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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: Second notice of proposed rulemaking and proposed interpretive guidance with request for public comment.

SUMMARY: Section 113 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) authorizes the Financial Stability Oversight Council (the “Council”) to require a nonbank financial company to be supervised by the Board of Governors of the Federal Reserve System (the “Board of Governors”) and be subject to prudential standards in accordance with Title I of the Dodd-Frank Act if the Council determines that material financial distress at the nonbank financial company, or 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.

The proposed rule and attached guidance describe the manner in which the Council intends to apply the statutory standards and considerations, and the processes and procedures that

the Council intends to follow, in making determinations under section 113 of the Dodd-Frank Act. The Council issued an advance notice of proposed rulemaking on October 6, 2010, and a notice of proposed rulemaking on January 26, 2011, regarding determinations under section 113.

DATES: Comment due date: [INSERT DATE THAT IS 60 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>. 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> 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.

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

Note: To receive consideration as public comments, comments must be submitted through the method specified.

Public Inspection of Public Comments: All properly submitted comments will be available for inspection and downloading at <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 Eric Froman, Office of the General Counsel, Treasury, at (202) 622-1942. All responses to this notice should be submitted via <http://www.regulations.gov> to ensure consideration.

SUPPLEMENTARY INFORMATION:

I. Background

Section 111 of the Dodd-Frank Act (12 U.S.C. 5321) established the Financial Stability Oversight Council. Among 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.”

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 nonbank financial

companies without causing further instability. To address any potential risks posed to U.S. financial stability by these companies, the Dodd-Frank Act authorizes the Council to determine that certain nonbank financial companies will be subject to supervision by the Board of Governors and prudential standards. Title I of the Dodd-Frank Act defines a “nonbank financial company” as a domestic or foreign company that is “predominantly engaged in financial activities” in the United States, other than bank holding companies and certain other types of firms.¹ The Council intends to interpret the term “company” broadly with respect to nonbank financial companies and other companies in connection with section 113 of the Dodd-Frank Act, to include any corporation, limited liability company, partnership, business trust, association (incorporated or unincorporated), or similar organization. The Dodd-Frank Act provides that a company is “predominantly engaged” in financial activities if either (i) the annual gross revenues derived by the company and all of its subsidiaries from financial activities, as well as from the ownership or control of insured depository institutions, represent 85 percent or more of the consolidated annual gross revenues of the company; or (ii) the consolidated assets of the company and all of its subsidiaries related to financial activities, as well as related to the ownership or control of insured depository institutions, represent 85 percent or more of the consolidated assets of the company. The Dodd-Frank Act requires the Board of Governors to establish the requirements for determining whether a company is “predominantly engaged in financial activities” for this purpose.²

¹ See 12 U.S.C. 5311(a)(4).

² See 12 U.S.C. 5311(b). The Board of Governors has requested comment on a proposed rule that would establish these requirements. See 76 FR 7731 (February 11, 2011). The Board of Governors’ proposed rule would establish a process by which a company may request a determination by the Board of Governors as to whether a particular activity is financial in nature. In addition, the proposed rule would provide the Board of Governors the authority to determine

The Council issued an advance notice of proposed rulemaking (the “ANPR”) on October 6, 2010 (75 FR 61653), in which it requested public comment on the statutory factors that the Dodd-Frank Act requires the Council to consider in determining whether a nonbank financial company should be supervised by the Board of Governors and subject to prudential standards. The ANPR posed 15 questions, all of which addressed the application of the statutory considerations that the Council must take into account in the process of determining whether a nonbank financial company should be subject to supervision by the Board of Governors and be subject to prudential standards (the “Determination Process”).

On January 26, 2011, the Council issued a notice of proposed rulemaking (the “NPR”) (76 FR 4555) through which it sought public comment regarding the specific criteria and analytic framework that the Council intends to apply in the Determination Process. The comment period for the NPR closed on February 25, 2011.

In response to comments that the Council received on the NPR, the Council is issuing a second notice of proposed rulemaking (the “Proposed Rule”) and proposed interpretive guidance (the “Proposed Guidance”) to provide (i) additional details regarding the framework that the Council intends to use in the process of assessing whether a nonbank financial company could pose a threat to U.S. financial stability, and (ii) further opportunity for public comment on the Council’s proposed approach to the Determination Process.

II. Overview of Comments

The Council received 35 comments in response to the NPR, of which 11 were from trade associations or advocacy groups, 10 were from the insurance industry, eight were from entities in the asset management industry, two were from law firms, two were from individuals, one was

that a company is predominantly engaged in financial activities based on all the facts and circumstances.

from a think tank, and one was from a specialty finance company. (Comment letters are available online at: <http://www.regulations.gov>.) In addition to issuing the ANPR and the NPR for public comment, staff of Council member agencies met with financial industry representatives to discuss the proposals. Meeting participants generally reiterated the views expressed in their comment submissions. Many commenters responding to the NPR referred to comments that they previously had submitted in response to the ANPR. While this preamble describes many of the comments submitted in response to the ANPR and the NPR, and describes how the Proposed Rule and Proposed Guidance address certain of those comments, the Council expects to provide a more complete discussion of the comments submitted in response to the Proposed Rule and Proposed Guidance after considering the comments received during the comment period on the Proposed Rule and Proposed Guidance.

The comments addressed various aspects of the NPR, but the majority of comments addressed one or more of the following three broad issues: the substantive content of the NPR, the scope of the Council’s Constitutional or statutory authority, and the Council’s compliance with the Administrative Procedure Act (the “APA”).

A. Substantive Content of the NPR

The majority of commenters asserted that the NPR lacked the necessary level of specificity and detail needed to provide meaningful guidance regarding the manner in which the Council intends to exercise its determination authority under section 113 of the Dodd-Frank Act.³

³ Many commenters stated that the NPR did not adequately define each of the 10 statutory considerations that the Council must consider when determining whether a nonbank financial company could pose a threat to the financial stability of the United States. Some commenters asserted that they were unable to provide substantive input regarding the determination framework set forth in the NPR, because the Council failed to explain its rationale for selecting the six framework categories. Other commenters stated that the Council’s NPR failed to provide

Some commenters asserted that the Council should include the proposed six-category framework in the rule text, rather than in the preamble, so as to require the Council to apply the framework in the Determination Process. The majority of commenters requested that the Council issue specific metrics to measure the six categories, and any relative weighting that the Council may assign to one or more of the six categories, for public comment. Other commenters suggested that the Council define the terms “financial stability” and “material financial distress” before establishing any specific metrics, as the Council should consider such definitions when identifying appropriate metrics.

Many commenters asserted that the Council provided an insufficient level of detail regarding the Determination Process. Specifically, commenters suggested that the initial notice of consideration should provide a detailed explanation of the basis of the Council’s consideration of the nonbank financial company for a proposed determination, including an outline of the specific statutory considerations on which the Council based its decision.

Some commenters, the majority of whom represented the insurance industry, noted that two insurance-related positions on the Council were vacant: (1) an independent insurance expert (to be appointed by the President) and (2) the Director of the Federal Insurance Office (to be

nonbank financial companies any basis on which to make informed business decisions in anticipation of a potential determination, such as decisions related to potential expansion into new lines of business, mergers, acquisitions, financial investments, and hiring plans, as companies may delay or avoid business pursuits in light of the uncertainty surrounding the Determination Process. Other commenters stated that the lack of clarity in the NPR failed to provide nonbank financial companies with a basis on which to consider actions that could reduce the company’s potential to pose a threat to U.S. financial stability, and thereby lessen the need for determination.

appointed by the Secretary of the Treasury). These commenters requested that the Council delay issuing a final rule until those Council positions are filled.⁴

Comments on the Six-Factor Framework

A majority of commenters addressed various aspects of the proposed six-category framework that the Council set forth in the NPR. Several commenters praised the six framework categories as useful tools to assess a nonbank financial company's potential to pose a threat to U.S. financial stability. One commenter expressed concern that the Council intended to use the six-category framework as a proxy for the 10 specific statutory considerations that the Council is required to consider when determining whether a nonbank financial company could pose a threat to U.S. financial stability.

Commenters also asked for clarification regarding the manner in which the Council intends to assess a nonbank financial company within each category and provided suggestions regarding the manner in which the Council should do so. Some of these comments are described below.

Interconnectedness

Many commenters expressed the view that interconnectedness with the broader financial system is the most important indicator of a nonbank financial company's potential to pose a threat to U.S. financial stability. Some commenters suggested that the Council should assess whether failure of a nonbank financial company would threaten the financial condition and competitive position of other significant financial companies when evaluating a nonbank financial company under this category. Commenters from the asset management industry and

⁴ S. Roy Woodall has been appointed by President Obama as the independent insurance expert on the Council. Michael McRaith has been appointed as the Director of the Federal Insurance Office.

the insurance industry provided comments on how interconnectedness should be measured within those industries.

Substitutability

Many commenters stated that the substitutability of a nonbank financial company's goods or services that are important to the overall financial system is an important factor that the Council should consider in the Determination Process. Commenters from the asset management and insurance industries noted that there is little concentration in the asset management and insurance industries.

Size

Commenters generally noted that size is an important factor that the Council should consider in the Determination Process, but that size alone should not provide a sufficient basis on which to make a determination with respect to a nonbank financial company, absent other considerations, such as the nonbank financial company's interconnectedness or contagion risk. Many commenters expressed concern that the Council had not sufficiently disclosed how it would measure size across different industries.

Leverage

Some commenters asserted that leverage is an important factor that the Council should consider in the Determination Process, while others suggested that different considerations, such as reliance on debt financing, would provide a more meaningful assessment of the potential of a nonbank financial company to pose a threat to U.S. financial stability. In addition, commenters asked that the Council clarify the manner in which it intends to calculate a nonbank financial company's leverage.

Liquidity Risk and Maturity Mismatch

Commenters generally agreed that liquidity risk and maturity mismatch are important criteria for assessing the likelihood that material financial distress at a nonbank financial company could pose a threat to U.S. financial stability, but certain commenters asked the Council to clarify the manner in which it intends to measure this category. Commenters from the asset management industry expressed the view that firms within the asset management industry are not vulnerable to significant liquidity risk or maturity mismatches. Commenters from the insurance industry noted that the insurance industry has had very little liquidity risk traditionally.

Existing Regulatory Scrutiny

Many commenters stated that an assessment of existing regulatory scrutiny is an important consideration for purposes of determining whether a nonbank financial company could pose a threat to U.S. financial stability. Some commenters suggested that the Council consider not only the degree to which regulatory requirements are already applicable to a particular nonbank financial company, but also any new regulatory requirements to which the nonbank financial company will become subject pursuant to new requirements imposed by the Dodd-Frank Act.

B. The Council's Authority

Some commenters asserted that the Council does not have the authority to issue rules and regulations setting forth the process and standards it will follow in fulfilling the Council's statutory functions related to nonbank financial company determinations under section 113 of the Dodd-Frank Act. In particular, commenters noted that while the Dodd-Frank Act authorizes the Council to issue such rules as may be necessary for the conduct of the business of the Council,

the Dodd-Frank Act does not specifically authorize the Council to issue rules or regulations regarding matters related to determinations regarding nonbank financial companies.

C. Compliance with the APA

Commenters stated that the rule is too vague to satisfy the “notice and comment” requirements under the APA, the requirement in Presidential Executive Order 13563, “Improving Regulation and Regulatory Review”⁵ that the rule contain clear, specific regulatory criteria and a cost/benefit analysis, or the due process requirements of the United States Constitution.

III. Overview of the Proposed Rule and the Proposed Guidance

In developing the Proposed Rule, the Council has carefully considered the comments received on the ANPR and the NPR, as well as the language and legislative history of the Dodd-Frank Act. After this review, the Council has determined to propose a rule that has been modified to provide additional details about the processes and procedures through which the Council may make a determination under section 113 of the Dodd-Frank Act, and the manner in which a nonbank financial company may respond to and contest a proposed determination.

In addition, the Council is issuing, with a request for comment, as an appendix to the Proposed Rule, the Proposed Guidance. Among other aspects of the Proposed Guidance, the Council invites interested parties to comment on—

- Key terms and concepts related to the Council’s determination authority, including “material financial distress” and “threat to financial stability”;

⁵ Available at <http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf>.

- The six-category framework that the Council intends to use to determine whether a nonbank financial company could pose a threat to the financial stability of the United States, including examples of quantitative metrics for assessing each category;
- The six uniform quantitative thresholds that the Council intends to use to identify those nonbank financial companies that will be subject to further evaluation by the Council; and
- The process that the Council intends to follow when considering whether to subject a nonbank financial company to supervision by the Board of Governors and prudential standards.

The Council's ultimate determination will be based on an evaluation of each of the statutory considerations taking into account facts and circumstances relevant to each nonbank financial company.

The Proposed Rule and Proposed Guidance, as well as the Council's responses to the comments received, are discussed in greater detail below.

As noted above under "Overview of Comments," the Council received comments that addressed virtually all aspects of the Council's authority to make a determination with respect to nonbank financial companies under section 113 of the Dodd-Frank Act. The Council is committed to fostering transparency with respect to the Determination Process, and the Proposed Rule and Proposed Guidance are intended to address such concerns by providing a detailed description of: (i) the profile of those nonbank financial companies that the Council likely will evaluate for potential determination so as to minimize the uncertainty to which many commenters referred regarding the Determination Process, and (ii) the metrics that the Council intends to use when analyzing companies at various stages of the Determination Process,

including examples of the metrics that the Council intends to use when evaluating a nonbank financial company using the six-category framework.

The Council has numerous authorities and tools to carry out its statutory duty to monitor the financial stability of the United States. In addition to the Council's determination authority under section 113 of the Dodd-Frank Act, the Council has the authority to make recommendations to primary financial regulatory agencies to apply new or heightened standards and safeguards for a financial activity or practice conducted by bank holding companies or nonbank financial companies under the jurisdiction of such agencies if the Council determines that the conduct, scope, nature, size, scale, concentration, or interconnectedness of such 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, U.S. financial markets, or low-income, minority, or underserved communities.⁶ In addition, the Council may designate financial market utilities and payment, clearing and settlement activities that the Council determines are, or are likely to become, systemically important.⁷ The Council expects that its response to any potential threat to financial stability will be based on an assessment of the circumstances.

Pursuant to section 115(a) of the Dodd-Frank Act, the Council may also make recommendations to the Board of Governors concerning the establishment and refinement of prudential standards and reporting and disclosure standards applicable to nonbank financial companies supervised by the Board of Governors pursuant to section 113 of the Dodd-Frank Act. In making such recommendations, the Dodd-Frank Act also authorizes the Council to differentiate among companies on an individual basis or by category, taking into consideration

⁶ See 12 U.S.C. 5330(a).

⁷ See 12 U.S.C. 5463(a)(1).

their capital structure, riskiness, complexity, financial activities (including the financial activities of their subsidiaries), size, and any other risk-related factors that the Council deems appropriate. In addition, section 165 of the Dodd-Frank Act gives the Board of Governors the ability to tailor the application of the prudential standards on its own.

Commenters are encouraged to provide comment on the Proposed Rule and Proposed Guidance. The Council will consider comments received on the Proposed Rule and Proposed Guidance as the Council continues to develop the approach that the Council intends to take in the Determination Process.

A. Statutory Considerations for Determinations

Section 113 of the Dodd-Frank Act authorizes the Council to subject a nonbank financial company to supervision by the Board of Governors and prudential standards if the Council determines that (i) material financial distress at the nonbank financial company could pose a threat to the financial stability of the United States (the “First Determination Standard”), or (ii) 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 (the “Second Determination Standard”).

Pursuant to the provisions of the Dodd-Frank Act, the Council is required to consider the following statutory considerations when evaluating whether to make this determination with respect to a nonbank financial company:⁸

- (A) The extent of the leverage of the company;
- (B) The extent and nature of the off-balance-sheet exposures of the company;

⁸ This list reflects the statutory considerations applicable to a determination with respect to a U.S. nonbank financial company. The Council is required to consider similar factors in making a determination with respect to a foreign nonbank financial 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 U.S. 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 one 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 intends to take into account each of the 10 statutory considerations when determining whether one of the statutory standards for determination has been met. The Council included each of the statutory considerations in the rule text in the NPR and has retained this rule text in the Proposed Rule. The Council has provided additional detail in the Proposed Guidance regarding the manner in which the Council intends to assess nonbank financial companies under the First and Second Determination Standards. The Council has set forth proposed definitions of

the terms “material financial distress,” which is relevant to the First Determination Standard, and “threat to U.S. financial stability,” which is relevant to both determination standards. The Proposed Guidance also describes the channels the Council believes are most likely to facilitate the transmission of the negative effects of a nonbank financial company’s material financial distress or activities to other firms and markets, thereby posing a threat to U.S. financial stability.

In exercising its anti-evasion authority with respect to a U.S. nonbank financial company or foreign nonbank financial company, the Council must consider the relevant statutory factors applicable to a U.S. or foreign nonbank financial company, respectively. The Proposed Rule retains the process for making anti-evasion determinations that was set forth in the NPR. The Council may make such a determination either on its own initiative or at the request of the Board of Governors.

B. Process for Identifying Nonbank Financial Companies for Further Evaluation

In response to comments requesting more detail regarding the Determination Process, the Proposed Guidance provides a detailed description of the manner in which the Council intends to conduct the Determination Process. For example, the Proposed Guidance provides a description of the manner in which the Council intends to identify nonbank financial companies for further evaluation. The Council intends to evaluate a broad group of nonbank financial companies by applying uniform quantitative thresholds representing the framework categories that are more readily quantified, namely size, interconnectedness, leverage, and liquidity risk and maturity mismatch. A nonbank financial company would be subject to additional review if it meets both the size threshold and any one of the other quantitative thresholds. The Council believes that this set of thresholds will help a nonbank financial company predict whether such company will likely be subject to additional review by the Council.

In addition to a discussion of the analytic framework, the Proposed Guidance describes the manner in which the Council intends to analyze the companies included in each subsequent stage in the Determination Process to determine whether any nonbank financial company initially identified could pose a threat to U.S. financial stability.

The Council expects that the detailed description of the Determination Process contained in the Proposed Guidance, including the discussion of the analytic framework, will mitigate many of the potential negative effects that could result from the perceived uncertainty regarding the Determination Process. However, as discussed in the Proposed Guidance, the Council does not believe that a determination decision can be reduced to a formula. Each determination will be made on a firm-specific basis, taking into account qualitative, as well as quantitative, information that the Council deems relevant to a particular nonbank financial company.

C. Analytic Framework for Determinations

As set forth in the NPR, the Council proposes to use a six-category framework that is designed to incorporate each of the 10 statutory considerations for evaluating whether a nonbank financial company meets one of the two Determination Standards. The Council has incorporated the statutory considerations into the following six factors: (1) size, (2) interconnectedness, (3) substitutability, (4) leverage, (5) liquidity risk and maturity mismatch, and (6) existing regulatory scrutiny. Three of the six categories seek to assess the potential impact of a nonbank financial company's financial distress on the broader economy: size, substitutability and interconnectedness. The remaining three categories seek to assess the vulnerability of a nonbank financial company to financial distress: leverage, liquidity risk and maturity mismatch, and existing regulatory scrutiny of the nonbank financial company. The NPR contained a table that illustrated the relationship between the 10 statutory considerations and the six framework

categories. The table is also included in the Proposed Guidance. In response to requests by commenters, the Proposed Guidance provides further detail regarding the Council's rationale for selecting the six framework categories and provides additional clarity regarding the manner in which the six-category analytic framework incorporates each of the statutory considerations. As requested by commenters, the Proposed Guidance also sets forth examples of metrics that the Council intends to use when evaluating a nonbank financial company in each of the six categories. These metrics include several metrics proposed by commenters.

D. Additional Detail Regarding the Determination Process

In response to the public comments requesting more transparency and clarity regarding the criteria that will inform the Determination Process, the Council has developed a three-stage process the Council expects to apply for determinations in non-emergency situations. Each stage of the Determination Process would involve an analysis based on an increasing amount of information to determine whether a nonbank financial company meets either Determination Standard. The Proposed Guidance provides a detailed discussion of the proposed three-stage review process.

The first stage of the process ("Stage 1") is designed to narrow the universe of nonbank financial companies to a smaller set of nonbank financial companies using quantitative thresholds that are broadly applicable across the financial sector. Stage 1 is not intended to indicate a determination by the Council that the nonbank financial companies identified during Stage 1 meet one of the Determination Standards. Rather, Stage 1 is intended to identify those nonbank financial companies that should be subject to further evaluation in subsequent stages of review. In the second stage of the process ("Stage 2"), the Council will conduct a comprehensive analysis of the potential for the identified nonbank financial companies to pose a

threat to U.S. financial stability. In general, this analysis will be based on a broad range of quantitative and qualitative information available to the Council through existing public and regulatory sources, including industry- and firm-specific metrics beyond those analyzed in Stage 1, and information obtained from the company voluntarily.

Based on the analysis conducted during Stage 2, the Council intends to contact those nonbank financial companies that the Council believes merit further review in the third stage (“Stage 3”). Stage 3 will build on the Stage 2 analysis using quantitative and qualitative information collected directly from the nonbank financial company by the Office of Financial Research (the “OFR”) or the appropriate regulatory agency in addition to the otherwise available information considered during Stages 1 and 2. The Council will determine whether to subject a nonbank financial company to Board of Governors supervision and prudential standards based on the results of the analyses conducted during each stage of review.

The Council considered several alternative quantitative approaches in developing a method to identify a subset of companies for additional review during Stage 1 and concluded that the thresholds-based approach set forth in the Proposed Guidance is the most appropriate method to identify this subset. In the Council’s view, the thresholds-based approach provides the maximum possible transparency to the market, thereby reducing the likelihood that uncertainty about the Determination Process could negatively affect financial markets. Furthermore, the Council selected the particular Stage 1 quantitative thresholds due to their applicability to nonbank financial companies that operate in different types of financial markets and industries, and because the data underlying these thresholds are generally available from existing public and regulatory sources. Thus, nonbank financial companies should be able to reproduce the Council’s initial assessments of nonbank financial companies.

The Council recognizes that the quantitative thresholds it has identified for application during Stage 1 may not provide an appropriate means to identify a subset of nonbank financial companies for further review in all cases across all financial industries and firms. While the Council will apply the Stage 1 thresholds to all types of nonbank financial companies, including financial guarantors, asset management companies, private equity firms, and hedge funds, these companies may pose risks that are not well-measured by the quantitative thresholds approach.

With respect to hedge funds and private equity firms in particular, the Council intends to apply the Stage 1 thresholds, but recognizes that less data is generally available about these companies than about certain other types of nonbank financial companies. Beginning in 2012, advisers to hedge funds and private equity firms and commodity pool operators and commodity trading advisors will be required to file Form PF with the Securities and Exchange Commission or the Commodity Futures Trading Commission, as applicable, on which form such companies will make certain financial disclosures. Using these and other data, the Council will consider whether to establish an additional set of metrics or thresholds tailored to evaluate hedge funds and private equity firms and their advisers.

In addition, the Council, its member agencies, and the OFR will analyze the extent to which there are potential threats to U.S. financial stability arising from asset management companies. This analysis will consider what threats exist, if any, and whether such threats can be mitigated by subjecting such companies to Board of Governors supervision and prudential standards, or whether they are better addressed through other regulatory measures. The Council may issue additional guidance for public comment regarding potential additional metrics and thresholds relevant to asset manager determinations.

Generally, as reporting requirements evolve and new data about certain industries and nonbank financial companies become available, the Council expects to review the quantitative thresholds as appropriate based on this new information. For example, the Council's analysis will be informed by credit exposure data proposed to be collected under section 165 of the Dodd-Frank Act by the Federal Deposit Insurance Corporation and the Board of Governors. Similarly, pursuant to reporting and disclosure requirements being implemented under the Dodd-Frank Act, Council members will gain access to additional information through swap data repositories.

The Council recognizes that the proposed Stage 1 threshold to measure a nonbank financial company's derivative liabilities captures only the current exposure, rather than the current and potential future exposure created by the nonbank financial company's outstanding derivatives. The SEC and CFTC have proposed rules to define the terms "major swap participant" ("MSP") and "major security-based swap participant" ("MSBSP") that contain a methodology to measure the potential future exposure created by an entity's outstanding derivatives.

Once the final rules establishing the MSP and MSBSP definitions have been adopted, the rules regarding reporting of data on swaps and security-based swaps come into effect, and data have been collected pursuant to those rules, the Council intends to establish a new Stage 1 threshold based on factors such as a nonbank financial company's current and potential future exposure from its outstanding derivatives for purposes of determining whether some or all MSPs, MSBSPs, or other firms will be subject to further examination in Stage 2.

In all instances, the Council reserves the right, in its discretion, to subject any nonbank financial company, irrespective of whether such company was identified in Stage 1, to further

review if the Council believes that further analysis of the company is warranted to determine if the company could pose a threat to U.S. financial stability.

After a subset of nonbank financial companies has been identified in Stage 1, the Council intends to conduct a robust analysis of the potential threat that each of those nonbank financial companies could pose to U.S. financial stability based on information available to the Council through existing public and regulatory sources, including information possessed by the company's primary financial regulatory agency or home country supervisor, as appropriate. In contrast to the application of uniform quantitative thresholds to a broad group of nonbank financial companies in Stage 1, the Council intends to evaluate the risk profile and characteristics of each individual nonbank financial company in Stage 2 based on a wide range of quantitative and qualitative industry- and company-specific factors. This analysis will use the six-category analytic framework described in section C above. In addition, the Stage 2 evaluation will include a review, based on available data, of whether the resolution of a nonbank financial company could pose a threat to U.S. financial stability.

Following Stage 2, nonbank financial companies that are selected for additional review will receive notice that they are being considered for a proposed determination and will be subject to further evaluation during Stage 3. As discussed in greater detail in the Proposed Guidance, during the Stage 3 review, the Council intends to conduct an in-depth analysis of the nonbank financial company's potential to pose a threat to financial stability based on information obtained directly from the nonbank financial company and the information previously obtained by the Council during prior stages of review. The Council believes that in this stage of the evaluation, the Council likely will consider qualitative factors, including considerations that could mitigate or aggravate the potential of a nonbank financial company to pose a threat to U.S.

financial stability, such as the nonbank financial company's resolvability, the opacity of the nonbank financial company's operations, its complexity, and the extent to which the nonbank financial company is subject to existing regulatory scrutiny and the nature of such scrutiny.

Based on the analysis performed in Stages 2 and 3, the Council may consider whether to determine by vote to subject any of the nonbank financial companies to a proposed determination. Prior to making a proposed determination, the Council may (i) consult with the nonbank financial company's primary financial regulatory agency or home country supervisor, as appropriate, and (ii) consider the views of such entities.⁹

Following a proposed determination, the Council intends to issue a written notice of the proposed determination to the nonbank financial company that would provide an explanation of the basis of the proposed determination. The nonbank financial company may request a hearing to contest the proposed determination in accordance with section 113(e) of the Dodd-Frank Act and section 1310.21(c) of the Proposed Rule. The Council has provided additional details regarding the hearing process in the Proposed Rule and in the Proposed Guidance.

E. Section-by-Section Analysis

I. Subpart A General

A. § 1310.1 Authority and purpose.

This section sets forth the authority for and purpose of the Proposed Rule.

B. § 1310.2 Definitions.

This section defines the terms relevant to the Proposed Rule. It retains the majority of the definitions proposed in the NPR, with some technical modifications. For instance, the definition

⁹ However, the Council does not believe that the concurrence of the primary financial regulatory agency is required prior to the Council's subjecting a nonbank financial company to a proposed determination. The Council's consultation with a nonbank financial company's primary financial regulatory agency does not create any rights on the part of the nonbank financial company under consideration.

of “predominantly engaged in financial activities” has been incorporated into the definitions of “U.S. nonbank financial company” and “foreign nonbank financial company” to clarify that such definition is relevant for purposes of determining whether an entity meets the definition of U.S. nonbank financial company or foreign nonbank financial company. It also introduces definitions not set forth in the NPR, including definitions of “Federal Insurance Office,” “hearing date,” “nonbank financial company,” and “Office of Financial Research.”

II. Subpart B Determinations

A. § 1310.10 Council determinations regarding nonbank financial companies.

This section sets forth the Council’s authority to make proposed and final determinations with respect to nonbank financial companies, pursuant to sections 113(a) and (b) of the Dodd-Frank Act. It sets forth the two standards for determinations, the requirements for a Council vote with respect to proposed and final determinations, and the Council’s ability pursuant to section 112(d)(4) of the Dodd-Frank Act to request that the Board of Governors conduct an examination to determine whether a U.S. nonbank financial company should be supervised by the Board of Governors for purposes of Title I of the Dodd-Frank Act. Certain provisions included in the corresponding section in the NPR have been moved to other sections of the Proposed Rule for organizational purposes.

B. § 1310.11 Considerations in making proposed and final determinations.

This section sets forth the considerations that the Council must consider in making a proposed or final determination with respect to a U.S. nonbank financial company or foreign nonbank financial company. These considerations reflect the statutory factors set forth in sections 113(a)(2) and (b)(2) of the Dodd-Frank Act.

C. § 1310.12 Anti-evasion provision.

This section sets forth the Council’s authority to require that the financial activities of a company that is not a nonbank financial company be supervised by the Board of Governors and be subject to prudential standards if the Council determines that 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 would pose a threat to the financial stability of the United States, and the company is organized or operates in such a manner as to evade the application of Title I of the Dodd-Frank Act. This section defines “financial activities” as that term is defined in section 113(c)(5) of the Dodd-Frank Act.

This section is intended to clarify the application of subpart C as previously set forth in the NPR. This section provides that, in accordance with section 113(c)(4) of the Dodd-Frank Act, the provisions of subpart C governing information collection (including the confidentiality provisions), consultation, notice and opportunity for an evidentiary hearing, emergency waivers or modifications, and reevaluation and rescission of determinations would apply in the context of the Council’s anti-evasion authority. The information-collection authority of the Council with respect to companies in this context derives from the authority of the Council to receive information from the OFR, member agencies, and the Federal Insurance Office, and from the authority of the OFR, on behalf of the Council, to require the submission of periodic and other reports from any financial company, under sections 112(d)(1) and (2) and 154(b) of the Dodd-Frank Act, respectively.

The provision in the corresponding section in the NPR relating to the establishment of an intermediate holding company was deleted because it related to authority of the Board of Governors rather than of the Council.

III. Subpart C Information collection; proposed and final determinations; evidentiary hearings

A. § 1310.20 Council information collection; consultation; coordination; confidentiality.

This section sets forth the Council's authority to collect information with respect to nonbank financial companies and its responsibilities in consulting and coordinating with regulators and maintaining the confidentiality of submitted information. Paragraph (a) sets forth the Council's ability to collect information from the OFR, member agencies, the Federal Insurance Office, and other Federal and State financial regulatory agencies, and paragraph (b) sets forth the Council's ability to collect information from nonbank financial companies. These two paragraphs implement the provisions of section 112(d) of the Dodd-Frank Act relating to the Council's authority to obtain information and collect financial data. Paragraph (c) provides that the Council will consult with a nonbank financial company's primary financial regulatory agency in a timely manner, in accordance with section 113(g) of the Dodd-Frank Act. Paragraph (d) provides that the Council will consult with appropriate foreign regulatory authorities, to the extent appropriate, in accordance with section 113(i) of the Dodd-Frank Act. The NPR included provisions similar to paragraphs (c) and (d) of the Proposed Rule that were located elsewhere in the NPR. Paragraph (e), which was not included in the NPR, implements the confidentiality requirements provided in section 112(d)(5) of the Dodd-Frank Act.

B. § 1310.21 Notice and opportunity for an evidentiary hearing; proposed and final determinations.

This section sets forth the procedural rights of a nonbank financial company being considered for a proposed or final determination, the time period within which the Council will act after it notifies the nonbank financial company that it is being considered for a proposed

determination, and the nonbank financial company's rights to a hearing after a proposed determination. Paragraph (a) provides that the Council will deliver written notice to a nonbank financial company that it is being considered for a proposed determination and will provide the nonbank financial company an opportunity to submit written materials to contest the proposed determination. Paragraph (a) clarifies that the nonbank financial company may submit any written materials to contest the determination, including materials concerning whether the nonbank financial company meets the standards for a determination. This broadens the scope of materials that may be provided to contest a determination from the version proposed in the NPR. Paragraph (b) provides that the Council will provide a nonbank financial company with written notice of a proposed determination, including an explanation of the basis of the proposed determination. Paragraphs (c), (d), and (e) set forth the procedures for an evidentiary hearing following a proposed determination, pursuant to section 113(e) of the Dodd-Frank Act, and provides the time period within which the Council will make a final determination. These paragraphs also provide that the Council will make public any final determination that it makes.

Paragraph (f) sets forth the time period within which the Council may make a proposed determination with respect to a nonbank financial company that has received a notice of consideration of determination. Under paragraph (a)(3), the Council will notify a nonbank financial company that is being considered for a proposed determination of the date on which the Council deems its evidentiary record regarding that nonbank financial company to be complete. If the Council does not make a proposed determination with respect to that nonbank financial company within 180 days after that date, the Council will not make a proposed determination unless the Council issues a subsequent written notice of consideration of determination under paragraph (a) and thereafter complies with the other procedures set forth in that section. This

paragraph was added to the Proposed Rule to provide clarity to a nonbank financial company that is subject to a notice of consideration of determination regarding the timing of any potential subsequent Council action.

C. § 1310.22 Emergency exception to § 1310.21.

This section sets forth the process by which the Council may waive or modify any of the notice or other procedural requirements of the Proposed Rule if the Council determines that the waiver or modification is necessary or appropriate to prevent or mitigate threats posed by the nonbank financial company to the financial stability of the United States, pursuant to section 113(f) of the Dodd-Frank Act. This section provides that a nonbank financial company will receive notice of the waiver or modification and an opportunity for a hearing to contest the waiver or modification, and sets forth the process by which the Council will make and publicly announce its final determination. This section incorporates the statutory requirement that the Council consult with the appropriate home country supervisor, if any, of a foreign nonbank financial company considered for a determination under this section. This section also requires the Council to consult with the primary financial regulatory agency, if any, of a nonbank financial company in making a determination under this section. These consultations will be conducted in such time and manner as the Council may deem appropriate.

D. § 1310.23 Council reevaluation and rescission of determinations.

This section sets forth the Council's statutory responsibility, pursuant to section 113(d) of the Dodd-Frank Act, to reevaluate currently effective determinations and rescind any determination if the Council determines that the nonbank financial company no longer meets the standards for determination.

The section in the NPR relating to judicial review of the Council's final determinations pursuant to section 113(h) of the Dodd-Frank Act was removed because it did not serve to implement the Council's authority to make determinations.

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 economic impact of this rule is not expected to be significant. The rule would apply only to nonbank financial companies that 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 could pose a threat to financial stability. The Council expects that few, if any, small companies (as defined for purposes of the Small Business Act) could pose a threat to financial stability. Therefore, 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. 601-612) 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, D.C. 20503, with copies to George A. Sacco, Department of the Treasury, Washington, D.C. 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 and § 1310.21.

Estimated total annual reporting burden: 1,000 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 Orders 12866 and 13563

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). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a “significant regulatory action” although

not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule 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 determinations regarding nonbank financial companies.

1310.11 Considerations in making proposed and final determinations.

1310.12 Anti-evasion provision.

Subpart C – Information collection; proposed and final determinations; evidentiary hearings

1310.20 Council information collection; consultation; coordination; confidentiality.

1310.21 Notice and opportunity for an evidentiary hearing; proposed and final determinations.

1310.22 Emergency exception to § 1310.21.

1310.23 Council reevaluation and rescission of determinations.

Appendix: Financial Stability Oversight Council Guidance for Nonbank Financial Company Determinations

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 under section 113 of the Dodd-Frank Act (12 U.S.C. 5323), including whether material financial distress at a nonbank financial company, or 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, and whether a nonbank financial company shall be supervised by the Board of Governors and shall be subject to prudential standards in accordance with Title I of the Dodd-Frank Act.

§ 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.

Federal Insurance Office. The term “Federal Insurance Office” means the office established within the Department of the Treasury by section 502(a) of the Dodd-Frank Act (31 U.S.C. 301 (note)).

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 that term is defined in section 102(a)(6) of the Dodd-Frank Act (12 U.S.C. 5311(a)(6)) and pursuant to the requirements for determining if a company is predominantly engaged in financial activities as established by regulation of the Board of Governors pursuant to section 102(b) of the Dodd-Frank Act (12 U.S.C. 5311(b)), including through a branch in the United States.

Hearing date. The term “hearing date” means the latest of—

(i) The date on which the Council has received all of the written materials timely submitted by a nonbank financial company for a hearing that is conducted without oral testimony;

(ii) The final date on which the Council or its representatives convene to hear oral testimony presented by a nonbank financial company pursuant to § 1310.21 or § 1310.22, as applicable; and

(iii) The date on which the Council has received all of the written materials timely submitted by a nonbank financial company to supplement any oral testimony and materials presented by the nonbank financial company pursuant to § 1310.21 or § 1310.22, as applicable.

Member agency. The term “member agency” means an agency represented by a voting member of the Council under section 111(b)(1) of the Dodd-Frank Act (12 U.S.C. 5321).

Nonbank financial company. The term “nonbank financial company” means a U.S. nonbank financial company or a foreign nonbank financial company.

Office of Financial Research. The term “Office of Financial Research” means the office established within the Department of the Treasury by section 152 of the Dodd-Frank Act (12 U.S.C. 5342).

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) of this definition;

(2) The 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. 7210 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 as defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a), 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 established by the Board of Governors under section 165 of the Dodd-Frank Act (12 U.S.C. 5365).

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 issued under section 102(a)(7) of the Dodd-Frank Act (12 U.S.C. 5311(a)(7)).

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.); 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; a board of trade designated as a contract market by the Commodity Futures Trading Commission (or parent thereof); or a derivatives clearing organization (or parent thereof, unless the parent is a bank holding company), swap execution facility, or 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 that term is defined in section 102(a)(6) of the Dodd-Frank Act (12 U.S.C. 5311(a)(6)), and pursuant to the requirements for determining if a company is predominantly engaged in financial activities as established by regulation of the Board of Governors pursuant to section 102(b) of the Dodd-Frank Act (12 U.S.C. 5311(b)).

Subpart B - Determinations

§ 1310.10 Council determinations regarding nonbank financial companies.

(a) Determinations. The Council may determine that a nonbank financial company shall be supervised by the Board of Governors and shall be subject to prudential standards, in accordance with Title I of the Dodd-Frank Act, if the Council determines that material financial distress at the nonbank financial company, or 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.

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

(1) Be made by the Council and shall 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) 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 obtained by the Council under § 1310.20, 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 should be supervised by the Board of Governors for purposes of Title I of the Dodd-Frank Act (12 U.S.C. 5311-5374).

(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 paragraph (c) in connection with any proposed or final determination under paragraph (a) of this section with respect to the nonbank financial company.

§ 1310.11 Considerations in making proposed and final determinations.

(a) Considerations for U.S. nonbank financial companies. In making a proposed or final determination under § 1310.10(a) with respect to a U.S. nonbank financial company, the Council shall consider—

(1) The extent of the leverage of the U.S. nonbank financial company and its subsidiaries;

(2) The extent and nature of the off-balance-sheet exposures of the U.S. nonbank financial company and its subsidiaries;

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

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

(6) The extent to which assets are managed rather than owned by the U.S. nonbank financial 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 U.S. nonbank financial company and its subsidiaries;

(8) The degree to which the U.S. nonbank financial 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 U.S. nonbank financial company and its subsidiaries;

(10) The amount and types of the liabilities of the U.S. nonbank financial 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.

(b) Considerations for foreign nonbank financial companies. In making a proposed or final determination under § 1310.10(a) with respect to a foreign nonbank financial company, the Council shall consider—

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

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

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

(4) The importance of the foreign nonbank financial 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 foreign nonbank financial 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 foreign nonbank financial company would have on the availability of credit in such communities;

(6) The extent to which assets are managed rather than owned by the foreign nonbank financial 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 foreign nonbank financial company and its subsidiaries;

(8) The extent to which the foreign nonbank financial company and its subsidiaries are subject to prudential standards on a consolidated basis in the foreign nonbank financial 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 foreign nonbank financial company and its subsidiaries;

(10) The amount and nature of the liabilities of the foreign nonbank financial 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.

§ 1310.12 Anti-evasion provision.

(a) Determinations. In order to avoid evasion of Title I of the Dodd-Frank Act (12 U.S.C. 5311-5374) or 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—

(i) § 1310.11(a) if the company is incorporated or organized under the laws of the United States or any State; or

(ii) § 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 (12 U.S.C. 5311-5374) or this part.

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

(1) Be made by the Council and shall 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) 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.

(d) Application of other provisions. Sections 1310.20(a), 1310.20(b), 1310.20(c), 1310.20(e), 1310.21, 1310.22, and 1310.23, and the definitions referred to therein, shall apply to proposed and final determinations of the Council with respect to the financial activities of a company pursuant to this section in the same manner as such sections apply to proposed and final determinations of the Council with respect to nonbank financial companies.

Subpart C – Information Collection; Proposed and Final Determinations; Evidentiary Hearings

§ 1310.20 Council information collection; consultation; coordination; confidentiality.

(a) Information collection 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 to carry out the provisions of Title I of the Dodd-Frank Act (12 U.S.C. 5311-5374) 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 and other reports from any nonbank financial company, including a nonbank financial company that is being considered for a proposed or final determination under § 1310.10(a), for the purpose of assessing the extent to which 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 foreign nonbank financial company and, whenever possible, rely on information already being collected by such foreign regulator, with English translation.

(c) Consultation. 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 § 1310.10(a) and with the primary financial regulatory agency, if any, of any subsidiary of such nonbank financial company, in a timely manner before the Council makes any final determination under §1310.10(a) with respect to such nonbank financial company.

(d) International coordination. In exercising its duties under this part with respect to foreign nonbank financial companies and 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.

(e) Confidentiality.

(1) In general. The Council shall maintain the confidentiality of any data, information, and reports submitted under this part.

(2) Retention of privilege. The submission of any non–publicly available data or information under this part shall not constitute a waiver of, or otherwise affect, any privilege arising under Federal or State law (including the rules of any Federal or State court) to which the data or information is otherwise subject.

(3) Freedom of Information Act. Section 552 of Title 5, United States Code, including the exceptions thereunder, shall apply to any data or information submitted under this part.

§ 1310.21 Notice and opportunity for an evidentiary hearing; proposed and final determinations.

(a) Written notice of consideration of determination; submission of materials. Before providing a nonbank financial company written notice of a proposed determination pursuant to paragraph (b) of this section, 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 nonbank financial company under § 1310.10(a);

(2) An opportunity to submit written materials, within such time as the Council determines to be appropriate, to the Council to contest the Council’s consideration of the nonbank financial company for a proposed determination, including materials concerning whether, in the nonbank financial company’s view, material financial distress at the nonbank financial company, or 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; and

(3) Notice when the Council deems its evidentiary record regarding such nonbank financial company to be complete.

(b) Notice of proposed determination. If the Council determines under § 1310.10(a) that a nonbank financial company should be supervised by the Board of Governors and be subject to prudential standards, the Council shall provide to the nonbank financial company written notice of the proposed determination, including an explanation of the basis of the proposed determination and the date by which an evidentiary hearing may be requested by the nonbank financial company under paragraph (c) of this section.

(c) Evidentiary hearing.

(1) Not later than 30 days after the date of receipt by a nonbank financial company of the notice of proposed determination under paragraph (b) of this section, the nonbank financial company may request, in writing, an opportunity for a written or oral evidentiary hearing before the Council to contest the proposed determination under § 1310.10(a).

(2) Upon receipt by the Council of a timely request under paragraph (c)(1), the Council shall fix a time (not later than 30 days after the date of receipt by the Council of the request) and place at which such nonbank financial company may appear, personally or through counsel, for an evidentiary hearing at which the nonbank financial company may submit written materials (or, at the sole discretion of the Council, oral testimony and oral argument) to contest the proposed determination under § 1310.10(a), including materials concerning whether, in the nonbank financial company's view, material financial distress at the nonbank financial company, or 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.

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

(1) Make a final determination under § 1310.10(a);

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

(3) Publicly announce the final determination of the Council.

(e) No evidentiary hearing requested. If a nonbank financial company does not make a timely request for an evidentiary hearing under paragraph (c) of this section or notifies the Council in writing that it is not requesting an evidentiary hearing under paragraph (c) of this section, the Council shall, not later than 10 days after the date by which the nonbank financial company could have requested a hearing under paragraph (c) of this section or 10 days after the date on which the Council receives notice from the nonbank financial company that it is not requesting an evidentiary hearing, as applicable—

(1) Make a final determination under § 1310.10(a);

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

(3) Publicly announce the final determination of the Council.

(f) Time period for consideration.

(1) If the Council does not make a proposed determination under § 1310.10(a) with respect to a nonbank financial company within 180 days after the date on which the nonbank financial company receives the notice of completion of the Council's evidentiary record described in paragraph (a)(3) of this section, the nonbank financial company shall not be eligible for a proposed determination under § 1310.10(a) unless the Council issues a subsequent written notice of consideration of determination under paragraph (a) of this section to such nonbank financial company.

(2) This paragraph (f) shall not limit the Council's ability to issue a subsequent written notice of consideration of determination under § 1310.21(a) to any nonbank financial company that, within 180 days after the date on which such nonbank financial company received a notice described in paragraph (a)(3) of this section, does not become subject to a proposed determination under § 1310.10(a).

§ 1310.22 Emergency exception to § 1310.21.

(a) Exception to § 1310.21. Notwithstanding anything to the contrary in § 1310.21, the Council may waive or modify any or all of the notice and other procedural requirements of § 1310.21 with respect to a nonbank financial 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 to the financial stability of the United States; and

(2) The Council provides written notice of the waiver or modification under this section to the nonbank financial company as soon as practicable, but not later than 24 hours after the waiver or modification is granted. Any such notice shall set forth the manner and form for transmitting a request for an evidentiary hearing under paragraph (c) of this section.

(b) Consultation.

(1) In making a determination under paragraph (a) of this section with respect to a nonbank financial company, the Council shall consult with the primary financial regulatory agency, if any, for such nonbank financial company, in such time and manner as the Council may deem appropriate.

(2) In making a determination under paragraph (a) of this section with respect to a foreign nonbank financial company, the Council shall consult with the appropriate home country supervisor, if any, of such foreign nonbank financial company, in such time and manner as the Council may deem appropriate.

(c) Opportunity for evidentiary hearing.

(1) If the Council, pursuant to paragraph (a) of this section, waives or modifies any of the notice or other procedural requirements of § 1310.21 with respect to a nonbank financial company, the nonbank financial company may request, in writing, an opportunity for a written or oral evidentiary hearing before the Council to contest such waiver or modification, not later than 10 days after the date of receipt by the nonbank financial company of the notice described in paragraph (a)(2) of this section.

(2) Upon receipt of a timely request for an evidentiary hearing under paragraph (c)(1), the Council shall fix a time (not later than 15 days after the date of receipt by the Council 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 the waiver or modification under this section.

(d) Notice of final determination. If the nonbank financial company makes a timely request for an evidentiary hearing under paragraph (c) of this section, the Council shall, not later than 30 days after the hearing date—

(1) Notify the nonbank financial company, in writing, of the final determination of the Council regarding the waiver or modification under this § 1310.22, which notice shall contain a statement of the basis for the final decision of the Council; and

(2) Publicly announce the final determination of the Council.

(e) Vote required. Any determination of the Council under paragraph (a)(1) of this section to waive or modify any of the notice or other procedural requirements of § 1310.21 shall—

(1) Be made by the Council and shall 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) Reevaluation and rescission. The Council shall, not less frequently than annually—

(1) Reevaluate each currently effective determination made under § 1310.10(a); and

(2) Rescind any such determination, if the Council determines that the nonbank financial company no longer meets the standard under § 1310.10(a), taking into account the considerations in § 1310.11(a) or § 1310.11(b), as applicable.

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

(1) Be made by the Council and shall 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.

APPENDIX

Financial Stability Oversight Council **Guidance for Nonbank Financial Company Determinations**

I. Introduction

Section 113 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) authorizes the Financial Stability Oversight Council (the “Council”) to determine that a nonbank financial company will be supervised by the Board of Governors of the Federal Reserve System (the “Board of Governors”) and be subject to prudential standards in accordance with Title I of the Dodd-Frank Act if either of two standards is met. Under the first standard, the Council may subject a nonbank financial company to supervision by the Board of Governors and prudential standards if the Council determines that “material financial distress” at the nonbank financial company could pose a threat to the financial stability of the United States. Under the second standard, the Council may determine that a nonbank financial company will be supervised by the Board of Governors and subject to prudential standards if the nature, scope, size, scale, concentration, interconnectedness, or mix of the nonbank financial company’s activities could pose a threat to U.S. financial stability. Section 113 of the Dodd-Frank Act also lists 10 considerations that the Council must take into account in making a determination.

Section II of this document describes the manner in which the Council intends to apply the statutory standards and considerations in making determinations under section 113 of the Dodd-Frank Act. First, section II defines “threat to the financial stability of the United States” and describes channels through which a nonbank financial company could pose such a threat. Second, it discusses each of the two statutory standards for determination. Third, it describes the six-category framework that the Council intends to use to evaluate nonbank financial companies under each of the 10 statutory considerations. Section II also includes a list of sample metrics that may be used to evaluate individual nonbank financial companies under each of the six categories.

Section III of this document outlines the process that the Council intends to follow in non-emergency situations when determining whether to subject a nonbank financial company to Board of Governors supervision and prudential standards. Section III also provides a detailed description of the analysis that the Council intends to conduct during each stage of its review. In the first stage of the process, the Council will apply six uniform quantitative thresholds to nonbank financial companies to identify those nonbank financial companies that will be subject to further evaluation by the Council. Because the Council is relying on quantitative thresholds using publicly available data in the first stage, nonbank financial companies should be able to assess whether they are likely to be subject to further evaluation by the Council. During the second stage of the evaluation process, the Council will analyze the identified nonbank financial companies using a broad range of information available to the Council primarily through existing public and regulatory sources. The third stage of the process will involve a comprehensive analysis of those nonbank financial companies using information collected directly from the nonbank financial company, as well as the information used in the first two stages.

II. Council Determination Authority and Proposed Framework

As noted above, the Council may determine that a nonbank financial company will be supervised by the Board of Governors and be subject to prudential standards if the Council determines that (i) material financial distress at the nonbank financial company could pose a threat to the financial stability of the United States (the “First Determination Standard”) or (ii) 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 (the “Second Determination Standard,” and, together with the First Determination Standard, the “Determination Standards”).

This section provides definitions of the terms “threat to the financial stability of the United States” and “material financial distress” and describes how the Council expects to apply the Determination Standards.

a. Threat to the Financial Stability of the United States

The Determination Standards require the Council to determine whether a nonbank financial company could pose a threat to the financial stability of the United States. The Council will consider a “threat to the financial stability of the United States” to exist if there would be an impairment of financial intermediation or of financial market functioning that would be sufficiently severe to inflict significant damage on the broader economy.

An impairment of financial intermediation and financial market functioning can occur through several channels. The Council has identified the following channels as most likely to facilitate the transmission of the negative effects of a nonbank financial company’s material financial distress or activities to other financial firms and markets:

- *Exposure.* A nonbank financial company’s creditors, counterparties, investors, or other market participants have exposure to the nonbank financial company that is significant enough to materially impair those creditors, counterparties, investors, or other market participants and thereby pose a threat to U.S. financial stability. In its initial analysis of nonbank financial companies with respect to this channel, the Council expects to consider metrics including total consolidated assets, credit default swaps outstanding, derivative liabilities, loans and bonds outstanding, and leverage ratio.
- *Asset liquidation.* A nonbank financial company holds assets that, if liquidated quickly, would significantly disrupt trading or funding in key markets or cause significant losses or funding problems for other firms with similar holdings due to falling asset prices. This channel would likely be most relevant for a nonbank financial company whose funding and liquid asset profile makes it likely that it would be forced to liquidate assets quickly when it comes under financial pressure. For example, this could be the case if a large nonbank financial company relies heavily on short-term funding. In its initial analysis of nonbank financial companies with respect to this channel, the Council expects to consider metrics including total consolidated assets and short-term debt ratio.

- *Critical function or service.* A nonbank financial company is no longer able or willing to provide a critical function or service that is relied upon by market participants and for which there are no ready substitutes. The analysis of this channel will incorporate a review of the competitive landscape for markets in which a nonbank financial company participates and for the services it provides (including the provision of liquidity to the U.S. financial system, the provision of credit to low-income, minority, or underserved communities or the provision of credit to households, businesses and state and local governments), the nonbank financial company’s market share, and the ability of other firms to replace those services. Due to the unique ways in which a nonbank financial company may provide a critical function or service to the market, the Council expects to apply company-specific analyses with respect to this channel, rather than applying a broadly applicable quantitative metric.

The Council believes that the threat a nonbank financial company may pose to U.S. financial stability through the impairment of financial intermediation and financial market functioning is likely to be exacerbated if the nonbank financial company is sufficiently complex, opaque, or difficult to resolve in bankruptcy such that its resolution in bankruptcy would disrupt key markets or have a material adverse impact on other financial firms or markets.

The Council intends to continue to evaluate additional transmission channels, and may, in its discretion, consider other channels through which a nonbank financial company may transmit the negative effects of its material financial distress or activities and thereby pose a threat to U.S. financial stability.

b. First Determination Standard: Material Financial Distress

Under the First Determination Standard, the Council may subject a nonbank financial company to supervision by the Board of Governors and prudential standards if the Council determines that “material financial distress” at the nonbank financial company could pose a threat to U.S. financial stability. The Council believes that material financial distress exists when a nonbank financial company is in imminent danger of insolvency or defaulting on its financial obligations.

For purposes of considering whether a nonbank financial company could pose a threat to U.S. financial stability under this Determination Standard, the Council intends to assess the impact of the nonbank financial company’s material financial distress in the context of a period of overall stress in the financial services industry and in a weak macroeconomic environment. The Council believes this is appropriate because in such a context, a nonbank financial company’s distress may have a greater effect on U.S. financial stability.

c. Second Determination Standard: Nature, Scope, Size, Scale, Concentration, Interconnectedness, or Mix of Activities

Under the Second Determination Standard, the Council may subject a nonbank financial company to supervision by the Board of Governors and prudential standards if the Council determines that the nature, scope, size, scale, concentration, interconnectedness, or mix of the

nonbank financial company’s activities could pose a threat to U.S. financial stability. The Council believes that this Determination Standard will be met if the Council determines that the nature of a nonbank financial company’s business practices, conduct, or operations could pose a threat to U.S. financial stability, regardless of whether the nonbank financial company is experiencing financial distress. The Council expects that there likely will be significant overlap between the outcome of an assessment of a nonbank financial company under the First and Second Determination Standards, because, in many cases, a nonbank financial company that could pose a threat to U.S. financial stability because of the nature, scope, size, scale, concentration, interconnectedness, or mix of its activities could also pose a threat to U.S. financial stability if it were to experience material financial distress.

d. Analytic Framework for Statutory Considerations

As required by section 113 of the Dodd-Frank Act, the Council’s determination will be based on its judgment that a firm meets one of the Determination Standards described above. In evaluating whether a firm meets one of the Determination Standards, the Council will consider each of the statutory considerations set forth in the statute. The discussion below outlines the analytic framework that the Council intends to use to organize its evaluation of a nonbank financial company under the statutory considerations and provides additional detail on the key data and analyses that the Council intends to use to assess the considerations.

1. *Grouping of Statutory Considerations into Six-Category Framework*

The Dodd-Frank Act requires the Council to consider 10 considerations (described below) when evaluating the potential of a nonbank financial company to pose a threat to U.S. financial stability. The statute also authorizes the Council to consider “any other risk-related factors that the Council deems appropriate.” These statutory considerations will help the Council to evaluate whether one of the Determination Standards, as described in sections II.b and II.c above, has been met. The Council has developed an analytic framework that groups all relevant factors, including the 10 statutory considerations and any additional risk-related factors, into six categories: size, interconnectedness, lack of substitutes, leverage, liquidity risk and maturity mismatch, and existing regulatory scrutiny. The Council expects to use these six categories to guide its evaluation of whether a particular nonbank financial company meets either Determination Standard. However, the Council’s ultimate determination decision regarding a nonbank financial company will not be based on a formulaic application of the six categories. Rather, the Council intends to analyze a nonbank financial company using quantitative and qualitative data relevant to each of the six categories, as the Council determines is appropriate with respect to a particular nonbank financial company.

Each of the six categories reflects a different dimension of a nonbank financial company’s potential to pose a threat to U.S. financial stability. Three of the six categories—size, substitutability and interconnectedness—seek to assess the potential impact of the nonbank financial company’s financial distress on the broader economy. Material financial distress at nonbank financial companies that are large, provide critical financial services for which there are few substitutes, or are highly interconnected with other financial firms or markets are more likely to have a financial or operational impact on other companies, markets, and consumers that could

pose a threat to the financial stability of the United States. The remaining three categories—leverage, liquidity risk and maturity mismatch, and existing regulatory scrutiny of the nonbank financial company—seek to assess the vulnerability of a nonbank financial company to financial distress. Nonbank financial companies that are highly leveraged, have a high degree of liquidity risk or maturity mismatch, and are under little or no regulatory scrutiny are more likely to be more vulnerable to financial distress.

Each of the statutory considerations in sections 113(a)(2) and (b)(2) of the Dodd-Frank Act would be considered as part of one or more of the six categories. This is reflected in the following table, using the considerations relevant to a U.S. nonbank financial company for illustrative purposes.¹⁰

¹⁰ The corresponding statutory considerations for a foreign nonbank financial company would be considered under the relevant categories indicated in the table.

Statutory considerations:	Category or categories in which this consideration would be addressed:
(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; lack of substitutes
(G) The nature, scope, size, scale, concentration, interconnectedness, and mix of the activities of the company	Size; interconnectedness; lack of substitutes
(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

2. Six-Category Framework

The discussion below describes each of the six categories and how these categories relate to a firm's likelihood to pose a threat to financial stability. The sample metrics set forth below under each category are representative, not exhaustive, and may not apply to all nonbank financial companies under evaluation. The Council may apply the sample metrics in the context of stressed market conditions.

Interconnectedness

Interconnectedness captures direct or indirect linkages between financial companies that may be conduits for the transmission of the effects resulting from a nonbank financial company's material financial distress or activities. Examples of the key conduits through which the effects may travel are a nonbank financial company's direct or indirect exposures to counterparties (including creditors, trading and derivatives counterparties, investors, borrowers, and other participants in the financial markets). Interconnectedness depends not only on the number of counterparties that a nonbank financial company has, but also on the importance of that nonbank financial company to its counterparties and the extent to which the counterparties are interconnected with other financial firms, the financial system and the broader economy. The Council's assessment of interconnectedness is intended to determine whether a nonbank financial company's exposure to its counterparties would pose a threat to U.S. financial stability if that company encountered material financial distress.

For example, metrics that may be used to assess interconnectedness include:

- Counterparties' exposures to a nonbank financial company, including derivatives, reinsurance, loans, securities borrowing and lending, and lines of credit that facilitate settlement and clearing activities.
- Number, size, and financial strength of a nonbank financial company's counterparties, including the proportion of its counterparties' exposure to the nonbank financial company relative to the counterparties' capital.
- Identity of a nonbank financial company's principal contractual counterparties, which reflects the concentration of the nonbank financial company's assets financed by particular firms and the importance of the nonbank financial company's counterparties to the market.
- Aggregate amounts of a nonbank financial company's gross or net derivatives exposures and the number of its derivatives counterparties.
- The amount of gross notional credit default swaps outstanding for which a nonbank financial company is the reference entity.
- Outstanding loans borrowed and bonds issued, which captures a nonbank financial company's sources of funding.
- Reinsurance obligations, which measure the reinsurance risk assumed from non-affiliates net of retrocession.

Substitutability

Substitutability captures the extent to which other firms could provide similar financial services in a timely manner at a similar price and quantity if a nonbank financial company withdraws from a particular market. Substitutability also captures situations in which a nonbank financial company is the primary or dominant provider of services in a market that the Council determines to be essential to U.S. financial stability. An example of the manner in which the Council may determine a nonbank financial company's substitutability is to consider its market share. The Council's evaluation of a nonbank financial company's market share regarding a

particular product or service will include assessments of the ability of the nonbank financial company's competitors to expand to meet market needs; the costs that market participants would incur if forced to switch providers; the timeframe within which a disruption in the provision of the product or service would materially affect market participants or market functioning; and the economic implications of such a disruption. Concern about a potential lack of substitutability could be greater if a nonbank financial company and its competitors are likely to experience stress at the same time because they are exposed to the same risks. The Council may also analyze a nonbank financial company's core operations and critical functions and the importance of those operations and functions to the U.S. financial system and assess how those operations and functions would be performed by the nonbank financial company or other market participants in the event of the nonbank financial company's material financial distress. The Council also intends to consider substitutability with respect to any nonbank financial company with global operations to identify the substitutability of critical market functions that the company provides in the United States in the event of material financial distress of a foreign parent company.

For example, metrics that may be used to assess substitutability include:

- The market share, using the appropriate quantitative measure (such as loans originated, loans outstanding, and notional transaction volume) of a nonbank financial company and its competitors in the market under consideration.
- The stability of market share across the firms in the market over time.
- The market share of the company and its competitors for products or services that serve a substantially similar economic function as the primary market under consideration.

Size

Size captures the amount of financial services or financial intermediation that a nonbank financial company provides. Size also may affect the extent to which the effects of a nonbank financial company's financial distress are transmitted to other firms and to the financial system. For example, financial distress at an extremely large nonbank financial company that is highly interconnected likely would transmit risk on a larger scale than would financial distress at a smaller nonbank financial company that is similarly interconnected. Size is conventionally measured by the assets, liabilities and capital of the firm. However, such measures of size may not provide complete or accurate assessments of the scale of a nonbank financial company's risk potential. Thus, the Council also intends to take into account off-balance sheet assets and liabilities and assets under management in a manner that recognizes the unique and distinct nature of these classes. Other measures of size, such as numbers of customers and counterparties, may also be relevant.

For example, metrics that may be used to assess size include:

- Total consolidated assets or liabilities, as determined under the applicable financial reporting standards.
- Total risk-weighted assets, as appropriate for different industry sectors.

- Off-balance sheet exposures where a nonbank financial company has a risk of loss, including, for example, lines of credit. For foreign nonbank financial companies, this would be evaluated based on the extent and nature of U.S.-related off-balance sheet exposures.
- The extent to which assets are managed rather than owned by a nonbank financial company and the extent to which ownership of assets under management is diffuse.
- Direct written premiums, as reported by insurance companies. This is the aggregate of direct written premiums reported by insurance entities under all lines of business and serves as a proxy for the amount of insurance underwritten by the insurance entities.
- Risk in force, which is the aggregate risk exposure from risk underwritten in insurance related to certain financial risks, such as mortgage insurance.
- Total loan originations, by loan type, in number and dollar amount.

Leverage

Leverage captures a company's exposure or risk in relation to its equity capital. Leverage amplifies a company's risk of financial distress in two ways. First, by increasing a company's exposure relative to capital, leverage raises the likelihood that a company will suffer losses exceeding its capital. Second, by increasing the size of a company's liabilities, leverage raises a company's dependence on its creditors' willingness and ability to fund its balance sheet. Leverage can also amplify the impact of a company's distress on other companies, both directly, by increasing the amount of exposure that other firms have to the company, and indirectly, by increasing the size of any asset liquidation that the company is forced to undertake as it comes under financial pressure. Leverage is typically measured by the ratio of debt to capital, but it can also be defined in terms of risk, as a measure of economic risk relative to capital. The latter measurement can better capture the effect of derivatives and other products with embedded leverage on the risk undertaken by a nonbank financial company.

For example, metrics that may be used to assess leverage include:

- Total assets and total debt measured relative to total equity, which is intended to measure financial leverage.
- Gross notional exposure of derivatives and off-balance sheet obligations relative to total equity or net assets under management, which is intended to show how much off-balance sheet leverage a nonbank financial company may have.
- The ratio of risk to statutory capital, which is relevant to certain insurance companies and is intended to show how much risk exposure a nonbank financial company has in relation to its ability to absorb loss.
- Changes in leverage ratios, which may indicate that a nonbank financial company is rapidly increasing its risk profile.

Liquidity Risk and Maturity Mismatch

Liquidity risk generally refers to the risk that a company may not have sufficient funding to satisfy its short-term needs, either through its cash flows, maturing assets, or assets salable at prices equivalent to book value, or through its ability to access funding markets. For example, if

a company holds assets that are illiquid or that are subject to significant decreases in market value during times of market stress, the company may be unable to liquidate its assets effectively in response to a loss of funding. In order to assess liquidity, the Council may examine a nonbank financial company's assets to determine if it possesses cash instruments or readily marketable securities, such as Treasury securities, which could reasonably be expected to have a liquid market in times of distress. The Council may also review a nonbank financial company's debt profile to determine if it has adequate long-term funding, or can otherwise mitigate liquidity risk. Liquidity problems also can arise from a company's inability to roll maturing debt or to satisfy margin calls, and from demands for additional collateral, depositor withdrawals, draws on committed lines, and other potential draws on liquidity.

A maturity mismatch generally refers to the difference between the maturities of a company's assets and liabilities. A maturity mismatch affects a company's ability to survive a period of stress that may limit its access to funding and to withstand shocks in the yield curve. For example, if a company relies on short-term funding to finance longer-term positions, it will be subject to significant refunding risk that may force it to sell assets at low market prices or potentially suffer through significant margin pressure. However, maturity mismatches are not confined to the use of short-term liabilities and can exist at any point in the maturity schedule of a nonbank financial company's assets and liabilities. For example, in the case of a life insurance company, liabilities may have maturities of 30 years or more, whereas the market availability of equivalently long-term assets may be limited.

For example, metrics that may be used to assess liquidity and maturity mismatch include:

- Fraction of assets that are classified as level 2 and level 3 under applicable accounting standards, as a measure of how much of a nonbank financial company's balance sheet is composed of hard-to-value and potentially illiquid securities.
- Liquid asset ratios, which are intended to indicate a nonbank financial company's ability to repay its short-term debt.
- The ratio of unencumbered and highly liquid assets to the net cash outflows that a nonbank financial company could encounter in a short-term stress scenario.
- Callable debt as a fraction of total debt, which provides one measure of a nonbank financial company's ability to manage its funding position in response to changes in interest rates.
- Asset-backed funding versus other funding, to determine a nonbank financial company's susceptibility to distress in particular credit markets.
- Asset-liability duration and gap analysis, which is intended to indicate how well a nonbank financial company is matching the re-pricing and maturity of the nonbank financial company's assets and liabilities.
- Short-term debt as a percentage of total debt and as a percentage of total assets, which indicates a nonbank financial company's reliance on short-term debt markets.

Existing Regulatory Scrutiny

The Council will consider the extent to which nonbank financial companies are already subject to regulation, including the consistency of that regulation across nonbank financial

companies within a sector, across different sectors, and providing similar services, and the statutory authority of those regulators. For example, the Council may consider whether a nonbank financial company is subject to consolidated supervision.

For example, metrics that may be used to assess existing regulatory scrutiny include:

- Existence of consolidated supervision, to determine whether non-regulated entities and groups within a nonbank financial company are supervised on a group-wide basis.
- For investment funds, whether the fund or manager is registered with the Securities and Exchange Commission, the Commodity Futures Trading Commission, or a bank or insurance regulator.
- For insurance companies, an assessment of the number of primary financial regulatory agencies and the number of “lead state” regulators.
- For entities based outside the United States, the extent to which a nonbank financial company is subject to prudential standards on a consolidated basis in its home country that are administered and enforced by a comparable foreign supervisory authority.
- Current regulatory bodies’ ability to impose detailed and timely regulatory reporting obligations, capital or liquidity requirements, enforcement actions, and resolutions.

III. The Determination Process

The Council expects generally to follow a three-stage process of increasingly in-depth evaluation and analysis leading up to a proposed determination (a “Proposed Determination”) that a nonbank financial company could pose a threat to the financial stability of the United States. Quantitative metrics, together with qualitative analysis, will inform the judgment of the Council when it is evaluating a nonbank financial company for a Proposed Determination. The purpose of this process is to help determine whether a nonbank financial company could pose a threat to the financial stability of the United States.

In the first stage of the process (“Stage 1”), a set of uniform quantitative metrics will be applied to a broad group of nonbank financial companies in order to identify nonbank financial companies for further evaluation and to provide clarity for nonbank financial companies that likely will not be subject to further evaluation. In Stage 1, the Council will rely solely on information available through existing public and regulatory sources. The purpose of Stage 1 is to enable the Council to identify a group of nonbank financial companies that are most likely to satisfy one of the Determination Standards.

In the second stage (“Stage 2”), the nonbank financial companies identified in Stage 1 will be analyzed and prioritized, based on a wide range of quantitative and qualitative information available to the Council primarily through public and regulatory sources. The Council will also begin the consultation process with the primary financial regulatory agencies or home country supervisors, as appropriate. During Stage 2, the Council intends to fulfill its statutory obligation to rely whenever possible on information available through the Office of

Financial Research (the “OFR”) or primary financial regulatory agencies before requiring the submission of reports from any nonbank financial company.¹¹

Following Stage 2, nonbank financial companies that are selected for additional review will receive notice that they are being considered for a proposed determination and will be subject to in-depth evaluation during the third stage of review (“Stage 3”). Stage 3 will involve the evaluation of information collected directly from the nonbank financial company, in addition to the information considered during Stages 1 and 2. At the end of Stage 3, 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 section 1310.21(c) of the proposed rule.

The Council expects to follow this three-stage process and to consider the categories, metrics, thresholds, and channels described in this guidance to assess a nonbank financial company’s potential to pose a threat to U.S. financial stability. In addition to the information described herein that the Council generally expects to consider, the Council also will consider quantitative and qualitative information that it deems relevant to a particular nonbank financial company, as each determination will be made on a company-specific basis. The Council may consider any nonbank financial company for a Proposed Determination at any point in the three-stage evaluation process described in this guidance if the Council believes such company could pose a threat to U.S. financial stability.

a. Stage 1: Initial Identification of Nonbank Financial Companies for Evaluation

In Stage 1, the Council will seek to identify a set of nonbank financial companies that merit company-specific evaluation. In this stage, the Council intends to apply quantitative thresholds to a broad group of nonbank financial companies. A nonbank financial company that is selected for further evaluation during Stage 1 will be further assessed during Stage 2. During the Stage 1 process, the Council will evaluate nonbank financial companies using data available to the Council, such as publicly available information and information member agencies possess in their supervisory capacities.

In the Stage 1 quantitative analysis, the Council intends to apply thresholds that relate to the framework categories of size, interconnectedness, leverage, and liquidity risk and maturity mismatch. These thresholds were selected based on (1) their applicability to nonbank financial companies that operate in different types of financial markets and industries, (2) the meaningful initial assessment that such thresholds provide regarding the potential for a nonbank financial company to pose a threat to financial stability in diverse financial markets, and (3) the current availability of data. These thresholds are intended to measure both the susceptibility of a nonbank financial company to financial distress and the potential for that nonbank financial company’s financial distress to spread throughout the financial system. A nonbank financial

¹¹ See 12 U.S.C. 5322(d)(3).

company will be evaluated further in Stage 2 if it meets both the total consolidated assets threshold and any one of the other thresholds.¹² The thresholds are:

- *Total Consolidated Assets.* The Council intends to apply a size threshold of \$50 billion in global total consolidated assets for U.S. nonbank financial companies or \$50 billion in U.S. total consolidated assets for foreign nonbank financial companies. This threshold is consistent with the Dodd-Frank Act threshold of \$50 billion in assets for subjecting bank holding companies to enhanced prudential standards.
- *Credit Default Swaps Outstanding.* The Council intends to apply a threshold of \$30 billion in gross notional credit default swaps (“CDS”) outstanding for which a nonbank financial company is the reference entity. Gross notional value equals the sum of CDS contracts bought (or equivalently sold). If the amount of CDS sold on a particular nonbank financial company is greater than \$30 billion, this indicates that a large number of institutions may be exposed to that nonbank financial company and that if the nonbank financial company fails, a significant number of financial market participants may be affected. This threshold was selected based on an analysis of the distribution of outstanding CDS data for nonbank financial companies included in a list of the top 1,000 CDS reference entities.
- *Derivative Liabilities.* The Council intends to apply a threshold of \$3.5 billion of derivative liabilities. In accordance with Accounting Standards Codification 815, derivative liabilities equals the fair value of any derivatives contracts in a negative position after taking into account the effects of master netting agreements and cash collateral held with the same counterparty on a net basis, if elected. This threshold serves as a proxy for interconnectedness, as a nonbank financial company that has a greater level of derivatives liabilities would have higher counterparty exposure throughout the financial system.
- *Loans and Bonds Outstanding.* The Council intends to apply a threshold of \$20 billion of outstanding loans borrowed and bonds issued. This threshold serves as a proxy for interconnectedness, as nonbank financial companies with a large amount of loans and bonds outstanding are generally more interconnected with the broader financial system, in part because financial institutions are the largest source of loans and hold a large proportion of bonds outstanding. An analysis of the distribution of total loans and bonds outstanding for a sample of nonbank financial companies was performed to determine the \$20 billion threshold. Historical testing of this threshold demonstrated that it would have captured many of the nonbank financial companies that encountered material financial distress during the recent financial crisis, including Bear Stearns, Countrywide, and Lehman Brothers.

¹² For purposes of applying these six thresholds to investment funds managed by a nonbank financial company, the Council may consider the funds as a single entity if their investments are identical or highly similar.

- *Leverage Ratio.* The Council intends to apply a threshold leverage ratio of total consolidated assets (excluding separate accounts) to total equity of 15 to 1. The Council intends to exclude separate accounts from this calculation because separate accounts are not available to claims by general creditors of a nonbank financial company. Measuring leverage in this manner benefits from simplicity, availability and comparability across industries. An analysis of the distribution of the historical leverage ratios of large financial institutions was used to identify the 15 to 1 threshold. Historical testing of this threshold demonstrated that it would have captured the major nonbank financial companies that encountered material financial distress and posed a threat to U.S. financial stability during the recent financial crisis, including Bear Stearns, Countrywide, IndyMac Bancorp, and Lehman Brothers.
- *Short-Term Debt Ratio.* The Council intends to apply a threshold ratio of debt with a maturity of less than 12 months to total consolidated assets (excluding separate accounts) of 10 percent. An analysis of the historical distribution of the short-term debt ratios of large financial institutions was used to determine the 10 percent threshold. Historical testing of this threshold demonstrated that it would have captured a number of the nonbank financial companies that faced short-term funding issues during the recent financial crisis, including Bear Stearns and Lehman Brothers.

In addition, because the uniform quantitative thresholds may not capture all of the potential ways in which a nonbank financial company could pose a threat to financial stability, the Council may, in limited cases, initially evaluate nonbank financial companies in Stage 1 based on other firm-specific qualitative or quantitative factors, such as substitutability and existing regulatory scrutiny.

A nonbank financial company that is identified for further evaluation in Stage 1 would be further assessed during Stage 2 (the “Stage 2 Pool”).

b. Stage 2: Review and Prioritization of Stage 2 Pool

After the Stage 2 Pool has been identified, the Council intends to conduct a robust analysis of the potential threat that each of those nonbank financial companies could pose to U.S. financial stability. In general, this analysis will be based on information already available to the Council through existing public and regulatory sources, including information possessed by the company’s primary financial regulatory agency or home country supervisor, as appropriate, and information obtained from the company voluntarily. In contrast to the application of uniform quantitative thresholds to a broad group of nonbank financial companies in Stage 1, the Council intends to evaluate the risk profile and characteristics of each individual nonbank financial company in the Stage 2 Pool based on a wide range of quantitative and qualitative industry-specific and company-specific factors. This analysis will use the six-category analytic framework described in section II.d above. In addition, the Stage 2 evaluation will include a review, based on available data, of qualitative factors, including whether the resolution of a nonbank financial company, as described below, could pose a threat to U.S. financial stability, and the extent to which the nonbank financial company is subject to regulation.

Based on this analysis, the Council intends to contact those nonbank financial companies that the Council believes merit further evaluation in Stage 3 (the “Stage 3 Pool”).

c. Stage 3: Review of Stage 3 Pool

In Stage 3, the Council, working with the OFR, will conduct a review of each nonbank financial company in the Stage 3 Pool using information collected directly from the nonbank financial company, as well as the information used in the first two stages. The review will focus on whether the nonbank financial company could pose a threat to U.S. financial stability because of the company’s material financial distress or the nature, scope, size, scale, concentration, interconnectedness, or mix of the company’s activities. The transmission channels discussed above, and other appropriate factors, will be used to evaluate a nonbank financial company’s potential to pose a threat to U.S. financial stability. The analytic framework consisting of the six categories set forth above, and the metrics used to measure each of the six categories, will assist the Council in assessing the extent to which the transmission of material financial distress is likely to occur.

Each nonbank financial company in the Stage 3 Pool will receive a notice (a “Notice of Consideration”) that the nonbank financial company is under consideration for a Proposed Determination. The Notice of Consideration likely will include a request that the nonbank financial 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.¹³ This information will be collected by the OFR or the appropriate regulatory agency.¹⁴ Before requiring the submission of reports from any nonbank financial company that is regulated by a Council member agency or any 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. The Council and its member agencies will maintain the confidentiality of such information to the fullest extent of applicable law.

Information requests likely will involve both qualitative and quantitative data. Information relevant to the Council’s analysis may include confidential business information such as internal assessments, internal risk management procedures, funding details, counterparty exposure or position data, strategic plans, resolvability, potential acquisitions or dispositions, and other anticipated changes to the nonbank financial company’s business or structure that could affect the threat to U.S. financial stability posed by the nonbank financial company.

In evaluating qualitative factors during Stage 3, the Council expects to have access, to a greater degree than during earlier stages of review, to information relating to factors that are not easily quantifiable or that may not directly cause a company to pose a threat to financial stability,

¹³ See section 1310.21(a) of the proposed rule.

¹⁴ Under section 112(d) of the Dodd-Frank Act, if the Council is unable to determine whether a U.S. nonbank financial company poses a threat to U.S. financial stability based on such information, the Council may request that the Board of Governors conduct an examination of the nonbank financial company to determine whether it should be supervised by the Board of Governors.

but could mitigate or aggravate the potential of a nonbank financial company to pose a threat to the United States. Such factors may include the nonbank financial company's resolvability, the opacity of its operations, its complexity, and the extent to which it is subject to existing regulatory scrutiny and the nature of such scrutiny.

The Stage 3 analysis will also include an evaluation of a nonbank financial company's resolvability. An evaluation of a nonbank financial company's resolvability entails an assessment of the complexity of the nonbank financial company's legal, funding, and operational structure, and any obstacles to the rapid and orderly resolution of a nonbank financial company in a manner that would mitigate the risk that the nonbank financial company's failure would have a material adverse effect on financial stability. In addition to the factors described above, a nonbank financial company's resolvability is also a function of legal entity and cross-border operations issues. These factors include the ability to separate functions and spin off services or business lines, the likelihood of preserving franchise value in a recovery or resolution scenario, maintaining continuity of critical services within the existing or in a new legal entity or structure, the degree of the nonbank financial company's intra-group dependency for liquidity and funding, payment operation and risk management needs, and the size and nature of the nonbank financial company's intra-group transactions.

The Council anticipates that the information necessary to conduct an in-depth analysis of a particular nonbank financial company may vary significantly based on the nonbank financial company's business and activities and the information already available to the Council from existing public sources and domestic or foreign regulatory authorities. The Council will also consult with the primary financial regulatory agency, if any, for each nonbank financial company under consideration in a timely manner before the Council makes any final determination with respect to such nonbank financial company, and with appropriate foreign regulatory authorities, to the extent appropriate.

Before making a Proposed Determination, the Council intends to notify each nonbank financial company in the Stage 3 Pool when the Council believes that the evidentiary record regarding such nonbank financial company is complete.

Based on the analysis performed in Stages 2 and 3, a nonbank financial company will be considered for a Proposed Determination. Before a vote of the Council with respect to a particular nonbank financial company, the Council members will review information relevant to the consideration of the nonbank financial company for a Proposed Determination. After this review, the Council may, by a vote of two-thirds of its members (including an affirmative vote of the Council Chairperson), make a Proposed Determination with respect to the nonbank financial company. Following a Proposed Determination, the Council intends to 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. The Council expects to notify any nonbank financial company in the Stage 3 Pool if the nonbank financial company, either before or after a Proposed Determination of such nonbank financial company, ceases to be considered for determination. Any nonbank financial company that ceases to be considered at any time in the Council's determination process may be considered for Proposed Determination in the future at the Council's discretion.

A nonbank financial company that is subject to a Proposed Determination may request a hearing to contest the Proposed Determination in accordance with section 113(e) of the Dodd-Frank Act. If the nonbank financial company requests a hearing in accordance with the procedures set forth in section 1310.21(c) of the proposed rule, the Council will set a time and place for such hearing. The Council will (after a hearing, if a hearing is requested), determine by a vote of two-thirds of the voting members of the Council (including the affirmative vote of the Chairperson) whether to subject such company to supervision by the Board of Governors and prudential standards. The Council will provide the nonbank financial company with written notice of the Council's final determination, including an explanation of the basis for the Council's decision. In accordance with section 113(h) of 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.

Dated: _____

Alastair Fitzpayne
Executive Secretary, Department of the Treasury.