), 12 U.S.C. 5322(a)(1).

² Dodd-Frank Act section 112(a)(2), 12 U.S.C. 5322(a)(2).

requirements. If the Council were to depart from the process set forth in this document, it would need to provide a reasoned explanation for its action, which would require acknowledging the change in position.³

II. Analytic Methodologies for Identifying and Assessing Potential Risks to U.S. Financial Stability

The Council considers a risk to U.S. financial stability to mean the potential for an event, act, or development that could impair financial intermediation or financial market functioning to a degree that would be sufficient to inflict significant damage on the broader U.S. economy. A risk to U.S. financial stability arises when an event, act, or development interacts with or exploits a vulnerability to transmit stress or dislocations through the financial system. This may take the form of a “shock,” which is an event, act, or development—arising from within the financial system or from external sources—the impact of which could impair financial intermediation or financial market functioning. Examples of shocks include a sudden fall in asset prices or market liquidity, or the failure of one or more financial companies that provide critical services to the financial sector. A “vulnerability” in the financial system is a characteristic that can amplify the negative impact of a shock. Conversely, the Council considers financial stability to mean the financial system being resilient to risks to U.S. financial stability. To accomplish its statutory purposes and duties, the Council seeks to mitigate vulnerabilities that may increase risks to U.S. financial stability.

Economic growth and economic security are important considerations related to financial stability. The Council works with member agencies to consider whether elements of the U.S. financial regulatory framework are fit for purpose or impose undue burdens that could constrain economic growth, thereby posing a potential risk to U.S. financial stability. Similarly, economic security requires that the U.S. financial system reliably provide the resources necessary to grow the real economy. Thus, economic security and financial stability can both be bolstered by encouraging technological innovation in the financial system and by modernizing financial regulation to ensure it is efficient, effective, and forward-looking.

The evaluation of any potential risk to U.S. financial stability will be highly fact-specific, but the Council has identified certain vulnerabilities that most commonly contribute to such risks. The mere presence of any single vulnerability does not indicate that a risk to U.S. financial stability exists; the Council’s analyses will take into account the risk associated with one or more vulnerabilities in the financial system.

- Leverage. Leverage can amplify risks by reducing market participants’ ability to satisfy their obligations and by increasing the potential for sudden liquidity strains. Leverage can arise from debt, derivatives, off-balance sheet obligations, and other arrangements. Leverage can arise broadly within a market or at a limited number of firms in a market.
- Liquidity risk and maturity mismatch. A shortfall of sufficient liquidity to satisfy short-term needs, or reliance on short-term liabilities to finance longer-term assets, can subject

³ See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

market participants to rollover or refinancing risk. These risks may force entities to sell assets rapidly at stressed market prices, which can contribute to broader stresses.

- Asset valuations. Sharp reductions in the valuation of particular assets or classes of assets can result in significant losses for financial market participants that hold or are otherwise exposed to those assets. This risk can be exacerbated by concentrated portfolios, or mitigated by hedging or other risk-management strategies.
- Interconnections. Direct or indirect financial interconnections, such as exposures of creditors, counterparties, investors, and borrowers, can increase the potential negative effect of dislocations or financial distress.
- Operational risks. Risks can arise from the impairment or failure of financial market infrastructures, processes, or systems, including due to cybersecurity vulnerabilities.
- Concentration. A risk may be amplified if financial exposures or important services are highly concentrated in a small number of entities, creating a risk of widespread losses or the risk that the service could not be replaced in a timely manner at a similar price and volume if existing providers withdrew from the market.
- Impediments to economic growth and economic security. Economic growth and economic security are important considerations related to financial stability. Circumstances or developments that negatively impact economic growth or economic security could undermine financial stability.

In addition, complexity and opacity of a market, activity, or firm can make it more difficult for regulators, counterparties, and other stakeholders to assess potential risks to U.S. financial stability, which may reduce the effectiveness of market discipline. Risks may also be aggravated by obstacles to the rapid and orderly resolution of market participants. In addition, a risk may be exacerbated if it is conducted without effective risk-management practices, including the absence of appropriate regulatory authority and requirements. In contrast, existing regulatory requirements or market practices may reduce risks by, for example, limiting exposures or leverage, increasing capital and liquidity, enhancing risk-management practices, restricting excessive risk-taking, providing consolidated prudential regulation and supervision, or increasing regulatory or public transparency.

The Council considers how the adverse effects of a potential risk to U.S. financial stability could be transmitted to financial markets or market participants and what impact the potential risk could have on the financial system. Such a transmission of risk can occur through various mechanisms, or “channels.” The Council has identified four transmission channels that could facilitate the transmission of the negative effects of a risk to U.S. financial stability. These transmission channels are:

- Exposure transmission channel. Direct and indirect exposures of creditors, counterparties, investors, and other market participants can result in losses in the event of a default or decreases in asset valuations. In particular, market participants’ exposures to a particular financial instrument or asset class, such as equity, debt, derivatives, or

securities financing transactions, could impair those market participants if there is a default on or other reduction in the value of the instrument or assets. In evaluating this transmission channel, risks arising from exposures to assets managed by a company on behalf of third parties are distinct from exposures to assets owned by, or liabilities issued by, the company itself. The potential risk to U.S. financial stability will generally be greater if the amounts of exposures are larger; if transaction terms provide less protection for counterparties; if exposures are correlated, concentrated, or interconnected with other instruments or asset classes; or if entities with significant exposures include large financial institutions. The leverage, interconnections, and concentration vulnerabilities described above may be particularly relevant to this transmission channel.

- Asset liquidation transmission channel. A rapid liquidation of financial assets can pose a risk to U.S. financial stability when it causes a significant decrease in asset prices that disrupts trading or funding in key markets or causes losses or funding problems for market participants holding those or related assets. Rapid liquidations can result from a deterioration in asset prices or market functioning that could pressure firms to sell their holdings of affected assets to maintain adequate capital and liquidity, which, in turn, could produce a cycle of asset sales that lead to further market disruptions. This analysis takes into account amounts and types of liabilities that are or could become short-term in nature, amounts of assets that could be rapidly liquidated to satisfy obligations, and the potential effects of a rapid asset liquidation on markets and market participants. The potential risk is greater, for example, if leverage or reliance on short-term funding is higher, if assets are riskier and may experience a reduction in market liquidity in times of broader market stress, and if asset price volatility could lead to significant margin calls. Actions that market participants or financial regulators may take to impose stays on counterparty terminations or withdrawals may reduce the risks of rapid asset liquidations, although such actions could potentially increase risks through the exposures transmission channel if they result in potential losses or delayed payments or through the contagion transmission channel if there is a loss of market confidence. The leverage and liquidity risk and maturity mismatch vulnerabilities described above may be particularly relevant to this transmission channel.
- Critical function or service transmission channel. A risk to financial stability can arise if there could be a disruption of a critical function or service that is relied upon by market participants and for which there are no ready substitutes that could provide the function or service at a similar price and quantity. This channel is commonly referred to as “substitutability.” Substitutability risks can arise in situations where a small number of entities are the primary or dominant providers of critical services in a market that the Council determines to be essential to U.S. financial stability. Concern about a potential lack of substitutability could be greater if providers of a critical function or service are likely to experience stress at the same time because they are exposed to the same risks. This channel is more prominent when the critical function or service is interconnected or large, when operations are opaque, when the function or service uses or relies on leverage to support its activities, or when risk-management practices related to operational risks are not sufficient. The interconnections, operational risks, and concentration vulnerabilities described above may be particularly relevant to this transmission channel.

- Contagion transmission channel. Even without direct or indirect exposures, contagion can arise from the perception of common vulnerabilities or exposures, such as business models or asset holdings that are similar or highly correlated. Such contagion can spread stress quickly and unexpectedly, particularly in circumstances where there is limited transparency into investment risks, correlated markets, or greater operational risks. Contagion can also arise when there is a loss of confidence in financial instruments that are treated as substitutes for money. In these circumstances, market dislocations or fire sales may result in a loss of confidence in other financial market sectors or participants, propagating further market dislocations or fire sales. The interconnections and complexity or opacity vulnerabilities described above may be particularly relevant to this transmission channel.

The Council may consider these vulnerabilities and transmission channels, as well as others that may be relevant, in identifying financial markets, activities, and entities that could pose risks to U.S. financial stability.

The Council may assess potential risks to U.S. financial stability as they could arise in the context of a period of overall stress in the financial services industry and in a weak macroeconomic environment.

III. Activities-Based Approach

The Dodd-Frank Act gives the Council broad discretion in determining how to respond to potential risks to U.S. financial stability. A determination to subject a nonbank financial company to Federal Reserve supervision and prudential standards under section 113 of the Dodd-Frank Act is only one of several Council authorities for responding to potential risks to U.S. financial stability.⁴ The Council will prioritize its efforts to identify, assess, and respond to potential risks to U.S. financial stability through a process that begins with an activities-based approach, applying the analytic methodologies described above, and will pursue entity-specific determinations under section 113 of the Dodd-Frank Act only if a potential risk to U.S. financial stability cannot be, or is not, adequately addressed through an activities-based approach. The Council's activities-based approach is intended to identify and respond to risks to U.S. financial stability using a two-step approach, described below.

- a. Step One of the Activities-Based Approach: Identifying and Assessing Potential Risks to U.S. Financial Stability

Identifying Potential Risks to U.S. Financial Stability

⁴ For example, the Council has authority to make recommendations to the Federal Reserve concerning the establishment and refinement of prudential standards and reporting and disclosure requirements applicable to nonbank financial companies supervised by the Federal Reserve; make recommendations to primary financial regulatory agencies to apply new or heightened standards and safeguards for a financial activity or practice conducted by certain financial companies if the Council determines that such activity or practice could create or increase certain risks; and designate financial market utilities and payment, clearing, and settlement activities that the Council determines are, or are likely to become, systemically important. Dodd-Frank Act sections 115, 120, 804, 12 U.S.C. 5325, 5330, 5463.

One of the Council’s statutory purposes is to identify risks to U.S. financial stability that could arise from within or outside the financial services marketplace.⁵ In the first step of the activities-based approach, to enable the Council to identify potential risks to U.S. financial stability, the Council, in consultation with relevant financial regulatory agencies, intends to monitor diverse financial markets and market developments on a system-wide basis to identify products, activities, or practices that could pose risks to U.S. financial stability.⁶ When monitoring potential risks to U.S. financial stability, the Council intends to consider the linkages across products, activities, regulations, and practices, their interconnectedness across firms and markets, and their impact on economic growth. The Council’s analysis will be consistent with the analytic methodologies described in Section II above.

Assessing Potential Risks to U.S. Financial Stability

If the Council’s monitoring of markets and market developments identifies a potential risk to U.S. financial stability, the Council will assess the potential risk to determine whether it merits further action. The Council’s work in this step may include efforts such as sharing data, research, and analysis among Council members and member agencies and their staffs; consultations with regulators and other experts regarding the scope of potential risks and factors that may mitigate those risks; and the collaborative development of analyses for consideration by the Council. As part of this work, the Council may also engage with industry participants and other members of the public as it assesses potential risks to U.S. financial stability.

Although the contours of the Council’s initial assessment of any potential risk to U.S. financial stability will depend on the type and scope of analysis relevant to the particular risk, the Council’s analyses will generally focus on four framing questions:

1. What shocks or other developments could trigger the potential risk to U.S. financial stability, and what vulnerabilities could be implicated? For example, could the potential risk be triggered by sharp reductions in the valuations of particular classes of financial assets? This analysis will be consistent with the analysis of vulnerabilities as described in Section II above.
2. How could the adverse effects of the potential risk to U.S. financial stability be transmitted to financial markets or market participants? For example, what are the direct or indirect exposures in financial markets to the potential risk? This analysis will be consistent with the analysis of transmission channels as described in Section II above.
3. What impact could the potential risk to U.S. financial stability have on the U.S. financial system? For example, what could be the scale of its adverse effects on other companies and markets, and would its effects be concentrated or distributed broadly among market participants? This analysis should take into account factors such as existing regulatory requirements or market practices that mitigate potential risks.

⁵ Dodd-Frank Act section 112(a)(1)(A), 12 U.S.C. 5322(a)(1)(A).

⁶ See Dodd-Frank Act section 2(12), 12 U.S.C. 5301(12). In fulfilling the Council’s duties to identify, assess, and respond to potential risks to U.S. financial stability, the Council generally intends to consult with, solicit information from, or coordinate with relevant state or federal financial regulatory agencies.

4. Could the adverse effects of the potential risk to U.S. financial stability impair financial intermediation or financial market functioning to a degree that would be sufficient to inflict significant damage on the broader U.S. economy?
 - b. Step Two of the Activities-Based Approach: Working With Regulators to Respond to Potential Risks to U.S. Financial Stability

If the Council's analysis under Section III.a of this appendix identifies a potential risk to U.S. financial stability that merits action, the Council generally will work with the relevant financial regulatory agencies at the federal and state levels to respond to the potential risk. The goal of this step would be for existing regulators to take appropriate action, such as modifying their regulation or supervision of companies or markets under their jurisdiction in order to mitigate potential risks to U.S. financial stability identified by the Council.⁷ If such a potential risk identified by the Council relates to a product, activity, or practice arising at a limited number of individual financial companies, the Council may nonetheless prioritize a remedy that addresses the underlying risk at other companies that engage in the relevant activity, as appropriate, taking into account each company's size, complexity, and business profile. The Council's actions will be guided in part by its statutory purposes of promoting market discipline and responding to emerging threats to U.S. financial stability.

In cases where the Council has identified a potential risk to U.S. financial stability that merits action, if existing regulators have adequate authority, the regulators could take actions such as modifying their regulation or supervision of companies or markets under their jurisdiction to mitigate the identified risks. If existing regulators can address a potential risk to U.S. financial stability in a sufficient and timely way, the Council generally will encourage those regulators to do so.

This process may result in recommendations to a financial regulatory agency in the Council's annual report, which is required by the Dodd-Frank Act to include recommendations (1) to enhance the integrity, efficiency, competitiveness, and stability of U.S. financial markets; (2) to promote market discipline; and (3) to maintain investor confidence.⁸ After the Council makes recommendations in an annual report, it will work with Council member agencies, as appropriate, regarding steps taken to address the potential risk to U.S. financial stability.

Alternatively, in certain cases, the Council may commence a process for Council member agencies to act to address a potential risk to U.S. financial stability. In these cases, the Council will notify an existing financial regulatory agency in writing of the potential risk to U.S. financial stability. The Council will request a written response from the agency within a specified period regarding the actions the agency proposes to take to address the potential risk.

⁷ The Dodd-Frank Act provides that the Council's duties include recommending to the member agencies general supervisory priorities and principles reflecting the outcome of discussions among the member agencies and to make recommendations to primary financial regulatory agencies to apply new or heightened standards and safeguards for financial activities or practices that could create or increase risks of significant liquidity, credit, or other problems spreading among bank holding companies, nonbank financial companies, and United States financial markets. Dodd-Frank Act sections 112(a)(2)(F), (K), 12 U.S.C. 5322(a)(2)(F), (K).

⁸ Dodd-Frank Act section 112(a)(2)(N), 12 U.S.C. 5322(a)(2)(N).

The agency will be expected to provide detailed information to the Council regarding its proposed actions, their anticipated effects, and the expected timeline for implementation.

If, after engaging with relevant financial regulatory agencies, the Council believes those regulators' actions are inadequate to address the potential risk to U.S. financial stability, the Council has authority to make formal public recommendations to primary financial regulatory agencies under section 120 of the Dodd-Frank Act. Under section 120, the Council may provide for more stringent regulation of a financial activity by issuing nonbinding recommendations, following consultation with the primary financial regulatory agency and public notice inviting comments on proposed recommendations, to the primary financial regulatory agency to apply new or heightened standards or safeguards for a financial activity or practice conducted by bank holding companies or nonbank financial companies under their jurisdiction. In addition, in any case in which no primary financial regulatory agency exists for the markets or companies conducting financial activities or practices identified by the Council as posing risks, the Council can consider reporting to Congress on recommendations for legislation that would prevent such activities or practices from threatening U.S. financial stability. The Council intends to make recommendations to an agency under section 120 only to the extent that its recommendations are consistent with the statutory mandate of the primary financial regulatory agency to which the Council is making the recommendation.

The authority to issue recommendations to primary financial regulatory agencies under section 120 is one of the Council's formal tools for responding to potential risks to U.S. financial stability. The Council will make these recommendations only if it determines that the conduct, scope, nature, size, scale, concentration, or interconnectedness of the activity or practice could create or increase the risk of significant liquidity, credit, or other problems spreading among bank holding companies and nonbank financial companies or U.S. financial markets.

In its recommendations under section 120, the Council may suggest broad approaches to address the risks it has identified, or, when appropriate, the Council may make a more specific recommendation. To promote analytical rigor and avoid duplication, before making any recommendation under section 120, the Council will ascertain whether the relevant primary financial regulatory agency would be expected to perform a cost-benefit analysis of the actions it would take in response to the Council's contemplated recommendation. In cases where the primary financial regulatory agency would not be expected to conduct such an analysis, the Council itself will conduct an analysis prior to making a final recommendation, using empirical data, to the extent available, of the benefits and costs of the actions that the primary financial regulatory agency would be expected to take in response to the contemplated recommendation. Where the Council conducts its own such analysis, the specificity of its assessment of benefits and costs would be commensurate with the specificity of the contemplated recommendation. Furthermore, where the Council conducts its own analysis, the Council will make a recommendation under section 120 only if it believes that the results of its assessment of benefits and costs support the recommendation. In every case, prior to issuing a recommendation under section 120, the Council will consult with the relevant primary financial regulatory agency and provide notice to the public and opportunity for comment as required by section 120.

IV. Nonbank Financial Company Determinations

As described in Section III above, the Council will prioritize an activities-based approach for identifying, assessing, and responding to potential risks to U.S. financial stability. If the Council's collaboration and engagement with the relevant financial regulatory agencies during the activities-based approach does not adequately address a potential threat identified by the Council, and if the potential threat identified by the Council is one that could be effectively addressed by a Council determination regarding one or more nonbank financial companies, the Council may evaluate one or more nonbank financial companies for an entity-specific determination under section 113 of the Dodd-Frank Act. This section describes the analysis the Council will conduct in general regarding individual nonbank financial companies that are considered for a potential determination, and the Council's process for those reviews.

Under section 113 of the Dodd-Frank Act, the Council may determine, by a vote of not fewer than two-thirds of the voting members of the Council then serving, including an affirmative vote by the Chairperson of the Council, that a nonbank financial company⁹ will be supervised by the Federal Reserve and be subject to prudential standards if the Council determines that (1) material financial distress at the nonbank financial company could pose a threat to the financial stability of the United States ("First Determination Standard") or (2) the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the nonbank financial company could pose a threat to the financial stability of the United States ("Second Determination Standard"). The Council has issued a procedural rule regarding its process for considering a nonbank financial company for potential designation under section 113.¹⁰ The Dodd-Frank Act requires the Council to consider 10 specific considerations, including the company's leverage, relationships with other significant financial companies, and existing regulation by primary financial regulatory agencies, when determining whether a nonbank financial company satisfies either of the determination standards.¹¹ Due to the unique threat that each nonbank financial company could pose to U.S. financial stability and the nature of the inquiry required by the statutory considerations set forth in section 113, the Council expects that its evaluations of nonbank financial companies under section 113 will be firm-specific; however, the analytic methodologies described in Section III above would apply in the context of an analysis under section 113.

For purposes of section 113 of the Dodd-Frank Act, the Council considers a "threat to the financial stability of the United States" to mean the threat of an impairment of financial intermediation or of financial market functioning to a degree that would be sufficient to inflict severe damage on the broader U.S. economy.¹² When evaluating a nonbank financial company,

⁹ In this context, the Council intends to interpret the term "company" to include any corporation, limited liability company, partnership, business trust, association, or similar organization, and "nonbank financial company supervised by the Board of Governors" as including any nonbank financial company that acquires, directly or indirectly, a majority of the assets or liabilities of a company that is subject to a Final Determination of the Council. See 12 U.S.C. 5311(a)(4) and 12 C.F.R. 1310.2 for the definition of "nonbank financial company."

¹⁰ See 12 CFR part 1310.

¹¹ Dodd-Frank Act sections 113(a)(2) and (b)(2), 12 U.S.C. 5323(a)(2) and (b)(2).

¹² This interpretation of a "threat" to U.S. financial stability refers to "severe damage" to the broader economy, while the definition in section II above of a "risk" to U.S. financial stability refers to "significant damage" to the

the Council may consider the company and its subsidiaries separately or together, to enable the Council to consider potential risks arising across the entire organization, while retaining the ability to make a determination regarding either the parent or any individual nonbank financial company subsidiary (or neither), depending on which entity the Council determines could pose a threat to financial stability.

Assessments of Benefits and Costs

In addition to the Council's analytic methodologies described above in Section II, in the context of potential determinations regarding nonbank financial companies under section 113 of the Dodd-Frank Act, the Council will assess whether the expected benefits of a potential Council determination justify the expected costs. Financial stability benefits may be difficult to quantify, and some of the costs may be difficult to forecast with precision. When possible, the Council will quantify reasonably estimable benefits and costs, using ranges, as appropriate, and based on empirical data when available. If such benefits or costs cannot be quantified in this manner, the Council will explain why such benefits or costs could not be quantified. The Council also expects to consider benefits and costs qualitatively. To the extent feasible, the Council will attempt to assess the relative importance of any such qualitative elements. The Council will make a determination under section 113 only if the expected benefits to financial stability from Federal Reserve supervision and prudential standards justify the expected costs that the determination would impose. As part of this analysis, the Council will assess the likelihood of a firm's material financial distress, as described below, in order to assess the extent to which a determination may promote U.S. financial stability, along with the extent to which material financial distress at the nonbank financial company could pose a threat to the financial stability of the United States.

The Council will conduct this analysis in cases where the Council is concluding that the company meets one of the standards for a determination by the Council under section 113 of the Dodd-Frank Act.

Benefits. With respect to the benefits of a Council determination, the Council will consider the benefits of the determination itself, both to (1) the U.S. financial system, long-term economic growth, and economic security and (2) the nonbank financial company due to additional regulatory requirements resulting from the determination, particularly the prudential standards adopted by the Federal Reserve under section 165 of the Dodd-Frank Act.

One of the Council's statutory purposes is to respond to emerging threats to the stability of the U.S. financial system.¹³ The primary intended benefit of a determination under section 113 of the Dodd-Frank Act is a reduction in the likelihood or severity of a financial crisis. Therefore, the Council will consider potential benefits to the U.S. financial system and the U.S. economy arising from a Council determination. To the extent that a Council determination reduces the likelihood or severity of a potential financial crisis, the determination could enhance financial stability and mitigate the severity of economic downturns. The Council may use

broader economy. This approach reflects that these distinct statutory terms, found in sections 112 and 113 of the Dodd-Frank Act, should be given distinct meanings.

¹³ Dodd-Frank Act section 112(a)(1)(C), 12 U.S.C. 5322(a)(1)(C).

various measures of systemic risk to assess any improvement in financial stability. Such measures include SRISK (which attempts to quantify the amount of capital a financial firm would need to raise in order to function normally in the event of a severe financial crisis), conditional value at risk, and estimates of fire sale risk, among others. To assess the benefit to the U.S. financial system and the U.S. economy from a determination, the Council may also consider historical analogues to the nonbank financial company under review. In addition, where appropriate, the Council may compare the risks to financial stability posed by a particular nonbank financial company to the risks posed by large bank holding companies, in order to produce an assessment of the relative risks the company may pose. Further, the loss of any implicit “too big to fail” subsidy would be considered a benefit to the economy.

Analysis of the benefits of a determination for the relevant nonbank financial company may include those arising directly from the Council’s determination as well as any benefits arising from anticipated new or increased requirements resulting from the determination, such as additional supervision and enhanced capital, liquidity, or risk-management requirements. For example, a nonbank financial company subject to a Council determination may benefit from a lower cost of capital or higher credit ratings upon meeting its post-determination regulatory requirements.

Costs. With respect to the costs of a Council determination, the Council will consider the costs of the determination itself, both to (1) the nonbank financial company due to additional regulatory requirements resulting from the determination, including the costs of the prudential standards adopted by the Federal Reserve under section 165 of the Dodd-Frank Act; and (2) the U.S. economy, including potential impacts on economic growth and economic security.

The Council will consider costs to the company arising from anticipated new or increased regulatory requirements resulting from the determination related to:

- Risk-management requirements, such as the costs of capital planning and stress testing.
- Supervision and examination, such as compliance costs to the firm of additional examination and supervision.
- Increased capital requirements, after accounting for offsetting benefits to taxpayers and to the holders of the firm’s other liabilities.
- Liquidity requirements, such as the opportunity cost from any requirement to hold additional high-quality liquid assets, relative to the company’s current investment portfolio.

Because the Federal Reserve is required to tailor prudential standards to a nonbank financial company subject to a Council determination after the Council has made a determination regarding the company, the new regulatory requirements that result from the Council’s determination will not be known to the Council during its analysis of the company. In cases where the nonbank financial company under review primarily engages in bank-like activities, the Council may consider, as a proxy, the costs that would be imposed on the nonbank if the Federal

Reserve imposed prudential standards similar to those imposed on bank holding companies with at least \$250 billion in total consolidated assets under section 165 of the Dodd-Frank Act.¹⁴

The Council also will consider the cost of a determination under section 113 of the Dodd-Frank Act to the U.S. economy by assessing the impact of the determination on the availability and cost of credit or financial products in relevant U.S. markets. To the extent that the markets in which the relevant nonbank participates have low concentration, the impact that the determination regarding one firm would have on credit conditions would generally be immaterial. However, if the relevant markets are concentrated, a Council determination regarding a significant market participant could have a material impact on credit conditions in that market. As part of this analysis, the Council may also consider the extent to which any reduction in financial services provided by the nonbank financial company under review would be offset by other market participants.

Likelihood of Material Financial Distress. As part of the assessment of the impact of a Council determination for any company under review under the First Determination Standard, the Council will assess the likelihood of the company's material financial distress based on its vulnerability to a range of factors.¹⁵ For example, these factors may include leverage (both on- and off-balance sheet), potential risks associated with asset revaluations (whether such revaluations arise from market disruptions or severe macroeconomic conditions), reliance on short-term funding or other fragile funding markets, maturity transformation, and risks from exposures to counterparties or other market participants. This assessment may rely upon historical examples regarding the characteristics of financial companies that have experienced financial distress, but may also consider other risks that do not have historical precedent. The Council's analysis of the likelihood of a nonbank financial company's material financial distress will be conducted taking into account a period of overall stress in the financial services industry and a weak macroeconomic environment. The Council may also consider the results of any stress tests that have previously been conducted by the company or by its primary financial regulatory agency. In light of the unpredictability of the failure of financial companies, the Council will not seek to determine that a nonbank financial company's material financial distress is reasonably likely, but instead will use this analysis to evaluate the factors that could cause such distress as part of the assessment of benefits of a designation as described above.

Administrative Process for Nonbank Financial Company Determinations

In the first stage of the process ("Stage 1"), nonbank financial companies identified as potentially posing risks to U.S. financial stability will be notified as described below and subject to a preliminary analysis, based on quantitative and qualitative information available to the Council primarily through public and regulatory sources. During Stage 1, the Council will permit, but not require, the company to submit relevant information. The Council will also consult with the primary financial regulatory agency or home country supervisor, as appropriate. This approach will enable the Council to fulfill its statutory obligation to rely whenever possible on information available through the Office of Financial Research (the "OFR"), Council member

¹⁴ Dodd-Frank Act section 165, 12 U.S.C. 5365.

¹⁵ The Council intends to interpret the term "material financial distress" as a nonbank financial company being in imminent danger of insolvency or defaulting on its financial obligations.

agencies, or the nonbank financial company's primary financial regulatory agencies before requiring the submission of reports from any nonbank financial company.¹⁶

Following Stage 1, nonbank financial companies that are selected for additional review will receive notice that they are being considered for a proposed determination that the company could pose a threat to U.S. financial stability (a "Proposed Determination") and will be subject to in-depth evaluation during the second stage of review ("Stage 2"). Stage 2 will involve the evaluation of additional information collected directly from the nonbank financial company. At the end of Stage 2, the Council may consider whether to make a Proposed Determination with respect to the nonbank financial company. If a Proposed Determination is made by the Council, the nonbank financial company may request a hearing in accordance with section 113(e) of the Dodd-Frank Act and § 1310.21(c) of the Council's rule.¹⁷ After making a Proposed Determination and holding any written or oral hearing if requested, the Council may vote to make a Final Determination.

a. Stage 1: Preliminary Evaluation of Nonbank Financial Companies

Engagement with Company and Regulators in Stage 1

The Council will provide a notice to any nonbank financial company under review in Stage 1 no later than 60 days before the Council votes on whether to evaluate the company in Stage 2. In Stage 1, the Council will consider available public and regulatory information. In order to reduce the burdens of review on the company, the Council will not require the company to submit information during Stage 1; however, a company under review in Stage 1 may submit to the Council any information relevant to the Council's evaluation and may, upon request, meet with staff of Council members and member agencies who are leading the Council's analysis. The Council may request a page-limited summary of the company's submissions. In addition, staff representing the Council will, upon request, provide the company with a list of the primary public sources of information being considered during the Stage 1 analysis, so that the company has an opportunity to understand the information the Council may rely upon during Stage 1. In addition, during discussions in Stage 1 with the company, the Council intends for representatives of the Council to indicate to the company potential risks to U.S. financial stability that have been identified in the analysis. However, any potential risks identified at this stage are preliminary and may continue to develop until the Council makes a Final Determination. Through this engagement, the Council seeks to provide the company under review an opportunity to understand the focus of the Council's analysis, which may enable the company to act to mitigate any risks to U.S. financial stability and thereby potentially avoid becoming subject to a Council determination.

The Council will also consider in Stage 1 information available from relevant existing regulators of the company. Under the Dodd-Frank Act, the Council is required to consult with the primary financial regulatory agency, if any, for each nonbank financial company or subsidiary of a nonbank financial company that is being considered for a determination before

¹⁶ See Dodd-Frank Act section 112(d)(3), 12 U.S.C. 5322(d)(3).

¹⁷ See 12 CFR 1310.21(c).

the Council makes any Final Determination with respect to such company.¹⁸ For any company under review in Stage 1 that is regulated by a primary financial regulatory agency or home country supervisor, the Council will notify the regulator or supervisor that the company is under review no later than the time the company is notified. The Council will also consult with the primary financial regulatory agency, if any, of each significant subsidiary of the nonbank financial company, to the extent the Council deems appropriate in Stage 1. The Council will actively solicit the regulator's views regarding risks at the company and potential mitigants or aggravating factors. In order to enable the regulator to provide relevant information, the Council will share its preliminary views regarding potential risks at the company, if any and to the extent practicable, and request that the regulator provide information regarding those specific risks, including the extent to which the risks are adequately mitigated by factors such as existing regulation or the company's business practices. During the determination process, the Council will encourage the regulator to address any risks to U.S. financial stability using the regulator's existing authorities; if the Council believes regulators' or the company's actions have adequately addressed the potential risks to U.S. financial stability the Council has identified, the Council may discontinue its consideration of the company for a potential determination under section 113 of the Dodd-Frank Act.

Based on the preliminary evaluation in Stage 1, the Council intends to identify steps a nonbank financial company or financial regulatory agencies could take to address a potential threat to U.S. financial stability. Subject to any necessary administrative procedures required to remediate the risk, the Council generally expects material risks to U.S. financial stability to be addressed within 180 days.

At the end of Stage 1, the Council may, on a nondelegable basis, vote to commence a more detailed analysis of the company by advancing the company to Stage 2, or it may decide not to evaluate the company further. If the Council votes not to advance a company that has been reviewed in Stage 1 to Stage 2, the Council will notify the company in writing of the Council's decision. The notice will clarify that a decision not to advance the company from Stage 1 to Stage 2 at that time does not preclude the Council from reinitiating review of the company in Stage 1.

In light of the preliminary nature of a review in Stage 1, the Council expects that not all companies reviewed in Stage 1 will proceed to Stage 2 or a Final Determination.

b. Stage 2: In-Depth Evaluation

Stage 2 involves an in-depth evaluation of a nonbank financial company that the Council has determined merits additional review.

In Stage 2, the Council will review a nonbank financial company using information collected directly from the company, through the OFR, as well as public and regulatory information. The review will focus on whether material financial distress at the nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the company, could pose a threat to U.S. financial stability.

¹⁸ Dodd-Frank Act section 113(g), 12 U.S.C. 5323(g).

Engagement With Company and Regulators in Stage 2

A nonbank financial company to be evaluated in Stage 2 will receive a notice (a “Notice of Consideration”) that the company is under consideration for a Proposed Determination. The Council also will submit to the company a request that the company provide information that the Council deems relevant to the Council’s evaluation, and the nonbank financial company will be provided an opportunity to submit written materials to the Council.¹⁹ This information will generally be collected by the OFR.²⁰ Before requiring the submission of reports from any nonbank financial company that is regulated by a Council member agency or a primary financial regulatory agency, the Council, acting through the OFR, will coordinate with such agencies and will, whenever possible, rely on information available from the OFR or such agencies. Council members and their agencies and staffs will maintain the confidentiality of such information in accordance with applicable law. During Stage 2, the company may also submit any other information that it deems relevant to the Council’s evaluation. Information that may be considered by the Council includes details regarding the company’s financial activities, legal structure, liabilities, counterparty exposures, resolvability, and existing regulatory oversight. Information requests likely will involve both qualitative and quantitative information. Information relevant to the Council’s analysis may include confidential business information such as detailed information regarding financial assets, terms of funding arrangements, counterparty exposure or position data, strategic plans, and interaffiliate transactions.

The Council will make staff representing Council members available to meet with the representatives of any company that enters Stage 2, to explain the evaluation process and the framework for the Council’s analysis. In addition, the Council expects that its Deputies Committee will grant a request to meet with a company in Stage 2 to allow the company to present any information or arguments it deems relevant to the Council’s evaluation. If the analysis in Stage 1 has identified specific aspects of the company’s operations or activities as the primary focus for the evaluation, staff will notify the company of those specific aspects, although the areas of analytic focus may change based on the ongoing analysis.

During Stage 2, the Council will also seek to continue its consultation with the company’s primary financial regulatory agency or home country supervisor in a timely manner before the Council makes a Proposed or Final Determination with respect to the company. The Council will continue to encourage the regulator during the determination process to address any risks to U.S. financial stability using the regulator’s existing authorities; as noted above, if the Council believes regulators’ or the company’s actions adequately address the potential risks to U.S. financial stability the Council has identified, the Council would expect to discontinue its consideration of the company for a potential determination under section 113 of the Dodd-Frank Act.

Before making a Proposed Determination regarding a nonbank financial company, the Council will notify the company when the Council believes that the evidentiary record regarding

¹⁹ See 12 CFR 1310.21(a).

²⁰ See Dodd-Frank Act section 112(d), 12 U.S.C. 5322(d).

the company is complete.²¹ The Council will notify any nonbank financial company in Stage 2 if the company ceases to be considered for a determination. Any nonbank financial company that ceases to be considered at any time in the Council’s determination process may be considered for a potential determination in the future at the Council’s discretion, consistent with the processes described above.

c. Proposed and Final Determination

Proposed Determination

Based on the analysis performed in Stage 2, a nonbank financial company may be considered for a Proposed Determination. A Proposed Determination requires a vote, on a nondelegable basis, of two-thirds of the voting members of the Council then serving, including an affirmative vote by the Chairperson of the Council.²² Following a Proposed Determination, the Council will issue a written notice of the Proposed Determination to the nonbank financial company, which will include an explanation of the basis of the Proposed Determination.²³ Promptly after the Council votes to make a Proposed Determination regarding a company, the Council will provide the company’s primary financial regulatory agency or home country supervisor with the nonpublic written explanation of the basis of the Council’s Proposed Determination (subject to appropriate protections for confidential information).

Hearing

A nonbank financial company that is subject to a Proposed Determination may request a nonpublic hearing to contest the Proposed Determination in accordance with section 113(e) of the Dodd-Frank Act and § 1310.21(c) of the Council’s rule regarding nonbank financial company determinations.²⁴ If the nonbank financial company requests a hearing in accordance with the procedures set forth in § 1310.21(c), the Council will set a time and place for such hearing. The Council has published hearing procedures on its website.²⁵ In light of the statutory timeframe for conducting a hearing, and the fact that the purpose of the hearing is to benefit the company, if a company requests that the Council waive the statutory deadline for conducting the hearing, the Council may do so in appropriate circumstances.

Final Determination

After making a Proposed Determination and holding any requested written or oral hearing, the Council, on a nondelegable basis, may, by a vote of not fewer than two-thirds of the voting members of the Council then serving (including an affirmative vote by the Chairperson of the Council), make a Final Determination that the company will be subject to supervision by the Federal Reserve and prudential standards. If the Council makes a Final Determination, it will

²¹ See 12 CFR 1310.21(a)(3).

²² 12 CFR 1310.10(b).

²³ See Dodd-Frank Act section 113(e)(1), 12 U.S.C. 5323(e)(1).

²⁴ See 12 CFR 1310.21(c).

²⁵ Financial Stability Oversight Council Hearing Procedures for Proceedings Under Title I or Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, available at <https://fsoc.gov>.

provide the company with a written notice of the Council's Final Determination, including an explanation of the basis for the Council's decision.²⁶ The Council will also provide the company's primary financial regulatory agency or home country supervisor with the nonpublic written explanation of the basis of the Council's Final Determination (subject to appropriate protections for confidential information). The Council expects that its explanation of the basis for any Final Determination will highlight the key risks that led to the determination and include guidance regarding the factors that were important in the Council's determination. When practicable and consistent with the purposes of the determination process, the Council will provide a nonbank financial company with notice of a Final Determination at least one business day before publicly announcing the determination pursuant to § 1310.21(d)(3), § 1310.21(e)(3), or § 1310.22(d)(3) of the Council's rule.²⁷ In accordance with the Dodd-Frank Act, a nonbank financial company that is subject to a Final Determination may bring an action in U.S. district court for an order requiring that the determination be rescinded.²⁸

The Council does not intend to publicly announce the name of any nonbank financial company that is under evaluation prior to a Final Determination with respect to such company. However, if a company that is under review in Stage 1 or Stage 2 publicly announces the status of its review by the Council, the Council intends, upon the request of a third party, to confirm the status of the company's review. In addition, the Council will publicly release the explanation of the Council's basis for any Final Determination or rescission of a determination, following such an action by the Council. The Council is subject to statutory and regulatory requirements to maintain the confidentiality of certain information submitted to it by a nonbank financial company or its regulators.²⁹ In light of these confidentiality obligations, such confidential information will be redacted from the materials that the Council makes publicly available, although the Council does not expect to restrict a company's ability to disclose such information.

d. Annual Reevaluations

After the Council makes a Final Determination regarding a nonbank financial company, the Council intends to encourage the company or its regulators to take steps to mitigate the potential risks identified in the Council's written explanation of the basis for its Final Determination. Except in cases where new material risks arise over time, if the potential risks identified in writing by the Council at the time of the Final Determination and in subsequent reevaluations have been adequately addressed, generally the Council would expect to rescind its determination regarding the company.

For any nonbank financial company that is subject to a Final Determination, the Council is required to reevaluate the determination at least annually, and to rescind the determination if the Council determines that the company no longer meets the statutory standards for a determination.³⁰ The Council may also consider a request from a company for a reevaluation

²⁶ Dodd-Frank Act section 113(e)(3), 12 U.S.C. 5323(e)(3); see also 12 CFR 1310.21(d)(2) and (e)(2).

²⁷ See 12 CFR 1310.21(d)(3) and (e)(3) and 1310.22(d)(3).

²⁸ See Dodd-Frank Act section 113(h), 12 U.S.C. 5323(h).

²⁹ See Dodd-Frank Act section 112(d)(5), 12 U.S.C. 5322(d)(5); see also 12 CFR 1310.20(e).

³⁰ Dodd-Frank Act section 113(d), 12 U.S.C. 5323(d).

before the next required annual reevaluation, in the case of an extraordinary change that materially affects the Council's analysis.

The Council will apply the same standards of review in its annual reevaluations as the standards for an initial determination regarding a nonbank financial company: either material financial distress at the company, or the nature, scope, size, scale, concentration, interconnectedness, or the mix of the company's activities, could pose a threat to U.S. financial stability. If the Council determines that the company does not meet either of those standards, the Council will rescind its determination.

The Council's annual reevaluations will generally assess whether any material changes since the previous reevaluation and since the Final Determination justify a rescission of the determination. The Council expects that its reevaluation process will focus on whether any material changes that have taken effect—including changes at the company, changes in its markets or its regulation, changes in the impact of relevant factors, or otherwise—result in the company no longer meeting the standards for a determination. In light of the frequent reevaluations, the Council's analyses will generally focus on material changes since the Council's previous review, but the ultimate question the Council will seek to assess is whether changes in the aggregate since the Council's Final Determination regarding the company have caused the company to cease meeting either of the statutory standards for a determination.

During the Council's annual reevaluation of a determination regarding a nonbank financial company, the Council will provide the company with an opportunity to meet with representatives of the Council to discuss the scope and process for the review and to present information regarding any change that may be relevant to the threat the company could pose to financial stability. In addition, during an annual reevaluation, the company may submit any written information to the Council the company deems relevant to the Council's analysis. During annual reevaluations, a company is encouraged to submit information regarding any changes related to the company's risk profile that mitigate the potential risks previously identified by the Council. Such changes could include updates regarding company restructurings, regulatory developments, market changes, or other factors. If the company or its regulators have taken steps to address the potential risks previously identified by the Council, the Council will assess whether the risks have been adequately mitigated to merit a rescission of the determination regarding the company. If the company explains in detail and in a timely manner potential changes it could make to its business to address the potential risks previously identified by the Council, representatives of the Council will endeavor to provide their feedback on the extent to which those changes may address the potential risks.

If a company contests the Council's determination during the Council's annual reevaluation, the Council will vote on whether to rescind the determination and provide the company, its primary financial regulatory agency or home country supervisor, and the primary financial regulatory agency of its significant subsidiaries with a notice explaining the primary basis for any decision not to rescind the determination. If the Council does not rescind the determination, the written notice provided to the company will address the most material factors raised by the company in its submissions to the Council contesting the determination during the annual reevaluation. The written notice from the Council will also explain why the Council did

not find that the company no longer met the standard for a determination under section 113 of the Dodd-Frank Act. In general, due to the sensitive, company-specific nature of its analyses in annual reevaluations, the Council generally would not publicly release the written findings that it provides to the company, although the Council does not expect to restrict a company's ability to disclose such information.

Finally, the Council will provide each nonbank financial company subject to a Council determination an opportunity for an oral hearing before the Council once every five years at which the company can contest the determination.