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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

FINANCIAL STABILITY OVERSIGHT COUNCIL

12 CFR Part 1310

Authority To Require Supervision and Regulation of Certain Nonbank Financial Companies

AGENCY: Financial Stability Oversight Council.

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

SUMMARY: This proposed interpretive guidance, which would replace the Financial Stability Oversight Council's existing interpretive guidance on nonbank financial company determinations, describes the process the Council intends to take in determining whether to subject a nonbank financial company to supervision and prudential standards by the Board of Governors of the Federal Reserve System.

DATES: *Comment due date:* June 27, 2023.

ADDRESSES: You may submit comments by either of the following methods. All submissions must refer to the document title and RIN 4030–[XXXX].

Electronic Submission of Comments: You may submit comments electronically through the Federal eRulemaking Portal at <https://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 <https://www.regulations.gov> website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Mail: Send comments to Financial Stability Oversight Council, Attn: Eric Froman, 1500 Pennsylvania Avenue NW, Room 2308, Washington, DC 20220.

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

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

FOR FURTHER INFORMATION CONTACT: Eric Froman, Office of the General Counsel, Treasury, at (202) 622–1942; Devin Mauney, Office of the General Counsel, Treasury, at (202) 622–2537; or Carol Rodrigues, Office of the General Counsel, Treasury, at (202) 622–6127.

SUPPLEMENTARY INFORMATION:

I. Background

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

The Dodd-Frank Act gives the Council broad discretion to determine how to respond to potential threats to U.S. financial stability, and the Council uses each of its statutory authorities as appropriate. The Council's duties under section 112 of the Dodd-Frank Act reflect the range of approaches the Council may consider, including collecting information from regulators, requesting data and analyses from the Office of Financial Research, monitoring the financial services marketplace and financial regulatory developments, facilitating information sharing and coordination among regulators, recommending to the Council member

agencies general supervisory priorities and principles, identifying regulatory gaps, making recommendations to the Board of Governors of the Federal Reserve System (“Federal Reserve”) or other primary financial regulatory agencies,¹ and designating certain entities or payment, clearing, and settlement activities for additional regulation.

Section 113 of the Dodd-Frank Act authorizes the Council to determine that a nonbank financial company will be subject to supervision by the Federal Reserve and prudential standards. Under section 165 of the Dodd-Frank Act, the Federal Reserve is responsible for establishing the prudential standards that will be applicable to a nonbank financial company subject to a Council designation² under section 113. The Council has previously issued rules, guidance, and other public statements regarding its process for evaluating nonbank financial companies for a potential designation.³ On April 11, 2012, the Council issued a final rule at 12 CFR 1310.1–23 (the “2012 Rule”) setting forth certain procedures related to designations under section 113 of the Dodd-Frank Act. Attached to the 2012 Rule as Appendix A was interpretive guidance (the “2012 Interpretive Guidance”) setting forth additional information regarding the manner in which the Council made determinations under section 113 (together with the 2012 Rule, the “2012 Rule and Guidance”). On February 4, 2015, the Council adopted supplemental procedures (the “2015 Supplemental Procedures”) to the 2012 Rule and Guidance.⁴ On March 13, 2019, the

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

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

³ On May 22, 2012, the Council approved hearing procedures relating to the conduct of hearings before the Council in connection with proposed determinations regarding nonbank financial companies and financial market utilities and related emergency waivers or modifications under sections 113 and 804 of the Dodd-Frank Act, 12 U.S.C. 5323, 5463; 77 FR 31855 (May 30, 2012). The hearing procedures were amended in 2013, 78 FR 22546 (April 16, 2013), and 2018, 83 FR 12010 (March 19, 2018). This proposed guidance would not amend the Council's hearing procedures.

⁴ Financial Stability Oversight Council Supplemental Procedures Relating to Nonbank

Council amended the 2012 Rule by adding a new provision at 12 CFR 1310.3.⁵ On December 30, 2019, the Council replaced the 2012 Interpretive Guidance with revised interpretive guidance (the “2019 Interpretive Guidance”).⁶ In connection with the adoption of the 2019 Interpretive Guidance, the Council rescinded the 2015 Supplemental Procedures.

The Council is proposing this interpretive guidance (the “Proposed Guidance”) to revise and update the 2019 Interpretive Guidance. If the Council issues final interpretive guidance based on this proposal, the final interpretive guidance will replace the 2019 Interpretive Guidance, found at Appendix A to 12 CFR part 1310, in its entirety but will not modify the rules at 12 CFR 1310.1–23.

The Council is concurrently issuing for public comment a separate document (the Proposed Analytic Framework) explaining the Council’s broader approach to identifying, evaluating, and addressing potential risks to U.S. financial stability. The Proposed Analytic Framework describes the Council’s analytic approach without regard to the origin of a particular risk, including whether the risk arises from widely conducted activities or from individual entities, and regardless of which of the Council’s authorities may be used to address the risk.

II. Overview of Proposed Guidance

A. Key Changes

The Proposed Guidance seeks to establish a durable process for the Council’s use of its authority to designate nonbank financial companies. The 2012 Interpretive Guidance provided a crucial framework for the Council’s analyses, but because it was adopted before the Council had designated any nonbank financial companies, it could not reflect the lessons learned from engaging in such designations. The 2019 Interpretive Guidance provided additional clarity regarding the Council’s procedures but

created inappropriate hurdles to the Council’s ability to use this authority. Congress created the designation authority to fill a glaring regulatory gap that became apparent during the financial crisis in 2007–09, when financial distress at large, complex, highly interconnected, highly leveraged, and inadequately regulated nonbank financial companies devastated the financial system. The Council has used this authority sparingly, but to mitigate the risks of future financial crises, the Council must be able to use each of its statutory authorities as appropriate to address potential threats to U.S. financial stability. The Proposed Guidance is intended to make this authority available to the Council while maintaining rigorous procedural protections for nonbank financial companies that may be reviewed for potential designation.

The Proposed Guidance would make three key changes. First, the Proposed Guidance would eliminate the statement, found in the 2019 Interpretive Guidance, that the Council would first rely on federal and state regulators to address risks to financial stability before the Council would begin to consider a nonbank financial company for potential designation. The 2019 Interpretive Guidance refers to the Council’s reliance on existing regulators as an “activities-based approach,” and provides that the Council will prioritize that approach before considering designations.⁷ The Council constantly works with federal and state financial regulatory agencies to identify, assess, and respond to risks to financial stability. Nearly all the Council members represent such agencies. Many of the Council’s statutory duties relate to promoting interagency collaboration, monitoring financial market developments, facilitating information sharing, and recommending that existing regulators address risks. These activities comprise the foundation of all the Council’s work, and under the Proposed Guidance the Council would continue to monitor for activities that pose risks to financial stability and to work with regulators to respond to those risks. Under the Proposed Guidance, the Council would maintain its previous commitment to engaging extensively with existing regulators. The Council considers dozens of potential risks to financial stability every year, as described in its annual reports, and the Council expects that most potential risks to financial stability will continue to be addressed by existing regulators rather than by use of the Council’s

nonbank financial company designation authority. However, to enable the Council to use its authorities as appropriate, the Proposed Guidance would eliminate the statement in the 2019 Interpretive Guidance that the Council would use an activities-based approach before considering a designation under section 113.

The second fundamental change under the Proposed Guidance is that it is limited to the Council’s procedures—rather than substantive analyses—related to nonbank financial company designations. The Council is issuing, for public comment, a separate document explaining the Council’s broader approach to identifying, evaluating, and addressing potential risks to U.S. financial stability. The Proposed Analytic Framework describes the Council’s analytic approach without regard to the origin of a particular risk, including whether the risk arises from widely conducted activities or from individual entities. It provides new public transparency into how the Council expects to consider any type of risk to financial stability, regardless of which of the Council’s authorities may be used to address those risks.

Therefore, the Council proposes to rescind the description, set forth in section III of the 2019 Interpretive Guidance, of the Council’s analytic approach to evaluating nonbank financial companies under consideration for designation.

The third primary change under the Proposed Guidance, related to its focus on the Council’s procedures rather than substantive analyses, is that the Proposed Guidance does not include language, found in the 2019 Interpretive Guidance, stating that the Council would conduct a cost-benefit analysis and an assessment of the likelihood of a firm’s material financial distress prior to making a determination under section 113. As explained in greater detail below, the Council believes that these steps are not required by the Dodd-Frank Act, are not useful or appropriate, and unduly hamper the Council’s ability to use the statutory authority Congress provided to it.

With respect to the Council’s procedures for nonbank financial company designations and annual reevaluations of designations, the Proposed Guidance would make only minor changes. The revisions made in the 2019 Interpretive Guidance related to the Council’s procedures for nonbank financial company designations largely reflected the rules and guidance the Council had previously issued, including the 2015 Supplemental Procedures, as well as the Council’s

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

⁵ 84 FR 8958 (March 13, 2019).

⁶ 84 FR 71740 (Dec. 30, 2019).

⁷ See 84 FR 71740, 71761 (Dec. 30, 2019).

practices in its previous designations. Among other things, the Proposed Guidance continues to provide for significant engagement and communication between the Council and a nonbank financial company under review for potential designation, and with the company's primary financial regulatory agency or home-country supervisor. In addition to these existing features, the Proposed Guidance provides further detail on how the Council would identify nonbank financial companies for preliminary evaluation to assess the risks they could pose to U.S. financial stability. The Council believes that under these procedures, the designation process would be rigorous and transparent.⁸

B. Basis for Nonbank Financial Company Determinations

Both the 2012 Interpretive Guidance and the 2019 Interpretive Guidance discussed substantive analytic factors the Council applies in its assessment of nonbank financial companies. The Proposed Guidance is instead limited to the Council's procedures related to nonbank financial company designations and does not include a discussion of the Council's substantive analyses of nonbank financial companies, like the description in section III of the 2019 Interpretive Guidance. The Proposed Guidance does not include that type of discussion because the Council is issuing a separate document—the Proposed Analytic Framework—apart from its guidance on nonbank financial company designations, regarding its approach for identifying and evaluating potential risks to U.S. financial stability. That framework describes the Council's planned analytic approach without regard to either the origin of a particular risk, including whether the risk arises from widely conducted activities or from individual entities, or any potential application of the Council's authorities to mitigate such risks.

In particular, the 2019 Interpretive Guidance describes channels deemed most likely to facilitate the transmission of the negative effects of a nonbank financial company's material financial distress, or of the nature, scope, size, scale, concentration, interconnectedness, or mix of the company's activities, to other financial firms and markets; how the complexity

and resolvability and existing regulatory scrutiny of a company under consideration for designation may affect the Council's evaluation of the relevant statutory factors; and the Council's interpretation of several statutory terms. For the reasons discussed below, these descriptions do not appear in the Proposed Guidance and would not be included in Appendix A to part 1310.

History illustrates that many factors, such as leverage, liquidity risk, and operational risk, regularly recur in different forms and under different conditions to generate risks to financial stability, and the Proposed Analytic Framework describes vulnerabilities that commonly generate or exacerbate risks to financial stability and the mechanisms by which negative effects can be transmitted more broadly. The Council may consider those risk factors and transmission channels in activities-based reviews, entity-specific analyses, or other work.⁹ Accordingly, the Council believes that describing these substantive analytic approaches broadly, rather than in a context limited to nonbank financial company designations, is most appropriate. With respect to nonbank financial company designations specifically, the Dodd-Frank Act sets forth the standard for designations and certain specific considerations that the Council must take into account in making any determination under section 113. The Council will apply the statutory standard and considerations in any evaluation of a nonbank financial company for potential designation.

The 2019 Interpretive Guidance also provides the Council's interpretation of several statutory terms not defined in the Dodd-Frank Act, including “company,” “nonbank financial company supervised by the Board of Governors,” and “material financial distress”—that the Council proposes to retain and has incorporated into the Proposed Guidance. However, the Council believes the 2019 Interpretive Guidance's interpretation of “threat to

the financial stability of the United States” as meaning “the threat of an impairment of financial intermediation or of financial market functioning that would be sufficient to inflict severe damage on the broader economy”¹⁰ is inappropriate. That definition, which requires the Council to determine that the economy “would” be severely damaged, contrasts sharply with the statutory standard under section 113 of the Dodd-Frank Act, which calls on the Council to determine whether there “could” be a threat to financial stability.¹¹ Moreover, the Council's statutory purpose “to respond to emerging threats to the stability of the United States financial system” indicates that the Council must address threats that may impair the financial system before they are realized. The nature of financial crises is that the precise severity of harm posed by emerging threats may not be apparent until it is too late. Accordingly, the Proposed Guidance does not include this definition. For purposes of analyses under section 113, the Council would expect to evaluate a “threat to the financial stability of the United States” with reference to the description of financial stability provided in the Proposed Analytic Framework.

Questions for Comment

1. Does the proposal described above not to include in the interpretive guidance a description of the Council's substantive analytic approach to evaluating nonbank financial companies in the context of a designation under section 113 of the Dodd-Frank Act, in favor of a separate framework that describes the Council's analytic approach without regard to the origin of a particular risk or the authority the Council may use to mitigate such risk, allow the Council to achieve its statutory purposes? Should the Council's proposed approach be modified for other considerations?

2. Are there additional statutory terms beyond “company,” “nonbank financial company supervised by the Board of Governors,” and “material financial distress” for which the Council should set forth its interpretation in the Proposed Guidance?

3. Would the Council's elimination of the 2019 Interpretive Guidance's

⁹ The Council has long noted that the identified transmission channels are non-exhaustive. See 2019 Interpretive Guidance, 84 FR 71763 (December 30, 2019) (“The transmission channels . . . set forth below are not exhaustive and may not apply to all nonbank financial companies under evaluation. . . . The Council may also consider other relevant channels through which risks could be transmitted from a particular nonbank financial company and thereby pose a threat to U.S. financial stability.”); see also 2012 Interpretive Guidance, 77 FR 21637, 21657 (April 11, 2012) (“The Council intends to continue to evaluate additional transmission channels and may, at 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.”).

¹⁰ See 84 FR 71763 (December 30, 2019). The definition of this term in the 2019 Interpretive Guidance imposed a higher threshold than the Council's previous interpretation of this term under the 2012 Interpretive Guidance.

¹¹ See also Dodd-Frank Act section 112(a)(2)(C) (setting forth the Council's duty to “require [enhanced] supervision . . . for nonbank financial companies that may pose risks to . . . financial stability” (emphasis added)).

⁸ In accordance with the Council's bylaws, the Council may delegate authority, including to its Deputies Committee, to implement and take any actions under the guidance, except with respect to actions that are expressly nondelegable under the Dodd-Frank Act, the Council's bylaws, or the guidance.

interpretation of “threat to the financial stability of the United States” as meaning “the threat of an impairment of financial intermediation or of financial market functioning that would be sufficient to inflict severe damage on the broader economy” enable it to achieve its statutory purposes? When the Council interprets the statutory phrase “threat to the financial stability of the United States,” are there additional factors it should consider?

C. Activities-Based Approach

The 2019 Interpretive Guidance states that the Council will prioritize its efforts to identify, assess, and address potential risks and threats to U.S. financial stability through a process that begins with an “activities-based approach,” and that the Council will pursue entity-specific determinations under section 113 of the Dodd-Frank Act only if a potential risk or threat cannot be adequately addressed through an activities-based approach. As explained in the 2019 Interpretive Guidance, an activities-based approach means an approach in which the Council seeks to address potential risks to financial stability using an authority other than nonbank financial company designations.

The Proposed Guidance removes this prioritization among the Council’s authorities, clarifying that the Council may use any of its statutory authorities, as appropriate, to address risks and threats to U.S. financial stability. As noted above, the Council will continue to monitor for activities that pose risks to financial stability and work with regulators to respond to those risks. Appropriate actions to respond to a particular risk depend on the nature of the risk. For example, vulnerabilities originating from activities that are widely conducted in a particular sector or market may be well-suited for activity-based or industry-wide regulation. In contrast, where distress at one entity could threaten financial stability, or where risks arising from a particular financial company could threaten financial stability, entity-based regulation may be appropriate. The Dodd-Frank Act gives the Council a range of authorities and broad discretion to determine how to respond to potential threats to U.S. financial stability. The Council stated in the 2019 Interpretive Guidance that it intended to use a prioritization scheme found nowhere in the Dodd-Frank Act, under which the Council would generally seek to use certain of its authorities before others. Consistent with the Council’s statutory purpose to respond to emerging threats to U.S. financial

stability, the Proposed Guidance would remove this prioritization, allowing the Council the flexibility to use the most appropriate tool for addressing potential risks. For example, the Proposed Guidance makes clear that the Council could consider using its section 113 designation authority when material financial distress at a nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of a nonbank financial company, could pose a threat to U.S. financial stability, as appropriate, without first needing to consider other approaches.

The Council’s history provides instructive examples of the Council’s use of different authorities and approaches for different types of risks. For example, the Council has taken an activities-based approach in recommending actions to address risks relating to crypto-assets, climate-related financial risks, and other topics. In 2012, the Council used an activities-based approach in issuing for public comment proposed recommendations for money market mutual fund reforms. Further, all of the Council’s annual reports have identified and recommended actions regarding various risks to U.S. financial stability,¹² many in the form of an activities-based approach. The Council has also used entity-specific approaches in designating eight financial market utilities under Title VIII of the Dodd-Frank Act and in designating four nonbank financial companies in 2013 and 2014 under section 113 of the Dodd-Frank Act.

Financial crises have illustrated the importance of ensuring that the Council can exercise its authorities as needed. For example, the 2007–09 financial crisis showed that material financial distress at a small number of large, interconnected, and highly leveraged nonbank financial companies could threaten the stability of the U.S. financial system. Based in part on that experience, Congress created the Council and gave it a mandate to address risks that arise in the future. Under the Proposed Guidance, the Council would retain flexibility to address risks and threats to U.S. financial stability using whichever authorities are appropriate for the circumstances.

Consistent with the modifications described above, the Proposed Guidance provides additional detail on how the

Council would identify nonbank financial companies for preliminary evaluation to assess the risks they could pose to U.S. financial stability (referred to as “Stage 1”). The 2019 Interpretive Guidance, in accordance with the activities-based approach, provided that the Council could evaluate a company for designation if a company’s primary financial regulatory agency did not adequately address a potential risk identified by the Council. The Proposed Guidance instead explains the process by which the Council’s staff-level committees would preliminarily identify and assess potential risks to U.S. financial stability using the analytical methods described in the Council’s separately issued Proposed Analytic Framework. This approach seeks to strengthen the Council’s ability to monitor, assess, and mitigate risks to U.S. financial stability, regardless of whether those risks originate from individual companies or widely conducted activities, while providing flexibility for the Council to adapt to circumstances that may rapidly evolve.

Questions for Comment

4. Would removal of the prioritization of the “activities-based approach” from the interpretive guidance enable the Council to achieve its statutory purposes? Should the Council’s proposed approach be modified for other considerations?

5. Are there additional steps the Council should take to ensure all of its authorities for addressing potential risks to U.S. financial stability are equally available and appropriately exercised?

6. Would the proposed staff-level process for identifying nonbank financial companies for preliminary evaluation enable the Council to achieve its statutory purposes? Does the Proposed Guidance identify the appropriate procedures the Council should follow as it considers a company for potential designation? Are there other means of identifying companies for preliminary review the Council should consider, such as the application of specific metrics for different sectors of the nonbank financial system?

7. If the Council were to establish a set of uniform quantitative metrics to identify nonbank financial companies for further evaluation, as it did through the Stage 1 thresholds in the 2012 Interpretive Guidance, what metrics should the Council consider?

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

The 2019 Interpretive Guidance states, “The Council will make a determination under section 113 only if

¹² See, e.g., FSOC, 2022 Annual Report (2022), available at <https://home.treasury.gov/system/files/261/FSOC2022AnnualReport.pdf>.

the expected benefits to financial stability from Federal Reserve supervision and prudential standards justify the expected costs that the determination would impose. As part of this analysis, the Council will assess the likelihood of a firm's material financial distress, in order to assess the extent to which a determination may promote U.S. financial stability." The Proposed Guidance does not include this language, as discussed below.

Cost-Benefit Analysis. The Dodd-Frank Act does not require a cost-benefit analysis prior to the designation of a nonbank financial company under section 113. Rather, the statute instructs the Council to designate a nonbank financial company if the Council "determines that material financial distress at the U.S. nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the U.S. nonbank financial company, could pose a threat to the financial stability of the United States."¹³ Subsection 113(a)(2) of the Dodd-Frank Act lists 10 factors the Council must consider when making a determination, such as the company's leverage, transactions with other financial companies, assets under management, and existing regulation.¹⁴

The costs and benefits of a designation are not listed considerations in the statute and are not similar to any of the listed considerations. The statute is clear that the only required considerations are related to the potential impact the company's material financial distress or activities could pose to U.S. financial stability. While Congress granted the Council discretion to consider other factors it "deems appropriate," these too must be "risk-related."¹⁵ The Council acknowledges that there may be costs associated with a designation or the resulting Federal Reserve supervision; however the Council does not consider the potential cost of a designation or of the resulting Federal Reserve supervision and prudential standards to be a "risk-related factor." The Council believes that the statutory reference to a "risk-related factor" instead should be interpreted, consistent with the statutory standard for designation and the expressly enumerated considerations, as meaning a factor related to the risk to U.S. financial stability posed by the company or the

company's activities.¹⁶ Moreover, costs incurred by a designated nonbank financial company to comply with prudential standards established by the Federal Reserve would not increase the risk posed by the company or its activities because they are incurred for the purpose of increasing the safety and soundness of the company. For example, risk-based capital requirements, leverage limits, or liquidity requirements would reduce the risk the company poses to the financial system.

The text of section 113 indicates that Congress itself determined that the potential costs of designation are outweighed by the benefits—mitigating risks to financial stability—if the company meets the statutory standard, based on the considerations Congress identified. That is, Congress's legislative judgment was that if, based on the Council's consideration of the factors listed in section 113, a nonbank financial company "could pose a threat to the financial stability of the United States," then the benefits of a designation outweigh the costs.¹⁷

Further, even if the potential cost of designation were a "risk-related factor," the Council does not believe that prescribing a cost-benefit analysis prior to a determination under section 113 is useful or appropriate. This is in part because it is not feasible to estimate with any certainty the likelihood, magnitude, or timing of a future financial crisis. The costs imposed by the potential failure of a nonbank financial company will depend on the

state of the economy and financial system at the time. The benefits of designation are potentially enormous and, in many respects, incalculable, representing the tangible and intangible gains that come from averting a financial crisis and economic catastrophe. The costs of any particular future financial crisis, and thus the benefits of its prevention through designation or other measures, cannot be predicted. Even estimates of the costs of past crises, in terms of reductions in gross domestic product, greater government expenses, increases in unemployment, or other factors, vary widely but can be measured in the trillions of dollars. Moreover, the Dodd-Frank Act directs the Federal Reserve to adopt regulatory requirements applicable to a designated nonbank financial company. The cost to a company of designation will depend critically on the applicable regulatory regime. Generally, specific regulatory requirements for designated nonbank financial companies have been determined after the designation, in order to enable the requirements to be appropriately tailored to risks posed by the company. As such, evaluating the potential costs and benefits of a designation with reasonable specificity is not possible before a designation, and it is unlikely that performing a cost-benefit analysis for a nonbank financial company would yield a balanced picture.

Likelihood of Material Financial Distress. Under the Proposed Guidance, the Council would not assess the likelihood of a company's material financial distress in considering a nonbank financial company under section 113. Similar to the language regarding a cost-benefit analysis, the Council does not believe an assessment of the likelihood of a company's material financial distress is required or appropriate.¹⁸

The Dodd-Frank Act charges the Council with designating a company under section 113 if it "determines that material financial distress at the U.S. nonbank financial company . . . could pose a threat to the financial stability of the United States."¹⁹ Under this first prong of the statutory determination standard, the Council is instructed to determine whether material financial

¹⁶ The U.S. District Court for the District of Columbia held that the Council should have considered the potential costs of designation before designating MetLife, Inc. under section 113, but the Court's reasoning assumes that a company's likelihood of material financial distress is itself a required consideration under the Council's guidance in effect at that time. See *MetLife Inc. v. Financial Stability Oversight Council (MetLife)*, 177 F. Supp. 3d 219, 239–42 (D.D.C. 2016) (discussing company's argument that "imposing billions of dollars in cost could actually make MetLife more vulnerable to distress"). The government appealed the district court's decision in 2016, but agreed to dismiss its appeal in 2018. In the final settlement agreement between the Council and MetLife, the Council maintained that its designation of MetLife complied with applicable law. In the agreement MetLife expressly waived any right to argue that the cost-benefit portion of the district court's opinion had any preclusive effect in any future proceeding before the Council or in any subsequent litigation. Under the Proposed Guidance, the likelihood of a company's material financial distress would not be a consideration in a designation under section 113.

¹⁷ See also Dodd-Frank Act section 112, 12 U.S.C. 5322(a)(2)(H) (providing that "[t]he Council shall . . . require supervision by the Board of Governors for nonbank financial companies that may pose risks to the financial stability of the United States in the event of their material financial distress or failure, or because of their activities" (emphasis added)).

¹⁸ In its *MetLife* decision, the U.S. District Court for the District of Columbia held that the Council's failure to assess the likelihood of MetLife's material financial distress was contrary to the 2012 Interpretive Guidance. 177 F. Supp. 3d at 233–39. This prong of the District Court's holding would not apply under the Proposed Guidance, which does not require any such assessment.

¹⁹ 12 U.S.C. 5323(a)(1).

¹³ 12 U.S.C. 5323(a)(1).

¹⁴ *Id.* 5323(a)(2).

¹⁵ Dodd-Frank Act section 113(a)(2)(K), 12 U.S.C. 5323(a)(2)(K).

distress at the company could pose a threat to U.S. financial stability. Thus, pursuant to section 113, the Council presupposes a company's material financial distress, and then evaluates what consequences could follow for U.S. financial stability. The first determination standard, by its terms, does not require the Council first to analyze the likelihood of a company experiencing material financial distress before determining whether such distress could threaten U.S. financial stability. Section 112 of the Dodd-Frank Act further underscores the statutory standard, making clear that the Council's duty is to designate nonbank financial companies that could threaten U.S. financial stability "in the event of their material financial distress or failure"—not based on the Council's estimation of the likelihood of such distress or failure.²⁰ Therefore, the language in the 2019 Interpretive Guidance regarding this factor fits poorly with the statutory standard.²¹

Further, the designation authority in section 113 is preventative and is meant to "respond to emerging threats to the stability of the United States financial system," consistent with the Council's purpose.²² Waiting to act until there is a reasonable likelihood of a company's failure would negate the purpose of the Council's designation authority, which is to mitigate risks before they threaten financial stability. The designation process under the Proposed Guidance would be a time-intensive exercise, and even once a company is designated, the Federal Reserve may then need to develop and implement prudential standards for the company. Such prudential standards, which may include capital and liquidity requirements, risk-management standards, and the development of resolution plans, are intended to prevent or mitigate risks to financial stability. For these tools to be most effective, they must be in place well before material financial distress appears to be likely.

There are good reasons that Congress chose not to require the Council to determine the likelihood of a nonbank financial company's material financial distress. A financial company can go

from seemingly healthy to in danger of imminent collapse in a matter of months, weeks, or even days. For example, at the end of August 2008, Lehman Brothers had reported shareholder equity—which is a measure of solvency—of \$28 billion.²³ On September 12, 2008 "experts from the country's biggest commercial investment banks . . . could not agree whether or not" Lehman Brothers was solvent.²⁴ Only two days later, on Monday, September 14, 2008, Lehman Brothers declared bankruptcy. The failures of Silicon Valley Bank and Signature Bank in March 2023 further underscored how quickly and unexpectedly an institution can become insolvent. For designation to strengthen the financial system, it must be deployed early enough that companies have time to take actions to bolster their safety and soundness, which in turn supports financial stability—something that can take several years.

Finally, if designation requires an assessment of the likelihood of material financial distress at the company, public awareness of designation (or its mere possibility) could create a run on the company by its creditors and counterparties. This is an important reason why bank supervisory ratings are confidential, in acknowledgement of the risk that disclosure of material issues at a company could trigger a run on the company. Thus, a designation that includes an assessment of the likelihood of material financial distress at the company could accelerate the company's demise and thereby threaten financial stability and undermine the purpose of the designation.

Questions for Comment

8. Does the Council's proposal described above to remove from the interpretive guidance provisions the discussion of the Council conducting a cost-benefit analysis and assessing the likelihood of a company's material financial distress allow the Council to achieve its statutory purposes? Should the Council's proposed approach be modified for other considerations?

9. Are there additional points the Council should consider regarding the usefulness, practicality, or feasibility of conducting a cost-benefit analysis regarding the designation of a company under section 113?

10. What data or factors should the Council consider in evaluating the potential risk to U.S. financial stability

that could be posed by the failure of a company, should that company experience material financial distress?

11. If the Council were to identify a nonbank financial company as likely to experience material financial distress, what, if any, effects would such identification have when it became public knowledge?

III. Legal Authority of Council and Status of the Proposed Guidance

The Council has numerous authorities and tools under the Dodd-Frank Act to carry out its statutory purposes.²⁵ The Council expects that its response to any potential risk or threat to U.S. financial stability will be based on an assessment of the circumstances. As the agency charged by Congress with broad-ranging responsibilities under sections 112 and 113 of the Dodd-Frank Act, the Council has the inherent authority to promulgate interpretive guidance under those provisions that explains and interprets the steps the Council will take when undertaking the determination process.²⁶ The Council also has authority to issue procedural rules²⁷ and policy statements.²⁸ The Proposed Guidance provides transparency to the public as to how the Council intends to exercise its statutory grant of discretionary authority. Except to the extent that the Proposed Guidance sets forth rules of agency organization, procedure, or practice, the Council has concluded that the Proposed Guidance does not have binding effect; does not impose duties on, or alter the rights or interests of, any person; does not change the statutory standards for the Council's decision making; and does not relieve the Council of the need to make entity-specific determinations in accordance with section 113 of the Dodd-Frank Act. The Proposed Guidance also does not limit the ability of the Council to take emergency action under section 113(f) of the Dodd-Frank Act if the Council determines that such action is necessary

²⁵ See, for example, Dodd-Frank Act sections 112(a)(2), 113, 115, 120, 804, 12 U.S.C. 5322(a)(2), 5323, 5325, 5330, 5463.

²⁶ Courts have recognized that "an agency charged with a duty to enforce or administer a statute has inherent authority to issue interpretive rules informing the public of the procedures and standards it intends to apply in exercising its discretion." See, for example, *Production Tool v. Employment & Training Administration*, 688 F.2d 1161, 1166 (7th Cir. 1982). The Supreme Court has acknowledged that "whether or not they enjoy any express delegation of authority on a particular question, agencies charged with applying a statute necessarily make all sorts of interpretive choices." See *U.S. v. Mead*, 533 U.S. 218, 227 (2001).

²⁷ See Dodd-Frank Act section 111(e)(2), 12 U.S.C. 5321(e)(2).

²⁸ See *Association of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710 (D.C. Cir. 2015).

²⁰ 12 U.S.C. 5322(a)(2)(H).

²¹ The Council for many years consistently expressed the view that the 2012 Interpretive Guidance did not contemplate the consideration of the likelihood of a nonbank financial company's material financial distress. The 2019 Interpretive Guidance altered the Council's approach. The Proposed Guidance would conform to the Council's original understanding that this factor should not be taken into account.

²² See Dodd-Frank Act section 112(a)(1)(c), 12 U.S.C. 5322(a)(1)(c).

²³ Financial Crisis Inquiry Commission, *The Financial Crisis Inquiry Report* at 324 (2011), available at <https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf>.

²⁴ *Id.*

or appropriate to prevent or mitigate threats posed by a nonbank financial company to U.S. financial stability. As a result, the Council has concluded that the notice and comment requirements of the Administrative Procedure Act would not apply.²⁹ However, under the Council's rule in 12 CFR 1310.3, the Council voluntarily committed that it would not amend or rescind Appendix A to part 1310 without providing the public with notice and an opportunity to comment in accordance with the procedures applicable to legislative rules under 5 U.S.C. 553.³⁰ Consequently, the Council invites interested persons to submit comments regarding the Proposed Guidance.

IV. Paperwork Reduction Act

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

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

The hours and costs associated with preparing data, information, and reports for submission to the Council constitute reporting and cost burdens imposed by the collection of information. The estimated total annual reporting burden associated with the collection of information in the Proposed Guidance is 20 hours, based on an estimate of 1 respondent. We estimate the cost associated with this information collection to be \$9,000.

In making this estimate, the Council estimates that due to the nature of the information likely to be requested, approximately 75 percent of the burden in hours will be carried by financial companies internally at an average cost of \$400 per hour, and the remainder

will be carried by outside professionals retained by financial companies at an average cost of \$600 per hour. In addition, in determining these estimates, the Council considered its obligation under 12 CFR 1310.20(b) to, whenever possible, rely on information available from the Office of Financial Research or any Council member agency or primary financial regulatory agency that regulates a nonbank financial company before requiring the submission of reports from such nonbank financial company. The Council expects that its collection of information under the Proposed Guidance would be performed in a manner that attempts to minimize burdens for affected financial companies. The aggregate burden will be subject to the number of financial companies that are evaluated in the determination process, the extent of information regarding such companies that is available to the Council through existing public and regulatory sources, and the amount and types of information that financial companies provide to the Council.

Interested persons are invited to submit comments regarding the estimates provided in this section. Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Financial Stability Oversight Council, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to Samantha MacInnis, Department of the Treasury, Washington, DC 20220. Comments on the collection of information must be received by June 27, 2023.

Comments are specifically requested concerning:

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

V. Executive Orders 12866, 13563, and 14094

Executive Orders 12866, 13563 and 14094 direct certain agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Pursuant to section 3(f) of Executive Order 12866, the Office of Information and Regulatory Affairs within the Office of Management and Budget has determined that the Proposed Guidance is a "significant regulatory action". Accordingly, the Proposed Guidance has been reviewed by the Office of Management and Budget.

List of Subjects in 12 CFR Part 1310

Brokers, Investments, Securities.

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

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

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

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

- 2. Appendix A is revised to read as follows:

Appendix A to Part 1310—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)³¹ 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 Federal Reserve Board) and be subject to prudential standards, in accordance with Title I of the Dodd-Frank Act, if either (1) the Council determines that material financial distress at the nonbank financial company could pose a threat to U.S. financial stability, or (2) the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the nonbank financial company could pose a threat to U.S. financial stability. Section 113 of the Dodd-Frank Act lists the considerations that the Council must take into account in making a determination. This guidance supplements the Council's rule

²⁹ See 5 U.S.C. 553(b)(A); 12 CFR 1310.3.

³⁰ Section 1310.3 does not apply to the Council's issuance of rules, guidance, procedures, or other documents that do not amend or rescind Appendix A. Thus, other Council materials, and documents that are referred to in but are not a part of the Proposed Guidance, such as the Council's separately issued Proposed Analytic Framework, hearing procedures, bylaws, and committee charters, are not subject to section 1310.3's requirements.

³¹ See Dodd-Frank Act section 113, 12 U.S.C. 5323.

regarding nonbank financial company determinations.³²

Section II of this appendix outlines a two-stage process that the Council generally expects to follow when determining whether to subject a nonbank financial company to Federal Reserve Board supervision and prudential standards.³³ Section III sets forth the process the Council expects to follow in conducting reevaluations of its previous determinations.

II. Process for Nonbank Financial Company Determinations

Under section 113 of the Dodd-Frank Act, the Council may evaluate a nonbank financial company³⁴ for an entity-specific determination. This section describes the process the Council expects to follow in general for those reviews.

a. Overview of the Determination Process

As described in detail below, the Council expects generally to follow a two-stage process of evaluation and analysis when evaluating a nonbank financial company under section 113 of the Dodd-Frank Act. During the first stage of the process (Stage 1), a nonbank financial company identified for review will be notified and subject to a preliminary analysis, based on quantitative and qualitative information available to the Council primarily through public and regulatory sources. During Stage 1, the Council will permit, but not require, the company to submit relevant information. The Council will also consult with the company's primary financial regulatory agency³⁵ or home country supervisor, as appropriate. This approach will enable the Council to

fulfill its statutory obligation to rely whenever possible on information available through the Office of Financial Research (the OFR), Council member agencies, or the nonbank financial company's primary financial regulatory agencies before requiring the submission of reports from any nonbank financial company.³⁶

Following Stage 1, any nonbank financial company that is selected for additional review will receive notice that it is being considered for a proposed determination that the company will be supervised by the Federal Reserve Board and be subject to prudential standards under Title I of the Dodd-Frank Act (a Proposed Determination) and that the company will be subject to in-depth evaluation during the second stage of review (Stage 2). Stage 2 will also involve the evaluation of additional information collected directly from the nonbank financial company. At the end of Stage 2, the Council may consider whether to make a Proposed Determination with respect to the nonbank financial company. If the Council makes a Proposed Determination, the nonbank financial company may request a hearing in accordance with section 113(e) of the Dodd-Frank Act and § 1310.21(c) of the Council's rule regarding nonbank financial company determinations.³⁷ After making a Proposed Determination and holding any written or oral hearing if requested, the Council may vote to make a final determination (a Final Determination).

b. Stage 1: Preliminary Evaluation of Nonbank Financial Companies

Stage 1 involves a preliminary analysis of nonbank financial companies to assess the risks they could pose to U.S. financial stability. In light of the preliminary nature of a review in Stage 1, the Council expects that not all companies reviewed in Stage 1 will proceed to Stage 2 or a Final Determination. Identification of Company for Review in Stage 1

The Council may evaluate one or more individual nonbank financial companies for an entity-specific determination under section 113 of the Dodd-Frank Act. The Council's staff-level committees are responsible for monitoring and analyzing financial markets, financial companies, the financial system, and issues related to financial stability. These committees monitor a broad range of asset classes, institutions, and activities, as described in the Council's Framework for Financial Stability Risk Identification, Assessment, and Response (the Analytic Framework), and as reflected in the Council's annual reports. In assessing potential risks, these committees consider the vulnerabilities and types of metrics described in the Analytic Framework. These committees, in the course of their duties, will monitor each sector of the financial system at least annually and will report to the Deputies Committee³⁸ regarding potential

risks to U.S. financial stability that they identify. With respect to these monitoring and reporting activities, the Council's Systemic Risk Committee is responsible for monitoring and reporting on each financial sector, including information on identified firms and activities that may pose risks that merit further review, unless another Council committee or working group provides such updates to the Deputies Committee on a particular sector. The updates to the Deputies Committee will use applicable metrics as described in the Analytic Framework. The Deputies Committee is responsible for directing, coordinating, and overseeing the work of the Systemic Risk Committee and all of the Council's other staff-level committees and working groups in accordance with this guidance. If an identified risk relates to one or more financial companies that may merit review in the context of a potential determination under section 113, the Council may review those companies in Stage 1. Alternatively, the Deputies Committee may direct a staff-level committee or working group to further assess the identified risks, including consideration of whether the risks could be addressed by a designation under section 113 or by use of a different Council authority, such as recommendations to existing regulators. The Deputies Committee may also direct the Council's Nonbank Financial Companies Designations Committee (the Nonbank Designations Committee)³⁹ to conduct an initial analysis of the companies based on the risk-assessment approach described in the Analytic Framework. The purpose of such an analysis by the Nonbank Designations Committee would be to further inform the determination regarding whether one or more companies should be reviewed in Stage 1, if needed. Following any such analysis by the Nonbank Designations Committee, the Council may review one or more companies in Stage 1. Any Council committee's identification, reporting, direction, analysis, or recommendation described in this paragraph will be made in accordance with such committee's bylaws or charter.

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

Deputies Committee of the Financial Stability Oversight Council, available at <https://fsoc.gov>.

³⁹ The Nonbank Designations Committee supports the Council in fulfilling the Council's responsibilities to consider, make, and review Council determinations regarding nonbank financial companies under section 113 of the Dodd-Frank Act. See Charter of the Nonbank Financial Companies Designations Committee of the Financial Stability Oversight Council, available at <https://fsoc.gov>.

³² See 12 CFR part 1310.

³³ The Council may waive or modify this process in its discretion if it determines that emergency circumstances exist, including if necessary or appropriate to prevent or mitigate threats posed by a nonbank financial company to U.S. financial stability in accordance with section 113(f) of the Dodd-Frank Act.

³⁴ The Council intends to interpret the term "company" to include any corporation, limited liability company, partnership, business trust, association, or similar organization. See Dodd-Frank Act section 102(a)(4), 12 U.S.C. 5311(a)(4). In addition, the Council intends to consider any nonbank financial company to be subject to a final determination of the Council if the company acquires, directly or indirectly, a majority of the assets or liabilities of a company that is subject to a final determination of the Council. As a result, if a nonbank financial company subject to a final determination of the Council sells or otherwise transfers a majority of its assets or liabilities, the acquirer will succeed to, and become subject to, the Council's determination. As discussed in section III below, a nonbank financial company that is subject to a final determination of the Council may request a reevaluation of the determination before the next required annual reevaluation, in an appropriate case. Such an acquirer can use this reevaluation process to seek a rescission of the determination upon consummation of its transaction.

³⁵ See Dodd-Frank Act section 2(12), 12 U.S.C. 5301(12). In each stage of the Council's process under section 113 of the Dodd-Frank Act, the Council may also consult with, solicit information from, or coordinate with other state or federal financial regulatory agencies that have jurisdiction over the nonbank financial company or its activities.

³⁶ See Dodd-Frank Act section 112(d)(3), 12 U.S.C. 5322(d)(3).

³⁷ See 12 CFR 1310.21(c).

³⁸ The Council's Deputies Committee is composed of senior officials from each Council member and member agency. See Bylaws of the

Engagement With Company and Regulators in Stage 1

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

The Council will also consider in Stage 1 information available from relevant existing regulators of the company. Under the Dodd-Frank Act, the Council is required to consult with the primary financial regulatory agency, if any, for each nonbank financial company or subsidiary of a nonbank financial company that is being considered for a determination before the Council makes any Final Determination with respect to such company.⁴⁰ For any company under review in Stage 1 that is regulated by a primary financial regulatory agency or home country supervisor, the Council will notify the regulator or supervisor that the company is under review no later than the time the company is notified. The Council will also consult with the primary financial regulatory agency, if any, of each significant subsidiary of the nonbank financial company, to the extent the Council deems appropriate in Stage 1. The Council will actively solicit the regulator's views regarding risks at the company and potential mitigants or aggravating factors. In order to enable the regulator to provide relevant information, the Council will share its preliminary views regarding potential risks at the company, if any and to the extent practicable, and request that the regulator provide information regarding those specific risks, including the extent to which the risks are adequately mitigated by factors such as existing regulation or the company's business

practices. During the determination process, the Council will encourage the regulator to address any risks to U.S. financial stability using the regulator's existing authorities; if the Council believes regulators' or the company's actions have adequately addressed the potential risks to U.S. financial stability the Council has identified, the Council may discontinue its consideration of the company for a potential determination under section 113 of the Dodd-Frank Act.

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

c. Stage 2: In-Depth Evaluation

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

In Stage 2, the Council will review a nonbank financial company using information collected directly from the company, through the OFR, as well as public and regulatory information. The review will focus on whether material financial distress⁴¹ at the nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the company, could pose a threat to U.S. financial stability. The Analytic Framework describes the Council's approach to evaluating potential risks to U.S. financial stability, including in the context of a review under section 113 of the Dodd-Frank Act.

Engagement With Company and Regulators in Stage 2

A nonbank financial company to be evaluated in Stage 2 will receive a notice (a Notice of Consideration) that the company is under consideration for a Proposed Determination. The Council also will submit to the company a request that the company provide information that the Council deems relevant to the Council's evaluation, and the nonbank financial company will be provided an opportunity to submit written materials to the Council.⁴² This information will generally be collected by the OFR.⁴³ Before requiring the submission of reports from any nonbank financial company that is regulated by a Council member agency or a primary financial regulatory agency, the Council, acting through the OFR, will coordinate with such agencies and will, whenever possible, rely on information available from the OFR or such agencies. Council members and their

agencies and staffs will maintain the confidentiality of such information in accordance with applicable law. During Stage 2, the company may also submit any other information that it deems relevant to the Council's evaluation. Information that may be considered by the Council includes details regarding the company's financial activities, legal structure, liabilities, counterparty exposures, resolvability, and existing regulatory oversight. Information requests likely will involve both qualitative and quantitative information. Information relevant to the Council's analysis may include confidential business information such as detailed information regarding financial assets, terms of funding arrangements, counterparty exposure or position data, strategic plans, and interaffiliate transactions.

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

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

Before making a Proposed Determination regarding a nonbank financial company, the Council will notify the company when the Council believes that the evidentiary record regarding the company is complete. The Council will notify any nonbank financial company in Stage 2 if the company ceases to be considered for a determination. Any nonbank financial company that ceases to be considered at any time in the Council's determination process may be considered for a Proposed Determination in the future at the Council's discretion, consistent with the processes described above.

d. Proposed and Final Determination Proposed Determination

Based on the analysis performed in Stage 2, a nonbank financial company may be considered for a Proposed Determination. A Proposed Determination requires a vote, on a

⁴⁰ Dodd-Frank Act section 113(g), 12 U.S.C. 5323(g).

⁴¹ The Council intends to interpret the term "material financial distress" as a nonbank financial company being in imminent danger of insolvency or defaulting on its financial obligations.

⁴² See 12 CFR 1310.21(a).

⁴³ See Dodd-Frank Act section 112(d), 12 U.S.C. 5322(d).

nondelegable basis, of two-thirds of the voting members of the Council then serving, including an affirmative vote by the Chairperson of the Council.⁴⁴ Following a Proposed Determination, the Council will issue a written notice of the Proposed Determination to the nonbank financial company, which will include an explanation of the basis of the Proposed Determination.⁴⁵ Promptly after the Council votes to make a Proposed Determination regarding a company, the Council will provide the company's primary financial regulatory agency or home country supervisor with the nonpublic written explanation of the basis of the Council's Proposed Determination (subject to appropriate protections for confidential information).

Hearing

A nonbank financial company that is subject to a Proposed Determination may request a nonpublic hearing to contest the Proposed Determination in accordance with section 113(e) of the Dodd-Frank Act. If the nonbank financial company requests a hearing in accordance with the procedures set forth in § 1310.21(c) of the Council's rule,⁴⁶ the Council will set a time and place for such hearing. The Council has published hearing procedures on its website.⁴⁷ In light of the statutory timeframe for conducting a hearing, and the fact that the purpose of the hearing is to benefit the company, if a company requests that the Council waive the statutory deadline for conducting the hearing, the Council may do so in appropriate circumstances.

Final Determination

After making a Proposed Determination and holding any requested written or oral hearing, the Council, on a nondelegable basis, may, by a vote of not fewer than two-thirds of the voting members of the Council then serving (including an affirmative vote by the Chairperson of the Council), make a Final Determination that the company will be subject to supervision by the Federal Reserve Board and prudential standards. If the Council makes a Final Determination, it will provide the company with a written notice of the Council's Final Determination, including an explanation of the basis for the Council's decision.⁴⁸ The Council will also provide the company's primary financial regulatory agency or home country supervisor with the nonpublic written explanation of the basis of the Council's Final Determination (subject to appropriate protections for confidential information). The Council expects that its explanation of the basis for any Final Determination will highlight the key risks that led to the determination and include guidance regarding the factors that were

important in the Council's determination. When practicable and consistent with the purposes of the determination process, the Council will provide a nonbank financial company with notice of a Final Determination at least one business day before publicly announcing the determination pursuant to § 1310.21, paragraphs (d)(3), (e)(3), or (d)(3) of the Council's rule.⁴⁹ In accordance with the Dodd-Frank Act, a nonbank financial company that is subject to a Final Determination may bring an action in U.S. district court for an order requiring that the determination be rescinded.⁵⁰

The Council does not intend to publicly announce the name of any nonbank financial company that is under evaluation prior to a Final Determination with respect to such company. However, if a company that is under review in Stage 1 or Stage 2 publicly announces the status of its review by the Council, the Council intends, upon the request of a third party, to confirm the status of the company's review. In addition, the Council will publicly release the explanation of the Council's basis for any Final Determination or rescission of a determination, following such an action by the Council. The Council is subject to statutory and regulatory requirements to maintain the confidentiality of certain information submitted to it by a nonbank financial company or its regulators.⁵¹ In light of these confidentiality obligations, such confidential information will be redacted from the materials that the Council makes publicly available, although the Council does not expect to restrict a company's ability to disclose such information.

III. Annual Reevaluations of Nonbank Financial Company Determinations

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

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

extraordinary change that materially affects the Council's analysis.⁵²

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

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

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

If a company contests the Council's determination during the Council's annual reevaluation, the Council will vote on

⁴⁴ 12 CFR 1310.10(b).

⁴⁵ Dodd-Frank Act section 113(e)(1), 12 U.S.C. 5323(e)(1).

⁴⁶ See 12 CFR 1310.21(c).

⁴⁷ Financial Stability Oversight Council Hearing Procedures for Proceedings Under Title I or Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, available at <https://fsoc.gov>.

⁴⁸ Dodd-Frank Act section 113(e)(3), 12 U.S.C. 5323(e)(3); see also 12 CFR 1310.21(d)(2) and (e)(2).

⁴⁹ See 12 CFR 1310.21(d)(3) and (e)(3) and 1310.22(d)(3).

⁵⁰ See Dodd-Frank Act section 113(h), 12 U.S.C. 5323(h).

⁵¹ See Dodd-Frank Act section 112(d)(5), 12 U.S.C. 5322(d)(5); see also 12 CFR 1310.20(e).

⁵² See note 3 above.

whether to rescind the determination and provide the company, its primary financial regulatory agency or home country supervisor, and the primary financial regulatory agency of its significant subsidiaries with a notice explaining the primary basis for any decision not to rescind the determination. If the Council does not rescind the determination, the written notice provided to the company will address the most material factors raised by the company in its submissions to the Council contesting the determination during the annual reevaluation. The written notice from the Council will also explain why the Council did not find that the company no longer met the standard for a determination under section 113 of the Dodd-Frank Act. In general, due to the sensitive, company-specific nature of its analyses in annual reevaluations, the Council generally would not publicly release the written findings that it provides to the company, although the Council does not expect to restrict a company's ability to disclose such information.

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

Kayla Arslanian,
Executive Secretary.

[FR Doc. 2023-08964 Filed 4-27-23; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 25

[Docket No. FWS-HQ-NWRS-2022-0092;
FXRS1261090000-212-FF09R20000]

RIN 1018-BG80

National Wildlife Refuge System; Drain Tile Setbacks

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose new regulations pertaining to wetland easements to bring consistency, transparency, and clarity for both easement landowners and the Service in the administration of conservation easements, pursuant to the National Wildlife Refuge Administration Act of 1966, as amended by the National Wildlife Refuge System Improvement Act of 1997. The proposed regulations would codify the process by which the Service establishes drain tile setbacks in wetland easement contracts. Setback distances would be calculated based upon the best available science

considering soil characteristics, tile diameter, the depth of the tile below the surface, and/or topography sufficient to the easement contract's standard of protection that ensures no drainage of adjacent protected wetland areas. The proposed regulations would apply only to setbacks provided by the Service beginning on the effective date of the final rule.

DATES:

Written comments: We will accept comments received or postmarked on or before June 27, 2023.

Information collection requirements: If you wish to comment on the information collection requirements in this proposed rule, please note that the Office of Management and Budget (OMB) is required to make a decision concerning the collection of information contained in this proposed rule between 30 and 60 days after publication of this proposed rule in the **Federal Register**. Therefore, comments should be submitted to OMB by June 27, 2023.

ADDRESSES:

Written comments: You may submit comments by one of the following methods:

- *Electronically:* Go to the Federal eRulemaking Portal: <https://www.regulations.gov>. In the Search box, type in FWS-HQ-NWRS-2022-0092, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting screen, find the correct document and submit a comment by clicking on "Comment."

- *By hard copy:* Submit by U.S. mail or hand delivery: Public Comments Processing, Attn: FWS-HQ-NWRS-2022-0092; U.S. Fish and Wildlife Service; 5275 Leesburg Pike, MS: PRB (JAO/3W); Falls Church, VA 22041-3803.

We will not accept email or faxes. We will post all comments on <https://www.regulations.gov>. This generally means that we will post any personal information you provide us (see Request for Comments, below, for more information).

Information collection requirements: Written comments and suggestions on the information collection requirements should be submitted by the date specified above in **DATES** to <https://www.reginfo.gov/public/do/PRAMain>. Find this particular information collection by selecting "Currently under Review—Open for Public Comments" or by using the search function. Please provide a copy of your comments to the Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, 5275 Leesburg Pike, MS: PRB (JAO/3W), Falls Church, VA

22041-3803 (mail); or Info_Coll@fws.gov (email). Please reference "OMB Control Number 1018-New Drain Tile Setbacks" in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT:

Debbie DeVore, (251) 604-1383.

Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Background

Wetland habitat in the Prairie Pothole Region (PPR) of Iowa, Minnesota, Montana, North Dakota, and South Dakota is critically important to waterfowl and other migratory bird populations. The unique topography of the PPR includes the numerous small wetlands and potholes typical of the PPR that were formed through glaciation thousands of years ago. Prairie potholes are freshwater depressions and marshes, often less than 2 feet deep and 1 acre in size, that are a permanent feature of these landscapes barring deliberate alteration of the topography or hydrology. What makes the PPR so biologically important to waterfowl is the seasonal fluctuation of surface water through these permanent wetlands basins. The PPR is responsible for producing approximately 50 to 75 percent of the primary species of ducks on the North American continent, providing habitat for more than 60 percent of the breeding population. Waterfowl fledged in the PPR are a significant natural resource that supports waterfowl hunting and an associated industry that creates an estimated 30,000 jobs and nearly \$1 billion in economic benefit.

Congress, recognizing the impact that widespread drainage was having on wetlands and waterfowl populations in the PPR, officially created the Small Wetlands Acquisition Program on August 1, 1958, by amending the 1934 Migratory Bird Hunting Stamp Act (commonly referred to as the "Duck Stamp Act"). The amendment allowed proceeds from the sale of Federal Duck Stamps to be used to conserve and protect "small wetland and pothole areas" through the acquisition and establishment of areas designated as Waterfowl Production Areas (WPAs). The Service purchased the first fee-title WPA in South Dakota in 1959 and began to purchase wetland easements