

**FINANCIAL STABILITY OVERSIGHT COUNCIL**

**12 CFR Part 1310**

**RIN 4030-AA00**

**Authority To Require Supervision and Regulation of Certain Nonbank Financial Companies**

**AGENCY:** Financial Stability Oversight Council.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** Section 113 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the ‘‘DFA’’) (Pub. L. 111-203) provides the Financial Stability Oversight Council (the ‘‘Council’’) the authority to require that a nonbank financial company be supervised by the Board of Governors of the Federal Reserve System (‘‘Board of Governors’’) and be subject to prudential standards in accordance with Title I of the DFA if the Council determines that material financial distress at such a firm, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the firm, could pose a threat to the financial stability of the United States. The proposed rule describes the criteria that will inform, and the processes and procedures established under the DFA for, the Council’s designation of nonbank financial companies under the DFA. The Council, on October 6, 2010, issued an advance notice of proposed rulemaking regarding the designation criteria in section 113.

**DATES:** Comments must be received on or before [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Interested persons are invited to submit comments regarding this notice of proposed rulemaking according to the instructions below. All submissions must refer to the document title. The Council encourages the early submission of comments.

Electronic Submission of Comments. Interested persons may submit comments electronically through the Federal eRulemaking Portal at [http:// www.regulations.gov](http://www.regulations.gov). 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 <http://www.regulations.gov> Web site 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.

Mail: Send comments to Financial Stability Oversight Council, Attn: Lance Auer, 1500 Pennsylvania Avenue, NW, Washington DC 20220.

**Note:** To receive consideration as public comments, comments must be submitted through the method specified above. Again, all submissions must refer to the title of the notice.

Public Inspection of Public Comments. All properly submitted comments will be available for inspection and downloading at [http:// www.regulations.gov](http://www.regulations.gov).

Additional Instructions. 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:** Lance Auer, Office of Domestic Finance, Treasury, at (202) 622–1262, or Jeff King, Office of the General Counsel, Treasury, at (202)

622-1978. All responses to this Notice should be submitted via [http:// www.regulations.gov](http://www.regulations.gov) to ensure consideration.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background:**

Section 111 of the DFA (12 U.S.C. 5321) established the Financial Stability Oversight Council. Among the purposes of the Council under section 112 of the DFA (12 U.S.C. 5322), are: “(A) \* \* \* identify[ing] risk 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) \* \* \* promot[ing] 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) \* \* \* respond[ing] to emerging threats to the stability of the United States financial system.”

In the recent financial crisis, financial distress at certain nonbank financial companies contributed to a broad seizing up of financial markets, stress at other financial firms, and a deep global recession with a considerable drop in employment, the classic symptoms of financial instability. These nonbank financial companies were not subject to the type of regulation and consolidated supervision applied to bank holding companies, nor were there effective mechanisms in place to resolve the largest and most interconnected of these firms without causing further instability. To address the risks posed by these companies, the DFA authorizes the Council to designate nonbank financial companies for enhanced prudential standards and consolidated supervision by the Board of Governors.

Specifically, section 113 of the DFA (12 U.S.C. 5323) gives the Council the authority to require that a nonbank financial company be supervised by the Board of Governors and be subject to enhanced prudential standards if the Council determines that material financial distress at such a firm, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the firm, could pose a threat to the financial stability of the United States.<sup>1</sup> Section 113 of the DFA sets forth a number of factors or criteria that the Council must consider in determining whether to designate a nonbank financial company for supervision by the Board of Governors.

Further, once a nonbank financial company is identified and made subject to supervision by the Board of Governors, section 165(d) requires the company to file a resolution plan with the Board of Governors and the FDIC that is both credible and would facilitate an orderly resolution of the company. The requirement to prepare and file a resolution plan will not only assist the Board of Governors to supervise these companies, but will also provide information essential if an orderly liquidation of the company under Title II or another resolution mechanism becomes necessary.

On October 6, 2010, the Council issued an advance notice of proposed rulemaking (“ANPR”) (75 FR 61653) through which it sought public comment to gather information in developing the specific criteria and analytical framework by which it will consider designating nonbank financial companies for supervision by the Board of Governors. The ANPR posed 15 questions, all of which focused on how to apply the statutory considerations for designating a nonbank financial company as specified in section 113 of the DFA. The comment period for the ANPR closed on November 5, 2010, and comments were submitted from 50 persons. Of these,

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<sup>1</sup> The Council’s decision requires the vote of at least two-thirds of the voting members of the Council then serving, including the affirmative vote of the Chairperson of the Council (the Secretary of the Treasury).

27 were from industry trade associations, 10 from individual firms, 5 from individuals, and 8 from other groups. (Comment letters are available online at: <http://www.regulations.gov>)

These comments addressed the Council's specific questions, as well as a range of other issues. Commenters generally encouraged further development of the framework for designations under section 113, and most supported the overall direction of the ANPR. Commenters, however, raised a number of conceptual and technical issues that they believed required additional consideration. Some commenters provided specific proposed frameworks for applying the criteria in section 113, and provided feedback on particular metrics and considerations that should be used in the designation process. In addition, some commenters provided views on the process of designation itself, emphasizing transparency and clear communication surrounding all designation decisions. The questions asked by the Council in the ANPR are provided below, along with an overview of the comments received on each question.

## **II. Summary of Public Responses to ANPR:**

- 1. What metrics should the Council use to measure the factors it is required to consider when making determinations under Section 113 of DFA?**
  - a. How should quantitative and qualitative considerations be incorporated into the determination process?**
  - b. Are there some factors that should be weighted more heavily by the Council than other factors in the designation process?**

Most commenters asserted that determinations should be based on a combination of qualitative and quantitative considerations. Furthermore, there was general consensus among commenters that the Council should give significant weight to the following factors in making a determination: size, leverage, dependence on short-term funding, substitutability, degree of primary regulation, and interconnectedness. However, many commenters also emphasized the importance of other factors such as concentration and diversification, balance sheet composition,

complexity, off-balance sheet exposure, level of uncollateralized exposures, risk appetite, and a firm's role in payment and settlement systems. A number of commenters argued that the first filter in the determination process should be an assessment of the likelihood of a firm's failure having a material impact on the financial system, together with an assessment of the likelihood that it could experience material financial distress. Commenters also argued that the Council should consider the likelihood that the company would be resolved under an orderly liquidation procedure under Title II if it were to fail or experience material financial distress.

**2. What types of nonbank financial companies should the Council review for designation under DFA? Should the analytical framework, considerations, and measures used by the Council vary across industries? Across time? If so, how?**

The majority of commenters argued that no nonbank financial company should automatically be excluded from potential review for designation. Several industry groups and firms also presented arguments generally as to why they do not present a systemic risk. Commenters generally agreed that analytical frameworks for designation should be tailored to the type of industry in which the firm operated, and that the Council should focus its attention on unregulated firms and activities. Many commenters also urged the Council to focus on those types of companies that rely heavily on short-term funding, are highly interconnected with other parts of the financial system, and are not already subject to consolidated supervision or heightened reporting.

**3. Since foreign nonbank financial companies can be designated, what role should international considerations play in designating companies? Are there unique considerations for foreign nonbank companies that should be taken into account?**

Many respondents noted that many foreign nonbank institutions may already be subject to prudential regulatory regimes within their home jurisdictions, including regimes that follow

internationally recognized practices for prudential supervision. These commenters asserted that these factors should be taken into account by the Council. Many also stressed the need for outreach and coordination with the home regulators of foreign institutions, as well as the need to avoid overlapping or conflicting regulations.

**4. Are there simple metrics that the Council should use to determine whether nonbank financial companies should even be considered for designation?**

Many commenters asserted that the Council should not rely solely on a limited number of simple metrics in considering firms for designation, with the most common example noted as asset size. A majority of commenters argued that the Council should consider several metrics in combination. However, many of the commenters agreed on one metric that they believe should be used to exclude a firm from designation: those firms that are already subject to consolidated supervision and/or heightened reporting requirements.

**5. How should the Council measure and assess the scope, size, and scale of nonbank financial companies?**

- a. **Should a risk-adjusted measure of a company's assets be used? If so, what methodology or methodologies should be used?**
- b. **Section 113 of DFA requires the Council to consider the extent and nature of the off-balance-sheet exposures of a company. Given this requirement, what should be considered an off-balance sheet exposure and how should they be assessed? How should off-balance sheet exposures be measured (e.g., notional values, mark-to-market values, future potential exposures)? What measures of comparison are appropriate?**
- c. **How should the Council take managed assets into consideration in making designations? How should the term "managed assets" be defined? Should the type of asset management activity (e.g., hedge fund, private equity fund, mutual fund) being conducted influence the assessment under this criterion? How should terms, conditions, triggers, and other contractual arrangements that require the nonbank financial firm either to fund or to satisfy an obligation in connection with managed assets be considered?**
- d. **During the financial crisis, some firms provided financial support to investment vehicles sponsored or managed by their firm despite having no legal obligation to do so. How should the Council take account of such implicit support?**

A majority of commenters emphasized the importance of looking at the scope, size and scale of nonbank financial companies through a variety of lenses to best understand the underlying risk. However, one commenter argued that measurement tools should be kept as simple and uniform as possible across all firms.

It was generally noted by commenters that some form of risk-weighting should be used in assessing the scope, size, and scale of nonbank financial companies. However, specific methodologies were not suggested by commenters.

*Asset Size Calculations* – Commenters emphasized that asset size should not be looked at in isolation, and that asset size alone does not fully reflect a firm’s ability to pose systemic risk.

*Treatment of Off-Balance-Sheet Exposures* – A majority of commenters argued that off-balance-sheet exposures should not be measured simply using notional values. In addition, several commenters argued that potential future exposures—estimated, for example, as part of stress tests—should include a firm’s off-balance-sheet exposures. Commenters also suggested that off-balance-sheet exposures should include, *inter alia*, all contingent liabilities, parental guarantees, capital support arrangements, special purpose vehicle (SPV) support arrangements, and repurchase obligations.

*Managed Asset Considerations* – Many commenters argued that managed assets are fundamentally less risky than those directly owned by a financial company. Some commenters also suggested that asset managers are less interconnected than other significant nonbank financial companies and engage predominantly in long-only trades, which the commenters suggested greatly reduced the amount of risk they pose to the financial system.

*Implicit Support* – Most commenters argued that implicit support provided to investment vehicles should not be considered in calculations of potential exposure. Most noted that the nature of such support can vary widely, and that legal recourse provides a cleaner line. In contrast, one commenter argued that the Council should consider implicit support in the overall exposures of a firm, referencing the support several institutions provided to funds during the recent financial crisis, despite having no legal obligation to do so.

6. **How should the Council measure and assess the nature, concentration, and mix of activities of a nonbank financial firm?**
  - a. **Section 113 of DFA requires the Council to consider the importance of the company as a source of credit for households, businesses, and State and local governments, and as a source of liquidity for the United States financial system. Given this requirement, are there measures of market concentration that can be used to inform the application of this criterion? How should these markets be defined? What other measures might be used to assess a nonbank financial firm’s importance under this criterion?**
  - b. **Section 113 of DFA requires the Council to consider the importance of the company as a source of credit for low-income, minority, and underserved communities. Given this requirement, are there measures of market concentration that can be used to inform the application of this criterion? How should these markets be defined? What other measures might be used to assess a nonbank financial firm’s importance under this criterion?**

Comments varied significantly on ways to measure a firm’s market concentration and mix of activities. However, most commenters suggested that a firm’s interconnectedness should be considered in evaluating the importance of a firm’s activities.

Comments also varied significantly on how to define the scope of the markets referenced in section 113, with some commenters advocating for broad definitions by product, trading venue and geography, and others arguing that markets must be considered distinctly (*i.e.*, households versus business, state versus local governments) given their unique characteristics.

- 7. How should the Council measure and assess the interconnectedness of a nonbank financial firm?**
- a. What measures of exposure should be considered (e.g., counterparty credit exposures, operational linkages, potential future exposures under derivative contracts, concentration in revenues, direct and contingent liquidity or credit lines, cross-holding of debt and equity)? What role should models of interconnectedness (e.g., correlation of returns or equity values across firms, stress tests) play in the Council’s determinations?**
  - b. Should the Council give special consideration to the relationships (including exposures and dependencies) between a nonbank financial company and other important financial firms or markets? If so, what metrics and thresholds should be used to identify what financial firms or markets should be considered significant for these purposes? What metrics and thresholds should be used in assessing the importance of a nonbank financial company’s relationships with these other firms and markets?**

Commenters suggested focusing on measures of interconnectedness by type of activity rather than by type of firm. Further, most commenters suggested focusing on those activities most prone to systemic risk through contagion.

To measure interconnectedness, commenters suggested evaluating, among other things, liquidity profile, contagion risk, counterparty credit risk, the nature of derivatives activity, levels of substitutability, and operational linkages.

- 8. How should the Council measure and assess the leverage of a nonbank financial firm? How should measures of leverage address liabilities, off-balance sheet exposures, and non-financial business lines? Should standards for leverage differ by types of financial activities or by industry? Should acceptable leverage standards recognize differences in regulation? Are there existing standards (e.g., the Basel III leverage ratio) for measuring leverage that could be used in assessing the leverage of nonbank financial companies?**

Most commenters asserted that it would be important for the Council to distinguish between different types and sources of leverage (secured versus unsecured; short-term versus long-term; operational versus financial). In addition, many commenters suggested varying the standards and tools for measuring leverage by the type of business and the amount of regulation

present in that industry. One commenter, however, suggested that leverage rules should be simple and apply equally to all nonbank firms according to their size.

- 9. How should the Council measure and assess the amount and types of liabilities, including the degree of reliance on short-term funding of a nonbank financial firm?**
- a. What factors should the Council consider in developing thresholds for identifying excessive reliance on short-term funding?**
  - b. How should funding concentrations be measured?**
  - c. Do some nonbank financial companies have funding sources that are contractually short-term but stable in practice (similar to “stable deposits” at banks)?**
  - d. Should the assessment link the maturity structure of the liabilities to the maturity structure and quality of the assets of nonbank financial companies?**

Commenters suggested examining the liquidity profile of a firm, taking into consideration the quality and duration of funding, diversity and mix of the sources of funding, the strength of the firm’s liquidity providers, the depth of secondary markets in the firm’s assets, and degree of maturity mismatch. Many also suggested risk-weighting liabilities to better evaluate the quality and strength of the liquidity source. One commenter suggested looking at historical industry trends in capital raising for additional color on the stability of liabilities for a particular industry.

- 10. How should the Council take into account the fact that a nonbank financial firm (or one or more of its subsidiaries or affiliates) is already subject to financial regulation in the Council’s decision to designate a firm? Are there particular aspects of prudential regulation that should be considered as particularly important (e.g., capital regulation, liquidity requirements, consolidated supervision)? Should the Council take into account whether the existing regulation of the company comports with relevant national or international standards?**

Commenters argued that firms already subjected to consolidated regulation are less likely to pose systemic risk than those that operate in “regulatory shadows”, and thus are less likely to need additional oversight. Many commenters also argued against designating a firm that is already subject to some form of regulation, as this could result in inconsistencies, interference, and duplication of regulatory effort. However, one commenter argued that the degree of current

regulation should not be a factor in evaluating whether a firm is systemically important; it should be a factor in deciding the appropriate degree of regulation for a designated firm.

Several respondents suggested distinguishing firms by industry and avoiding imposing bank-centric standards on other industries. The quality or extent of existing regulation was also cited by some commenters as a factor to be considered. Some commenters also suggested that the Council seek to follow international standards, where applicable, in designating firms and seek to prevent regulatory arbitrage within a particular industry.

Commenters indicated that the Council has the ability to obtain necessary information and data through either prudential regulators or the Office of Financial Research to make its determinations.

**11. Should the degree of public disclosures and transparency be a factor in the assessment? Should asset valuation methodologies (e.g., level 2 and level 3 assets) and risk management practices be factored into the assessment?**

Comments related to public disclosures and transparency varied. Many commenters favored public disclosure, noting that shareholders, other investors and other stakeholders benefit when rules and regulations provide adequate protections to owners and ensure that important information is promptly and transparently provided to the marketplace. Other commenters asserted that public disclosures do not have any direct bearing on risk to financial stability, and therefore should not be a factor in the designation process.

Among the commenters, there was a consensus that risk management practices be factored into the assessment of a nonbank financial company, because they are a key factor in determining the probability of material financial distress. Particular aspects of risk management practices that were highlighted include: culture; transparency; risk appetite; and management philosophy. One commenter in particular cited that effective firm-wide risk management

practices in large part distinguished companies that experienced the greatest material financial distress during the financial crisis from those that weathered the crisis.

Most commenters were silent on asset valuation methodologies except for one, which stated that valuation methodologies should not be a material factor in the assessment process.

**12. During the financial crisis, the U.S. Government instituted a variety of programs that served to strengthen the resiliency of the financial system. Nonbank financial companies participated in several of these programs. How should the Council consider the Government's extension of financial assistance to nonbank financial companies in designating companies?**

Some commenters argued that the extension of financial assistance to nonbank financial companies should not be considered determinative of which entities present systemic risk. Instead, these commenters argued that the assistance must be viewed in light of the facts and circumstances under which it was provided; whether the assistance was drawn upon; whether such assistance was permitted to expire; and any new regulatory changes that have been implemented since the assistance was initially extended.

Other commenters argued that those entities receiving federal assistance should be held to a higher standard of supervision and oversight, and that the receipt of federal assistance should serve as a threshold question for the Council in evaluating nonbank financial institutions. One commenter in particular stated that nonbank financial institutions that received government support during the crisis should automatically be regulated under section 113 from the outset.

**13. Please provide examples of best practices used by your organization or in your industry in evaluating and considering various types of risks that could be systemic in nature.**

- a. How do you approach analyzing and quantifying interdependencies with other organizations?**
- b. When and if important counterparties or linkages are identified, how do you evaluate and quantify the risks that a firm is exposed to?**
- c. What other types of information would be effective in helping to identify and avoid excessive risk concentrations that could ultimately lead to systemic instability?**

Responses to this question were few in number, but generally grouped the types of risk they faced into credit or counterparty risk, and enterprise risk. Suggested approaches in analyzing and managing risk were specific to those two categories, and within them, to industry type.

**14. Should the Council define “material financial distress” or “financial stability”? If so, what factors should the Council consider in developing those definitions?**

There was broad consensus that the Council should define “material financial distress” and “financial stability.”

Commenters suggested that a company be considered to be in “material financial distress” if it has substantial difficulty meeting its financial obligations to its creditors and counterparties, or faces capital impairment or insolvency. One commenter warned against keeping the concept of financial distress so broad as to cover significant problems with a company's business model, a history of financial losses that have not resulted in failure of the company, or a significant loss of market value or market share of the company. This commenter suggested that such concerns should be resolved through normal operations of the financial markets.

Commenters suggested that “financial stability” means a condition in which financial intermediaries, markets and market infrastructures can withstand shocks to the financial system. Others suggested that “financial stability” is characterized by a stable market defined as when there are stable prices, an efficient allocation of capital, availability of short-term funding, and low rates of failure of financial intermediaries and markets. Commenters also encouraged the

Council to look to widely-used definitions of “financial stability” used by the Financial Stability Board, the International Monetary Fund, the European Central Bank, and the Bank of England.

**15. What other risk-related considerations should the Council take into account when establishing a framework for designating nonbank financial companies?**

Other suggested risk-related considerations are as follows:

- *Legislative intent.* Some commenters argued that a determination should be based on the legislative history and intent of the DFA, and whether the treatment of certain industries was discussed when the legislation was drafted.
- *Cyclicality.* One commenter noted that those least affected by the cyclical nature of the economy are less likely to be systemically important. This commenter argued that risks are greatest at peaks and troughs of economic and market cycles and there is a need for diverse and countercyclical behavior.
- *Holistic/enterprise-view of risk management.* Some commenters asserted that an evaluation of a firm should take a holistic view of the enterprise and consider how it is managing risks. That analysis should consider the characteristics of the firm, its culture, risk tolerance and its risk management to help determine the probability of its material distress. The four firm-wide risk management practices that commenters identified as differentiating good from bad performance were: (a) effective firm-wide risk identification and analysis; (b) consistent application of independent and rigorous valuation practices across the firm; (c) effective management of funding liquidity, capital, and the balance sheet, and (d) informative and responsive risk measurement and management reporting.

- *Considering the cost of designation.* Some commenters argued that designation of a nonbank would subject it to regulatory burdens without providing the company the same benefits that a regulated bank would enjoy. Thus, the commenters argued, the cost of designation could reduce the competitiveness of the designated nonbank institution and could also potentially cause an exit or flight of businesses to less regulated products or jurisdictions.

### **III. Overview of Proposed Rule**

The proposed rule lays out the framework that the Council proposes to use to determine whether a nonbank financial company could pose a threat to the financial stability of the United States. It also implements the process set forth in the DFA that the Council would use when considering whether to subject a firm to supervision by the Board of Governors and prudential standards.

#### **A. Considerations for Determination**

As discussed in Part I, there were several themes in the ANPR commentary regarding how the Council should analyze these factors in the designation process.

One broad theme was that any analytical framework for designation should be tailored to the type of industry in which a firm operates, and that different metrics are needed for different industries. From the commentary provided, there was clear support for the need to weigh qualitative considerations in addition to quantitative factors.

With respect to the criteria for designation, one theme was that the Council should give significant weight to the following factors in making a determination: leverage, liquidity risk, interconnectedness, degree of primary regulation, and substitutability. Further, responses emphasized the importance of looking at the scope, size and scale of nonbank financial companies through a variety of lenses to best understand the underlying risk.

Commenters also noted leverage for its importance and encouraged the Council to distinguish between different types and sources of leverage (secured versus unsecured; short-term versus long-term; operational versus financial), and to use varying standards for measuring leverage by type of business.

Almost all commenters emphasized the importance of examining the liquidity profile of a firm, taking into consideration the quality and tenor of funding, diversity and mix of the sources of funding, the strength of the liquidity providers, and the degree of maturity mismatch. Many also suggested risk-weighting liabilities to better evaluate the quality and strength of the liquidity sources.

Commenters viewed both the degree to which a firm is already subjected to regulation or consolidated regulation, as well as the substitutability of an institution and its activities, as important factors in making a determination. It was generally argued that firms already subject to prudential regulation are less likely to pose systemic risk than those that operate outside a formal regulatory umbrella.

## **B. Statutory and Analytical Framework for Designations**

As discussed previously, section 113 of the DFA provides the Council the authority to require that a nonbank financial company be supervised by the Board of Governors and subject

to prudential standards if the Council determines that material financial distress at such a firm, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the firm, could pose a threat to the financial stability of the United States.

Pursuant to the provisions of the DFA, the considerations that the Council must use in making a determination on whether the company should be subject to supervision by the Board of Governors are as follows:

- (A) The extent of the leverage of the company;
- (B) The extent and nature of the off-balance-sheet exposures of the company;
- (C) The extent and nature of the transactions and relationships of the company with other significant nonbank financial companies and significant bank holding companies;
- (D) The importance of the company as a source of credit for households, businesses, and State and local governments and as a source of liquidity for the United States financial system;
- (E) The importance of the company as a source of credit for low-income, minority, or underserved communities, and the impact that the failure of such company would have on the availability of credit in such communities;
- (F) The extent to which assets are managed rather than owned by the company, and the extent to which ownership of assets under management is diffuse;
- (G) The nature, scope, size, scale, concentration, interconnectedness, and mix of the activities of the company;
- (H) The degree to which the company is already regulated by 1 or more primary financial regulatory agencies;
- (I) The amount and nature of the financial assets of the company;

(J) The amount and types of the liabilities of the company, including the degree of reliance on short-term funding; and

(K) Any other risk-related factors that the Council deems appropriate.

The Council shall consider similar factors in determining whether a foreign nonbank financial company should be designated. In addition, the Council shall consider the factors relevant to a U.S. or foreign nonbank financial company in determining whether a U.S. or foreign company, respectively, should be designated for supervision by the Board of Governors under the special anti-evasion provisions in section 113(c) of the DFA.

The proposed rule incorporates each of the statutory factors that must be considered in determining whether a U.S. or foreign nonbank financial company should be designated. The Council proposes to use a framework for applying the statutory considerations to its analysis. In developing the proposed framework, the Council has taken account of the comments received on the ANPR. If adopted in a final rule, this framework would be used by the Council in meeting its statutory obligations of assessing the threat a nonbank financial company may pose to the financial stability of the United States, taking into consideration the factors set forth in the DFA. The proposed framework for assessing systemic importance is organized around six broad categories. Each of the proposed categories reflects a different dimension of a firm's potential to experience material financial distress, as well as the nature, scope, size, scale, concentration, interconnectedness and mix of the company's activities. The six categories are as follows:

1. Size;
2. Lack of substitutes for the financial services and products the company provides;
3. Interconnectedness with other financial firms;
4. Leverage;

5. Liquidity risk and maturity mismatch; and
6. Existing regulatory scrutiny

Each of the specific statutory factors is relevant to, and would be considered as part of, one or more categories within this analytical framework. In addition, the Council would consider any other risk-related factors that the Council deems appropriate, either by regulation or on a case-by-case basis, under section 113(a)(2)(K) or (b)(2)(K) in accordance with this analytical framework. The same categories and framework would be used in the case of a foreign nonbank financial company, although the statutory factors included as part of this analysis would be adjusted to reflect the focus of certain of those factors on the U.S. operations of the foreign nonbank financial company.

The six categories can be divided into two groups. The criteria in the first group -- size, lack of substitutes, and interconnectedness -- seek to assess the potential for spillovers from the firm's distress to the broader financial system or real economy. Firms that are larger, that provide critical financial services for which there are few substitutes, and that are highly interconnected with other financial firms or markets are more likely to create spillovers if they fall into financial distress and hence pose a greater systemic threat to the financial stability of the United States. The criteria in the second group -- leverage, liquidity risk and maturity mismatch, and existing regulatory scrutiny -- seek to assess how vulnerable a company is to financial distress. Firms that are highly leveraged, that have a high degree of liquidity risk or maturity mismatch, and that are under little or no regulatory scrutiny are more vulnerable to financial distress and hence pose a greater systemic threat to the financial stability of the United States.

The Council would evaluate nonbank financial companies in each of the six categories, using quantitative metrics where possible. The Council expects to use its judgment, informed by

data on the six categories, to determine whether a firm should be designated as systemically important and supervised by the Board of Governors. This approach incorporates both quantitative measures and qualitative judgments. As part of the qualitative judgment, the Council would consider potential spillovers that could occur from financial distress or failure of the company in normal times, as well as those that could occur in times of widespread financial stress.

As noted above, each of the statutory factors in sections 113(a)(2) and (b)(2) of the DFA would be considered as part of one or more the six analytical categories. This is reflected in the following table, using the factors relevant to a U.S. nonbank financial company for illustrative purposes.<sup>2</sup>

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<sup>2</sup> The corresponding statutory factors for a foreign nonbank financial company would be considered under the relevant category or categories indicated in the table.

<b>Statutory factors:</b>	<b>Category or categories in which this factor would be considered:</b>
(A) the extent of the leverage of the company;	Leverage
(B) the extent and nature of the off-balance-sheet exposures of the company;	Size; Interconnectedness
(C) the extent and nature of the transactions and relationships of the company with other significant nonbank financial companies and significant bank holding companies;	Interconnectedness
(D) the importance of the company as a source of credit for households, businesses, and State and local governments and as a source of liquidity for the United States financial system;	Size; Lack of substitutes
(E) the importance of the company as a source of credit for low-income, minority, or underserved communities, and the impact that the failure of such company would have on the availability of credit in such communities;	Lack of substitutes
(F) the extent to which assets are managed rather than owned by the company, and the extent to which ownership of assets under management is diffuse;	Size; Interconnectedness
(G) the nature, scope, size, scale, concentration, interconnectedness, and mix of the activities of the company;	Size; Lack of substitutes; Interconnectedness
(H) the degree to which the company is already regulated by 1 or more primary financial regulatory agencies;	Existing regulatory scrutiny
(I) the amount and nature of the financial assets of the company;	Size; Interconnectedness
(J) the amount and types of the liabilities of the company, including the degree of reliance on short-term funding;	Liquidity risk and maturity mismatch; Size; Interconnectedness
(K) any other risk-related factors that the Council deems appropriate	Appropriate category or categories based on the nature of the additional risk-related factor

Any determinations of the Council made under the proposed rule using this analytical framework would be based on whether the firm’s material financial distress, or the nature, scope, size, scale, concentration, interconnectedness or mix of its activities, could pose a threat to the financial stability of the United States in accordance with sections 113(a)(1) and (b)(1), as relevant.

Under the proposal, the Council would use the same six categories embodied in the framework in assessing the systemic importance of companies in different industry sectors, although the application of the framework would be adapted for the risks presented by a particular industry sector and the business models present in each sector. For example, the metrics that are best suited to measure the six categories of systemic importance likely will differ across industry sectors. The Council will review these metrics on a periodic basis and revise them as appropriate.

The proposed framework is consistent with the international approach to identifying systemically important firms that is currently under development by the Basel Committee on Banking Supervision and the Financial Stability Board, reducing concerns about an unlevel global playing field and regulatory arbitrage. Receipt of previous federal assistance as a criterion to identify a systemically significant firm will not be considered as a separate criteria in the proposed framework as that assistance should be viewed in light of the facts and circumstances under which it was provided. Furthermore, the framework described above incorporates the concepts of “material financial distress” and “financial stability” without the need to explicitly define them in the rule.

The Council expects to begin assessing the systemic importance of nonbank financial companies under the proposed framework shortly after adopting a final rule. Subsequently, and on a regular basis, the Council expects to screen nonbank financial companies using the six categories to identify companies whose material financial distress, or the nature, scope, size, scale, concentration, interconnectedness, or mix of activities, could pose a threat to the financial stability of the United States. In addition, under the DFA, the Council must review each designation of a nonbank financial company at least once a year. The review would follow the

same framework as the initial designation and would consider current data on the six categories described above.

### **C. Other Aspects of Proposed Rule**

The proposed rule also implements the other provisions of section 113 of the DFA, including (i) the anti-evasion authority of the Council set forth in section 113(c) of the DFA; (ii) the provisions governing notice of, and the opportunity for a hearing on, a proposed determination; and (iii) the provisions regarding consultation, coordination and judicial review in connection with a determination.

Given the importance of this rulemaking and the fact that the Council already published and received comment on the ANPR, we are providing a 30-day comment period for this NPR.

### **IV. Regulatory Flexibility Act**

It is hereby certified that this rule will not have a significant economic impact on a substantial number of small entities. The rule would apply only to nonbank financial companies whose failure could pose a threat to the financial stability of the United States. Size is an important factor, although not the exclusive factor, in assessing whether a company's failure could pose a threat to financial stability. The Council does not expect the rule to directly affect a substantial number of small entities. Accordingly, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. 601 et seq) is not required.

### **V. Paperwork Reduction Act**

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). 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, DC 20503, with copies to Michael Tae, Department of the Treasury, Washington, DC 20220. Comments on the collection of information must be received by [INSERT DATE 60 DAYS AFTER PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]. Comments are specifically requested concerning:

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;

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

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

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

The collection of information in these proposed regulations are found in § 1310.20, § 1310.21 and § 1310.22.

Estimated total annual reporting burden: 500 hours.

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.

## VI. Executive Order 12866

It has been determined that this regulation is a significant regulatory action as defined in section 3 of Executive Order 12866 (“Regulatory Planning and Review”) and it has been reviewed by the Office of Management and Budget.

### **List of Subjects**

Financial Stability Oversight Council, nonbank financial companies.

### **Financial Stability Oversight Council**

#### *Authority and Issuance*

For the reasons set forth in the preamble, the Financial Stability Oversight Council proposes to add a new part 1310 to Title 12 of the Code of Federal Regulations, to read as follows:

### **Part 1310 – Supervision and Regulation of Certain Nonbank Financial Companies**

Sec.

Subpart A - General

§ 1310.1 Authority and purpose.

§ 1310.2 Definitions.

Subpart B - Determinations

§ 1310.10 Council determination regarding U.S. nonbank financial companies.

§ 1310.11 Council determination regarding foreign nonbank financial companies.

§ 1310.12 Anti-evasion provision.

Subpart C – Information Collection and Hearings

§ 1310.20 Council information collection and coordination.

§ 1310.21 Notice and opportunity for a hearing and final determination.

§ 1310.22 Emergency exception to § 1310.21.

§ 1310.23 Council reevaluation and rescission of determinations.

§ 1310.24 Judicial review of Council’s final determination.

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

**Subpart A - General**

### **§ 1310.1 Authority and purpose.**

(a) Authority. This part is issued by the Financial Stability Oversight Council (Council) under sections 111, 112 and 113 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) (12 U.S.C. 5321, 5322 and 5323).

(b) Purpose. The principal purposes of this part are to set forth the standards and procedures governing Council determinations whether to require that a nonbank financial company be supervised by the Board of Governors and be subject to prudential standards because the company could pose a threat to the financial stability of the United States.

### **§ 1310.2 Definitions.**

The terms used in this regulation have the following meanings:

Board of Governors. The term ‘Board of Governors’ means the Board of Governors of the Federal Reserve System.

Commission. The term “Commission” means the Securities and Exchange Commission, except in the context of the Commodity Futures Trading Commission.

Council. The term ‘Council’ means the Financial Stability Oversight Council.

Foreign nonbank financial company. The term ‘foreign nonbank financial company’ means a company (other than a company that is, or is treated in the United States as, a bank holding company) that is--

- (1) Incorporated or organized in a country other than the United States; and
- (2) Predominantly engaged in financial activities as defined by regulation of the Board of Governors under section 102(a)(6) of the Dodd-Frank Act, including through a branch in the United States.

Member agency. The term `member agency' means an agency represented by a voting member of the Council.

Primary financial regulatory agency. The term `primary financial regulatory agency' means--

(1) The appropriate Federal banking agency, with respect to institutions described in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), except to the extent that an institution is or the activities of an institution are otherwise described in paragraph (2), (3), (4), or (5);

(2) the Securities and Exchange Commission, with respect to--

(i) Any broker or dealer that is registered with the Commission under the Securities Exchange Act of 1934, with respect to the activities of the broker or dealer that require the broker or dealer to be registered under that Act;

(ii) Any investment company that is registered with the Commission under the Investment Company Act of 1940, with respect to the activities of the investment company that require the investment company to be registered under that Act;

(iii) Any investment adviser that is registered with the Commission under the Investment Advisers Act of 1940, with respect to the investment advisory activities of such company and activities that are incidental to such advisory activities;

(iv) Any clearing agency registered with the Commission under the Securities Exchange Act of 1934, with respect to the activities of the clearing agency that require the agency to be registered under such Act;

(v) Any nationally recognized statistical rating organization registered with the Commission under the Securities Exchange Act of 1934;

(vi) Any transfer agent registered with the Commission under the Securities Exchange Act of 1934;

(vii) Any exchange registered as a national securities exchange with the Commission under the Securities Exchange Act of 1934;

(viii) Any national securities association registered with the Commission under the Securities Exchange Act of 1934;

(ix) Any securities information processor registered with the Commission under the Securities Exchange Act of 1934;

(x) The Municipal Securities Rulemaking Board established under the Securities Exchange Act of 1934;

(xi) The Public Company Accounting Oversight Board established under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7211 et seq.);

(xii) The Securities Investor Protection Corporation established under the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa et seq.); and

(xiii) Any security-based swap execution facility, security-based swap data repository, security-based swap dealer or major security-based swap participant registered with the Commission under the Securities Exchange Act of 1934, with respect to the security-based swap activities of the person that require such person to be registered under such Act;

(3) The Commodity Futures Trading Commission, with respect to--

(i) Any futures commission merchant registered with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 et seq.), with respect to the activities of the futures commission merchant that require the futures commission merchant to be registered under that Act;

(ii) Any commodity pool operator registered with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 et seq.), with respect to the activities of the commodity pool operator that require the commodity pool operator to be registered under that Act, or a commodity pool, as defined in that Act;

(iii) Any commodity trading advisor or introducing broker registered with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 et seq.), with respect to the activities of the commodity trading advisor or introducing broker that require the commodity trading advisor or introducing broker to be registered under that Act;

(iv) Any derivatives clearing organization registered with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 et seq.), with respect to the activities of the derivatives clearing organization that require the derivatives clearing organization to be registered under that Act;

(v) Any board of trade designated as a contract market by the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 et seq.);

(vi) Any futures association registered with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 et seq.);

(vii) Any retail foreign exchange dealer registered with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 et seq.), with respect to the activities of the retail foreign exchange dealer that require the retail foreign exchange dealer to be registered under that Act;

(viii) Any swap execution facility, swap data repository, swap dealer, or major swap participant registered with the Commodity Futures Trading Commission under the Commodity

Exchange Act (7 U.S.C. 1 et seq.) with respect to the swap activities of the person that require such person to be registered under that Act; and

(ix) Any registered entity under the Commodity Exchange Act (7 U.S.C. 1 et seq.), with respect to the activities of the registered entity that require the registered entity to be registered under that Act;

(4) The State insurance authority of the State in which an insurance company is domiciled, with respect to the insurance activities and activities that are incidental to such insurance activities of an insurance company that is subject to supervision by the State insurance authority under State insurance law; and

(5) the Federal Housing Finance Agency, with respect to Federal Home Loan Banks or the Federal Home Loan Bank System, and with respect to the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation.

Prudential standards. The term `prudential standards' means enhanced supervision and regulatory standards developed by the Board of Governors under section 165 of the Dodd-Frank Act.

Significant companies. The terms “significant nonbank financial company” and “significant bank holding company” have the meanings ascribed to such terms by regulation of the Board of Governors.

U.S. nonbank financial company. The term `U.S. nonbank financial company' means a company (other than a bank holding company, a Farm Credit System institution chartered and subject to the provisions of the Farm Credit Act of 1971 (12 U.S.C. 2001 et seq.), or a national securities exchange (or parent thereof), clearing agency (or parent thereof, unless the parent is a bank holding company), security-based swap execution facility, or security-based swap data

repository registered with the Commission, or a board of trade designated as a contract market (or parent thereof), or a derivatives clearing organization (or parent thereof, unless the parent is a bank holding company), swap execution facility or a swap data repository registered with the Commodity Futures Trading Commission), that is--

- (1) Incorporated or organized under the laws of the United States or any State; and
- (2) Predominantly engaged in financial activities as defined by regulation of the Board of Governors under section 102(a)(6) of the Dodd-Frank Act.

## **Subpart B - Determinations**

### **§ 1310.10 Council determination regarding U.S. nonbank financial companies.**

(a) Determination. The Council may determine that a U.S. nonbank financial company shall be supervised by the Board of Governors and shall be subject to prudential standards if the Council determines that material financial distress at the U.S. nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the U.S. nonbank financial company, could pose a threat to the financial stability of the United States.

(b) Vote required. Any proposed or final determination under paragraph (a) shall—

- (1) Be made by the Council and may not be delegated by the Council; and
- (2) Require the vote of not fewer than two-thirds of the voting members of the Council then serving, including the affirmative vote of the Chairperson of the Council.

(c) Considerations. In making a proposed or final determination with respect to a U.S. nonbank financial company under this section, the Council shall consider:

- (1) The extent of the leverage of the company and its subsidiaries;

(2) The extent and nature of the off-balance-sheet exposures of the company and its subsidiaries;

(3) The extent and nature of the transactions and relationships of the company and its subsidiaries with other significant nonbank financial companies and significant bank holding companies;

(4) The importance of the company and its subsidiaries as a source of credit for households, businesses, and State and local governments and as a source of liquidity for the United States financial system;

(5) The importance of the company and its subsidiaries as a source of credit for low-income, minority, or underserved communities, and the impact that the failure of such company would have on the availability of credit in such communities;

(6) The extent to which assets are managed rather than owned by the company and its subsidiaries, and the extent to which ownership of assets under management is diffuse;

(7) The nature, scope, size, scale, concentration, interconnectedness, and mix of the activities of the company and its subsidiaries;

(8) The degree to which the company and its subsidiaries are already regulated by 1 or more primary financial regulatory agencies;

(9) The amount and nature of the financial assets of the company and its subsidiaries;

(10) The amount and types of the liabilities of the company and its subsidiaries, including the degree of reliance on short-term funding; and

(11) Any other risk-related factor that the Council deems appropriate, either by regulation or on a case-by-case basis.

(d) Consultations. The Council shall consult with the primary financial regulatory agency, if any, for each nonbank financial company that is being considered for supervision by the Board of Governors under this § 1310.10 and with the primary financial regulatory agency, if any, of any subsidiary of such nonbank financial company before the Council makes any final determination under this §1310.10 with respect to such nonbank financial company.

(e) Back-up examination by the Board of Governors. (1) If the Council is unable to determine whether the financial activities of a U.S. nonbank financial company, including a U.S. nonbank financial company that is owned by a foreign nonbank financial company, pose a threat to the financial stability of the United States, based on information or reports otherwise obtained by the Council, including discussions with management and publicly available information, the Council may request the Board of Governors, and the Board of Governors is authorized, to conduct an examination of the U.S. nonbank financial company and its subsidiaries for the sole purpose of determining whether the nonbank financial company or foreign nonbank financial company should be designated under this section or § 1310.11, as applicable, for supervision by the Board of Governors.

(2) The Council shall review the results of the examination of a nonbank financial company (including its subsidiaries) conducted by the Board of Governors under this subsection in connection with any determination by the Council under paragraph (a) or § 1310.11 with respect to the company.

(f) International Coordination. In exercising its duties under this section with respect to cross-border activities and markets the Council, acting through its Chairperson or other authorized designee, shall consult with appropriate foreign regulatory authorities, to the extent appropriate.

**§ 1310.11 Council determination regarding foreign nonbank financial companies.**

(a) Determination. The Council may determine that a foreign nonbank financial company shall be supervised by the Board of Governors and shall be subject to prudential standards if the Council determines that material financial distress at the foreign nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the foreign nonbank financial company, could pose a threat to the financial stability of the United States.

(b) Vote required. Any proposed or final determination under paragraph (a) shall—

(1) Be made by the Council and may not be delegated by the Council; and

(2) Require the vote of not fewer than two-thirds of the voting members of the Council then serving, including the affirmative vote of the Chairperson of the Council.

(c) Considerations. In making a proposed or final determination under this section with respect to a foreign nonbank financial company, the Council shall consider:

(1) The extent of the leverage of the company and its subsidiaries;

(2) The extent and nature of the United States related off-balance-sheet exposures of the company and its subsidiaries;

(3) The extent and nature of the transactions and relationships of the company and its subsidiaries with other significant nonbank financial companies and significant bank holding companies;

(4) The importance of the company and its subsidiaries as a source of credit for United States households, businesses, and State and local governments and as a source of liquidity for the United States financial system;

(5) The importance of the company and its subsidiaries as a source of credit for low-income, minority, or underserved communities in the United States, and the impact that the failure of such company would have on the availability of credit in such communities;

(6) The extent to which assets are managed rather than owned by the company and its subsidiaries and the extent to which ownership of assets under management is diffuse;

(7) The nature, scope, size, scale, concentration, interconnectedness, and mix of the activities of the company and its subsidiaries;

(8) The extent to which the company and its subsidiaries are subject to prudential standards on a consolidated basis in the company's home country that are administered and enforced by a comparable foreign supervisory authority;

(9) The amount and nature of the United States financial assets of the company its subsidiaries;

(10) The amount and nature of the liabilities of the company and its subsidiaries used to fund activities and operations in the United States, including the degree of reliance on short-term funding; and;

(11) Any other risk-related factor that the Council deems appropriate, either by regulation or on a case-by-case basis.

(d) Consultation. The Council shall consult with the primary financial regulatory agency, if any, for each foreign nonbank financial company that is being considered for supervision by the Board of Governors under this §1310.11 and with the primary financial regulatory agency, if any, of any subsidiary of such foreign nonbank financial company before the Council makes any final determination under this § 1310.11 with respect to such foreign nonbank financial company.

(e) International Coordination. In exercising its duties under this section with respect to foreign nonbank financial companies, the Council, acting through its Chairperson or other authorized designee, shall consult with appropriate foreign regulatory authorities, to the extent appropriate.

**§ 1310.12 Anti-evasion provision.**

(a) Determinations. In order to avoid evasion of this part, the Council, on its own initiative or at the request of the Board of Governors, may require that the financial activities of a company shall be supervised by the Board of Governors and subject to prudential standards if the Council determines that:

(1) Material financial distress related to, or the nature, scope, size, scale, concentration, interconnectedness, or mix of, the financial activities conducted directly or indirectly by a company incorporated or organized under the laws of the United States or any State or the financial activities in the United States of a company incorporated or organized in a country other than the United States would pose a threat to the financial stability of the United States, based on consideration of the factors in—

(A) § 1310.10(b) if the company is incorporated or organized under the laws of the United States or any State; or

(B) § 1310.11(b) if the company is incorporated or organized in a country other than the United States; and

(2) The company is organized or operates in such a manner as to evade the application of Title I of the Dodd-Frank Act or this part;

(b) Vote required. Any proposed or final determination under paragraph (a) shall—

(1) Be made by the Council and may not be delegated by the Council; and

(2) Require the vote of not fewer than two-thirds of the voting members of the Council then serving, including the affirmative vote of the Chairperson of the Council.

(c) Establishment of an intermediate holding company. (1) Upon a determination under this section, the company that is the subject of the determination may establish, subject to such regulations, orders and guidance as the Board of Governors may issue, an intermediate holding company in which the financial activities of such company and its subsidiaries shall be conducted in compliance with any regulations or guidance provided by the Board of Governors. Such intermediate holding company shall be subject to the supervision of the Board of Governors and to prudential standards as if the intermediate holding company were a nonbank financial company supervised by the Board of Governors.

(2) To facilitate the supervision of the financial activities conducted by a company that is the subject of a determination under this section, the Board of Governors may require the company to establish, subject to such regulations, orders and guidance as the Board of Governors may issue, an intermediate holding company that will be subject to the supervision of the Board of Governors and to prudential standards, as if the intermediate holding company were a nonbank financial company supervised by the Board of Governors.

(d) Definition of covered financial activities. For purposes of this section, the term `financial activities'--

(1) Means activities that are financial in nature (as defined in section 4(k) of the Bank Holding Company Act of 1956);

(2) Includes the ownership or control of one or more insured depository institutions; and

(3) Does not include internal financial activities conducted for the company or any affiliate thereof, including internal treasury, investment, and employee benefit functions, as such activities may be defined by the Board of Governors.

(e) Consultation. The Council shall consult with the primary financial regulatory agency, if any, for each company or subsidiary of a company that is being considered for supervision by the Board of Governors under this section before the Council makes any final determination with respect to such company.

(f) International coordination. In exercising its duties under this section with respect to a company that is incorporated or organized in a country other than the United States, the Council, acting through its Chairperson or other authorized designee, shall consult with appropriate foreign regulatory authorities, to the extent appropriate.

### **Subpart C – Information Collection and Hearings**

#### **§ 1310.20 Council information collection and coordination.**

(a) Information Collection regarding Nonbank Financial Companies from the Office of Financial Research, Member Agencies, the Federal Insurance Office, and Other Federal and State Financial Regulatory Agencies. The Council may receive, and may request the submission of, such data or information from the Office of Financial Research, member agencies, the Federal Insurance Office, and other Federal and State financial regulatory agencies as the Council deems necessary or appropriate to carry out the duties of the Council under Title I of the Dodd-Frank Act or this part.

(b) Information Collection from Nonbank Financial Companies. (1) The Council may, to the extent the Council determines appropriate, direct the Office of Financial Research to require the submission of periodic, special or other reports concerning one or more nonbank financial companies, including a nonbank financial company that is being considered for potential designation by the Council under § 1310.10, § 1310.11, or § 1310.12, for the purpose of assessing whether a nonbank financial company poses a threat to the financial stability of the United States.

(2) Before requiring the submission of reports under this paragraph (b) from any nonbank financial company that is regulated by a member agency or any primary financial regulatory agency, the Council, acting through the Office of Financial Research, shall coordinate with such agency or agencies and shall, whenever possible, rely on information available from the Office of Financial Research or such agency or agencies.

(3) Before requiring the submission of reports under this paragraph (b) from a company that is a foreign nonbank financial company, the Council shall, acting through the Office of Financial Research, to the extent appropriate, consult with the appropriate foreign regulator of such company and, whenever possible, rely on information already being collected by such foreign regulator, with English translation.

§ 1310.21 Notice and opportunity for a hearing and final determination.

(a) Written notice of Council consideration of determination. Before providing a nonbank financial company written notice of a proposed determination under paragraph (b), the Council shall provide the nonbank financial company—

(1) Written notice that the Council is considering whether to make a proposed determination with respect to the company under this part; and

(2) An opportunity to submit written materials, within such time as the Council determines to be appropriate, to the Council concerning whether, in the company's view, material financial distress at the company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the company, could pose a threat to the financial stability of the United States. The Council shall fix a time (not later than 30 days after the Council's notice under this subsection) and place for the nonbank financial company to submit written materials. The Council, in its discretion, may also provide the nonbank financial company additional time to submit written materials under this paragraph.

(b) Written notice of proposed determination. If the Council determines under § 1310.10, § 1310.11, or § 1310.12 that a nonbank financial company or the financial activities of a company should be supervised by the Board of Governors and be subject to prudential standards, the Council shall provide to the nonbank financial company or company written notice of the proposed determination of the Council, including an explanation of the basis of the proposed determination of the Council.

(c) Hearing. (1) Not later than 30 days after the date of receipt of the notice of a proposed determination under paragraph (b), the nonbank financial company or company may request, in writing, an opportunity for a written or oral hearing before the Council to contest the proposed determination.

(2) Any such request from a nonbank financial company or company for an opportunity for a written or oral hearing before the Council shall be transmitted to the Council's Legal Counsel.

(3) Upon receipt of a timely request under this paragraph (c), the Council shall fix a time (not later than 30 days after the date of receipt of the request) and place at which such company may appear, personally or through counsel, to submit written materials (or, at the sole discretion of the Council, oral testimony and oral argument) concerning whether material financial distress at the company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the company, could pose a threat to the financial stability of the United States.

(d) Final determination. If the nonbank financial company or company makes a timely request for a hearing under paragraph (c), the Council shall, not later than 60 days after the date of the hearing under paragraph (c)—

(1) Make a final determination under § 1310.10, § 1310.11, or § 1310.12 regarding whether the nonbank financial company or the financial activities of the company shall be supervised by the Board of Governors and subject to prudential standards; and

(2) Notify the nonbank financial company or company, in writing, of the final determination of the Council, which shall contain a statement of the basis for the decision of the Council.

(e) No hearing requested. If a nonbank financial company or company does not make a timely request for a hearing under paragraph (c), the Council shall, not later than 10 days after the date by which the company could have requested a hearing under paragraph (c)—

(1) Make a final determination under § 1310.10, § 1310.11, or § 1310.12 regarding whether the nonbank financial company or the financial activities of the company shall be supervised by the Board of Governors and subject to prudential standards; and

(2) Notify the nonbank financial company or company, in writing, of the final determination of the Council, which shall contain a statement of the basis for the decision of the Council.

**§ 1310.22 Emergency exception to § 1310.21.**

(a) Exception to § 1310.21. Notwithstanding § 1310.21, the Council may waive or modify any or all of the notice, hearing and other requirements of § 1310.21 with respect to a nonbank financial company or company if—

(1) The Council determines that such waiver or modification is necessary or appropriate to prevent or mitigate threats posed by the nonbank financial company or the financial activities of the company, as appropriate, to the financial stability of the United States;

(2) The Council provides notice of the waiver or modification under this section and the proposed determination of the Council under § 1310.10, § 1310.11, or § 1310.12 to the nonbank financial company or company as soon as practicable, but not later than 24 hours after the waiver or modification is granted.

(b) Opportunity for hearing. (1) If the Council pursuant to paragraph (a) waives or modifies the requirements of § 1310.21 with respect to a nonbank financial company or company, the Council shall—

(i) Allow the nonbank financial company or company, not later than 10 days after the date of receipt of the notice described in paragraph (a)(2), to request, in writing, an opportunity for a written or oral hearing before the Council to contest—

(A) The waiver or modification under this section; and

(B) The proposed determination of the Council under § 1310.10, § 1310.11, or § 1310.12, as applicable

(2) Any request from a nonbank financial company or other company under paragraph (b)(1) for an opportunity for a written or oral hearing before the Council shall be transmitted to the Council's Legal Counsel.

(3) Upon receipt of a timely request under paragraph (b)(2), the Council shall fix a time (not later than 15 days after the date of receipt of the request) and place at which the nonbank financial company may appear, personally or through counsel, to submit written materials (or, at the sole discretion of the Council, oral testimony and oral argument) regarding—

(i) The waiver or modification granted under this section; and

(ii) Whether material financial distress at the company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the company, could pose a threat to the financial stability of the United States.

(c) Notice of final determination. (1) If the nonbank financial company or other company makes a timely request for a hearing under paragraph (b), the Council shall, not later than 30 days after the date of the hearing under paragraph (b)—

(i) Make a final determination regarding—

(A) Any waiver or modifications under this § 1310.22; and

(B) Whether the nonbank financial company or the financial activities of the company shall be supervised by the Board of Governors and subject to prudential standards under § 1310.10, § 1310.11, or § 1310.12, as applicable; and

(ii) Notify the nonbank financial company or company of the final determinations of the Council described in paragraph (e)(1), which shall contain a statement of the basis for the decision of the Council.

(2) The Council may not make a final determination regarding any waiver or modifications under this § 1310.22 or whether the nonbank financial company or the financial activities of the company shall be supervised by the Board of Governors and subject to prudential standards under § 1310.10, § 1310.11, or § 1310.12, as applicable, prior to the earlier of—

(i) The date by which the company could have requested a hearing under paragraph (b); or

(ii) The date on which the company notifies the Council in writing that it does not intend to request a hearing;

(d) Vote required. Any determination by the Council under paragraph (a)(1) to waive or modify the requirements of § 1310.21 shall—

(1) Be made by the Council and may not be delegated by the Council; and

(2) Require the vote of not fewer than two-thirds of the voting members of the Council then serving, including the affirmative vote of the Chairperson of the Council.

### **§ 1310.23 Council reevaluation and rescission of determinations.**

(a) The Council shall, not less frequently than annually:

(1) Reevaluate each currently effective determination made under § 1310.10(a), § 1310.11(a), or § 1310.12(a); and

(2) Rescind any such determination, if the Council determines that the nonbank financial company no longer meets the standards under § 1310.10(a), or § 1310.11(a), as applicable.

(b) Vote required. Any decision by the Council under paragraph (a)(2) to rescind a determination made with respect to a nonbank financial company or the financial activities of a company shall—

(1) Be made by the Council and may not be delegated by the Council; and

(2) Require the vote of not fewer than two-thirds of the voting members of the Council then serving, including the affirmative vote of the Chairperson of the Council.

**§ 1310.24 Judicial review of Council’s final determination.**

(a) In accordance with 12 U.S.C. 5323(h), if the Council makes a final determination under this part that a nonbank financial company, or the financial activities of a company, shall be subject to supervision by the Board of Governors and subject to prudential standards, such nonbank financial company or company may, not later than 30 days after the date of receipt of the notice of final determination under § 1310.21(d) or (e) or § 1310.22(e), or § 1310.23(a)(2), bring an action in the United States district court for the judicial district in which the home office of such nonbank financial company or company is located, or in the United States District Court for the District of Columbia, for an order requiring that the final determination be rescinded.

(b) Review of a final determination by the Council by the court shall be limited to whether the final determination made under this part was arbitrary and capricious.

Dated:

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