FINANCIAL STABILITY OVERSIGHT COUNCIL

12 CFR Part 1310

Guidance on Nonbank Financial Company Determinations

AGENCY: Financial Stability Oversight Council.

ACTION: Final interpretive guidance.

SUMMARY: This final interpretive guidance describes the process the Financial Stability Oversight Council intends to undertake in determining whether to subject a nonbank financial company to prudential standards and supervision by the Board of Governors of the Federal Reserve System under section 113 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

DATES: Effective January 16, 2024

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SUPPLEMENTARY INFORMATION:

I. Background

Section 111 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) established the Financial Stability Oversight Council (the Council).[1] The statutory purposes of the Council 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.'' [2]

The Council's duties under section 112 of the Dodd-Frank Act reflect the range of approaches the Council may consider to respond to potential threats to U.S. financial stability, which include collecting information from regulators, requesting data and analyses from the Office of Financial Research (OFR), 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,[3] 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 and lists the considerations that the Council must take into account in making such a determination. Designation [4] is authorized if the Council determines that either (1) material financial distress at the nonbank financial company could pose a threat to U.S. financial stability (referred to as the ''first determination standard''), or (2) the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the nonbank financial company could pose a threat to U.S. financial stability (the ''second determination standard'').[5] 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 designation under section 113 of the Dodd-Frank Act.

The Council has previously issued rules, guidance, and other public statements regarding its process for evaluating nonbank financial companies for potential designation. On April 11, 2012, the Council issued a final rule at 12 CFR 1310.1 through 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.[6] On March 13, 2019, the Council amended the 2012 Rule by adding a new provision at 12 CFR 1310.3.[7] On December 30, 2019, the Council replaced the 2012 Interpretive Guidance with revised interpretive guidance (the 2019 Interpretive Guidance).[8] In connection with the adoption of the 2019 Interpretive Guidance, the Council rescinded the 2015 Supplemental Procedures.[9]

On April 21, 2023, the Council approved proposed interpretive guidance (the Proposed Guidance) to revise and update the 2019 Interpretive Guidance.[10] The comment period was initially set to close after 60 days; however, in response to public requests for additional time to review and comment on the Proposed Guidance, the Council extended the comment period by 30 days.[11] The comment period closed on July 27, 2023.

The Council received 47 comment letters in response to the Proposed Guidance, of which 13 were from various advocacy groups, 11 were from companies or trade associations in the investment management industry, six were from trade associations in the

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[1] Dodd-Frank Act section 111, 12 U.S.C. 5321.

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

[3] ''Primary financial regulatory agency'' is defined in section 2(12) of the Dodd-Frank Act, 12 U.S.C. 5301(12). Primary financial regulatory agencies and home country supervisors are referred to collectively as ''primary financial regulators'' in this preamble.

[4] Section 113 of the Dodd-Frank Act, 12 U.S.C. 5323, refers to a Council ''determination'' regarding a nonbank financial company. This preamble and the following interpretive guidance refer to ''determination'' and ''designation'' interchangeably for ease of reading.

[5] For ease of reading, this preamble often refers to the first and second determination standards together as whether a company's ''material financial distress or activities'' could pose a threat to financial stability.

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

[7] 84 FR 8,958 (March 13, 2019).

[8] 84 FR 71,740 (Dec. 30, 2019).

[9] Minutes of the Council (Dec. 4, 2019), available at *https://home.treasury.gov/system/files/261/December-4-2019.pdf*. In addition, 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 and 5463; see 77 FR 31,855 (May 30, 2012). The hearing procedures were amended in 2013 (78 FR 22,546 (April 16, 2013)) and 2018 (83 FR 12,010 (March 19, 2018)). The following interpretive guidance does not amend the Council's hearing procedures.

[10] 88 FR 26,234 (April 28, 2023).

[11] 88 FR 41,510 (June 27, 2023).

insurance industry, seven were from other companies or trade associations, five were from current or former state or federal government officials, two were from groups of academics, and three were from other individuals.[12]

Having carefully considered the comments it received, at a public meeting on November 3, 2023, the Council adopted the final interpretive guidance below (the Final Guidance), which replaces in its entirety the 2019 Interpretive Guidance, found at Appendix A to 12 CFR part 1310. The Council's rules at 12 CFR 1310.1 through 23 remain in effect.

Also on November 3, 2023, the Council adopted a separate document explaining the Council's substantive approach to identifying, assessing, and responding to certain potential risks to U.S. financial stability (the Analytic Framework). The 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. The Council approved a proposed version of the Analytic Framework (the Proposed Analytic Framework) on April 21, 2023.[13] The public comment period for the Proposed Analytic Framework ran concurrently with the comment period for the Proposed Guidance, including the 30-day extension, and most of the comment letters noted above also addressed the Proposed Analytic Framework.

II. Overview of the Final Guidance

A. Overview

With the Final Guidance, the Council aims to establish a durable process for the Council's use of its nonbank financial company designation authority, maintain rigorous procedural protections for nonbank financial companies reviewed for potential designation, and remove unwarranted hurdles to designation imposed by the 2019 Interpretive Guidance. Congress created the designation authority based on lessons learned from 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. While the financial system, market participants, and risks can rapidly evolve, it remains the Council's statutory responsibility not only to monitor the financial services marketplace but to take action to respond to emerging threats to U.S. financial stability.[14]

Under the Final Guidance, the Council's designation process is built on transparency and engagement with a company under review and its existing primary financial regulator (if any) during the designation process. Through this process, any Council designation of a nonbank financial company will be based on data-driven analysis that reflects the distinctive aspects of the company, its market, and its existing regulation. Further, the approach adopted in the Final Guidance does not make designation the Council's default method of addressing risks to financial stability—and the Final Guidance does not eliminate the Council's use of an activities-based approach to address risks to financial stability when the Council finds it to be appropriate. Instead, the Final Guidance puts the Council's designation authority on equal footing with its other powers. The Council expects to continue addressing most risks through its collaboration with primary financial regulators.

B. Key Changes From the 2019 Interpretive Guidance

The Final Guidance removes three significant but inappropriate prerequisites to the exercise of the Council's nonbank financial company designation authority that were created by the 2019 Interpretive Guidance. In particular, the 2019 Interpretive Guidance stated that before considering a nonbank financial company for potential designation under section 113 of the Dodd-Frank Act, the Council would exhaust all available alternatives by prioritizing an ''activities-based approach,'' perform a cost-benefit analysis, and assess a company's likelihood of material financial distress. As explained below, the Council has determined that these steps are not legally required, are not useful or appropriate, and would unduly hamper the Council's ability to use the statutory designation authority in relevant circumstances:

- By prioritizing other approaches to mitigating risks to financial stability, the 2019 Interpretive Guidance generally allowed the Council to consider a nonbank financial company for potential designation only after the Council completed a multi-step process in which the Council would wait for existing regulators to address identified risks to financial stability, obstructing the Council's ability to respond to risks to financial stability in a timely fashion.
- Cost-benefit analysis is not in the list of considerations Congress specifically required the Council to consider in a designation, and due to the unpredictability of financial crises, such an analysis is not reasonably estimable, useful, or warranted in this context.
- Assessing a nonbank financial company's likelihood of material financial distress is not among the tasks Congress set for the Council and could undermine financial stability by spurring a run on a company that is designated or under review for potential designation.

Unlike the 2012 Interpretive Guidance and the 2019 Interpretive Guidance, the Final Guidance is focused on the Council's procedures for nonbank financial company designations. It therefore does not discuss the substantive analytic factors the Council applies in its assessments of nonbank financial companies. The Council has issued a separate document—the Analytic Framework—regarding its approach to identifying, assessing, and responding to potential risks to U.S. financial stability. The Analytic Framework provides additional 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 the risk.

Similarly, the Final Guidance does not include the 2019 Interpretive Guidance's definition of ''threat to the financial stability of the United States'' as requiring ''severe damage on the broader economy.'' [15] The Council has determined that this definition was overly restrictive and in conflict with the Council's statutory purpose ''to respond to emerging threats to the stability of the United States financial system.'' [16] Instead, as described in detail below, the Analytic Framework states that events or conditions that could substantially impair the financial system's ability to support economic activity would constitute a threat to financial stability.

With respect to the Council's procedures for nonbank financial company designations and annual reevaluations of designations, the Final

[12] The comment letters are available at *https://www.regulations.gov/docket/FSOC-2023-0002/comments.*

[13] 88 FR 26,305 (April 28, 2023).

[14] See Dodd-Frank Act sections 112(a)(1)(C), (a)(2)(C), and (a)(2)(H), 12 U.S.C. 5322(a)(1)(C), (a)(2)(C), and (a)(2)(H).

[15] See 84 FR at 71,763 (Dec. 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.

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

Guidance makes only minor changes to the 2019 Interpretive Guidance. Among other things, the Final 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 regulator. In addition to these pre-existing features, the Final Guidance provides further detail on how the Council expects to 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 will be rigorous and transparent.[17]

C. Process for Nonbank Financial Company Determinations

As described in the Final Guidance,[18] the Council expects generally to follow a two-stage process in considering a nonbank financial company for potential designation under section 113 of the Dodd-Frank Act. This process is designed to enable substantial engagement with the company under consideration and its primary financial regulator,[19] in recognition of the primary financial regulator's knowledge regarding the company and its market. The Final Guidance does not prioritize the designation authority above other approaches to mitigating risks to financial stability; instead, the Council's process explicitly contemplates that identified risks may be addressed through alternatives to designation, such as nonbinding recommendations to primary financial regulatory agencies. The Council does not expect that every company that comes under review will progress to a proposed or final designation, and it is the Council's goal that companies will have ample opportunities to provide relevant information to and engage with the Council as part of a transparent and durable designation process.

The initial identification of companies that the Council may review in the first stage of the designation process (Stage 1) is a function of the Council's staff-level committees, which are responsible for monitoring and analyzing financial markets, financial companies, the financial system, and issues related to financial stability. These committees monitor the financial system and report to the Council's Deputies Committee[20] regarding potential risks to U.S. financial stability that they identify. If an identified risk relates to one or more nonbank financial companies that may merit review, 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 or direct the Council's Nonbank Financial Companies Designations Committee[21] to conduct an initial analysis of one or more companies based on the risk-assessment approach described in the Analytic Framework. Following any such analysis, the Council may review one or more companies in Stage 1.

Stage 1 involves a preliminary analysis of nonbank financial companies to assess the risks they could pose to U.S. financial stability. Review in this stage is based on quantitative and qualitative information available to the Council primarily through public and regulatory sources and includes consultation with the company's primary financial regulator (if any), as appropriate. Among other procedural safeguards, the Final Guidance states that the company is notified of its consideration in Stage 1 at least 60 days before the Council votes on whether to evaluate the company further in the second stage of review (Stage 2). This provides the company with an opportunity voluntarily to submit relevant information to the Council and to meet with staff who are leading the Council's analysis. A nonbank financial company that is identified for review in Stage 2 will receive an additional notice that it is being considered for a proposed designation. The Council wishes to underscore, as the Final Guidance notes, that its work in Stage 1 is preliminary. A decision to commence review of a company in Stage 1, or to continue a review in Stage 2, does not constitute a final decision regarding whether the company should be designated.

Stage 2 involves an in-depth review of a nonbank financial company using information collected directly from the company through the OFR, as well as public and regulatory information. Stage 2 involves significant engagement with the company under review and its primary financial regulator. Following notice of a Council decision to evaluate the company in Stage 2, the Council will submit to the company a request that it provide information that the Council deems relevant to the Council's evaluation. The nonbank financial company will also be provided an opportunity to submit any other written information it deems relevant. The Council will make staff representing its 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, and the Council expects that its Deputies Committee will also grant a request to meet with a company in Stage 2. Further, communication during Stage 2 will be two-way: For example, if the analysis in Stage 1 has identified specific aspects of the company's operations or activities as the primary focus for the Council's evaluation, staff will notify the company of those specific aspects, enabling the company to understand and provide information relevant to those concerns. The Council will also notify any nonbank financial company in Stage 2 if the company ceases to be considered for a determination.

At the conclusion of Stage 2, the Council may consider whether to make a proposed determination with respect to the nonbank financial company (a Proposed Determination) through a process that emphasizes transparency through additional notice, engagement, and procedural safeguards. A Proposed Determination requires a vote of two-thirds of the voting members of the Council then serving, including an affirmative vote by the Chairperson of the Council, and cannot be delegated by the Council.[22] Following a Proposed Determination, the Council will issue a written notice of the Proposed

[17] Because the Final Guidance itself appears in narrative form and makes only minor changes to the designation process described in the Council's existing guidance—separate from the modification of the substantive analytic content discussed below—this preamble does not include a complete and detailed description of the designation process, which appears in the Final Guidance itself. Instead, the following overview focuses on the Council's reasons for adopting the Final Guidance, key changes from the 2019 Interpretive Guidance and the Proposed Guidance, and responses to comments received on the Proposed Guidance.

[18] This discussion provides an abbreviated summary of the procedural steps of the Council's nonbank financial company designation process. The Final Guidance itself sets forth the process the Council expects to follow and should be consulted with respect to the elements of that process.

[19] In each stage of the designation process, the Council may also consult with, request information from, or coordinate with other state or federal financial regulatory agencies that have jurisdiction over the nonbank financial company or its activities.

[20] The Council's Deputies Committee is composed of senior officials from each Council member and member agency. See Bylaws of the Deputies Committee of the Financial Stability Oversight Council, available at *https://fsoc.gov*.

[21] The Nonbank Financial Companies 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*.

[22] 12 CFR 1310.10(b).

Determination to the nonbank financial company, which will include an explanation of the basis of the Proposed Determination.[23] Promptly after the Council votes to make a Proposed Determination regarding a company, the Council will also provide the company's primary financial regulator with the written explanation of the basis of the Council's Proposed Determination (subject to appropriate protections for confidential information). 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 and applicable Council procedures.

After making a Proposed Determination and holding any written or oral hearing if requested, the Council may vote to make a final determination that the company will be subject to supervision by the Federal Reserve and prudential standards (a Final Determination). Like a Proposed Determination, a Final Determination requires a vote of two-thirds of the voting members of the Council then serving, including an affirmative vote by the Chairperson of the Council, and cannot be delegated by the Council.[24] If the Council makes a Final Determination, it will provide the company with a written notice of its Final Determination, including an explanation of the basis for the Council's decision.[25] The Council will also provide the company's primary financial regulator with the written explanation of the basis of the Council's Final Determination (subject to appropriate protections for confidential information) and will publicly release the explanation of the Council's basis for the Final Determination.[26]

After the Council makes a Final Determination regarding a nonbank financial company, the Council intends to continue 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. The Council is required to reevaluate each Final Determination at least annually and to rescind the designation if the Council determines that the company no longer meets the statutory standards for designation under section 113 of the Dodd-Frank Act.[27] The annual reevaluation process is a key mechanism through which a company's designation may be rescinded if the company has mitigated the threat that its material financial distress or activities could pose to U.S. financial stability. Moreover, once every five years, each nonbank financial company subject to a Final Determination will have an opportunity for an oral hearing before the Council at which the company can contest the designation.

Numerous public comments on the Proposed Guidance supported the proposed approach of maintaining certain procedural steps that were set forth in the 2019 Interpretive Guidance, including the two-stage designation process, extensive engagement by the Council and staff with companies under review and their primary financial regulators, and the Council's annual reevaluations of previous designations. Some commenters stated that the two-stage process, including notice and opportunities for engagement between the Council and the company under review and its primary financial regulator, provides a balanced and transparent approach to designation. Others expressed support for specific aspects of the Proposed Guidance. For example, one commenter stated that the Council should retain the ability to consider companies and their subsidiaries either together or separately for designation because modern risk management emphasizes the importance of understanding and managing a firm's risks holistically, across the entire enterprise.

Some commenters noted that the Proposed Guidance would increase public transparency regarding how companies are identified for review for a potential designation under section 113 of the Dodd-Frank Act. As discussed above, the Final Guidance provides additional detail, compared to the 2019 Interpretive Guidance, on how the Council expects to identify nonbank financial companies for preliminary review in Stage 1.

Other commenters suggested procedural changes to the designation process in the Proposed Guidance. For example, commenters suggested accelerating the designation process by combining Stage 1 and Stage 2 or by removing the opportunity in Stage 1 for a company under review to submit information to the Council. At least one commenter suggested adding a step in the process to determine whether existing regulation is insufficient to mitigate relevant threats to financial stability. Other commenters suggested expanding the notice periods provided in the Proposed Guidance, including a longer notice period in advance of a vote to commence Stage 2 or a 120-day period for a company to review all information before the Council[28] in advance of a Final Determination vote. The Council has declined to modify the stages or notice periods as proposed, which enable appropriate time periods for engaging with companies and their primary financial regulators while not unduly delaying the Council's ability to act to address a potential threat to U.S. financial stability. Further, the proposed two-stage process enables the Council gradually to intensify its review of a company, beginning with a review in Stage 1 based primarily on available information and potentially moving to in-depth engagement with the company and its primary financial regulator in Stage 2.

Some commenters requested that the Council further explain how companies under consideration in Stage 1 or Stage 2 can take steps that would avoid a designation. Others recommended that the guidance include language, found in the 2019 Interpretive Guidance, that the information the Council provides to a company during Stage 1 "may enable the company to act to mitigate any risks to financial stability and thereby potentially avoid becoming subject to a Council determination."[29] The Council agrees that its engagement with a company under review may enable the company to act to mitigate the threat its material financial distress or activities could pose to financial stability. Further, if the company were to mitigate those risks before a Final Designation such that its material financial distress or activities could not pose a threat to financial stability, designation would not be warranted. Accordingly, the Council has added the language quoted above to the Final Guidance.

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

[24] 12 CFR 1310.10(b).

[25] Dodd-Frank Act section 113(e)(3), 12 U.S.C. 5323(e)(3); see also 12 CFR 1310.21 and 1310.22.

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

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

[28] Some commenters also advocated providing the "full evidentiary record" to the company under review before a Council vote on a Final Determination. The Council appreciates the importance of transparency and dialogue with a company under review and will provide a company under review with a written explanation of the basis of any Proposed Determination as well as the opportunity for a hearing, among other opportunities to engage with the Council and staff representing Council members and member agencies.

[29] 84 FR at 71,767 (Dec. 30, 2019).

Nonetheless, while the Council expects to communicate to companies under review regarding potential risks to financial stability that have been identified, in light of the importance of acting promptly to mitigate potential threats to financial stability, the Council does not expect to advise companies on actions they may take, delay the designation process in connection with potential actions that a company considers taking, or refrain from a proposed or final designation based on actions that a company has proposed but not completed.

With respect to the transparency measures embedded in the designation process under the Proposed Guidance, several commenters voiced support, including noting that the Council has continued the procedural transparency provided for in the 2019 Interpretive Guidance. For example, some commenters noted that the opportunities for engagement with the Council and submission of relevant information to it would facilitate transparency for companies under review. Other commenters specifically noted the importance of the Proposed Guidance's commitment to publicly release the written explanation of the Council's basis for a Final Determination.

Several commenters raised other transparency-related suggestions. Some stated that more information regarding how the Council considers threats to financial stability could give companies additional insight and help mitigate risks and avoid designation. As noted above, the Final Guidance states that engagement with a company under review may enable the company to mitigate any risks to financial stability. The Council's Analytic Framework also provides additional transparency into how the Council considers risks to financial stability. The Council believes that the numerous transparency mechanisms in the Final Guidance, which provide opportunities for engagement with companies under review and their primary financial regulators in Stage 1, in Stage 2, after a Proposed Determination, and after a Final Determination, provide an appropriate level of transparency to companies regarding the Council's reviews. Some commenters also noted that the Federal Reserve's establishment of prudential standards and an applicable supervisory regime only after a company's designation leaves opaque the consequences of designation. However, the division of authority between the Council and the Federal Reserve is an element of the statutory structure Congress adopted, not the Council's designation procedures. In developing prudential standards applicable to designated nonbank financial companies, the Federal Reserve is required to differentiate among companies on an individual basis or by category, taking into consideration their capital structure, riskiness, complexity, financial activities, size, and any other risk-related factors that the Federal Reserve deems appropriate.[30]

Several commenters suggested the Council further emphasize the importance of the Council's engagement with primary financial regulators. The Proposed Guidance noted the Council's expectation of engagement with the primary financial regulator of a company under review at every stage of the designation process, and the Final Guidance maintains that commitment. The Council extensively engages 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.[31] These activities comprise the foundation of the Council's work, and under the Final Guidance the Council will continue to work with regulators to identify, assess, and respond to risks to financial stability.

Other commenters suggested that the Council should notify a company's primary financial regulator that the company is under consideration in Stage 1. The Proposed Guidance and Final Guidance provide that a company's primary financial regulator will receive notice that the company is under review no later than when the company receives notice, which occurs no later than 60 days before the Council votes on whether to evaluate the company in Stage 2. In some cases, the primary financial regulator may receive earlier notice, including if the Council has been engaging with the primary financial regulator in previous efforts, unrelated to a potential designation, to evaluate the potential threat to financial stability, or if the primary financial regulator is among the Council's member agencies. In general, however, the Council believes that receiving notice simultaneously with the company during Stage 1 will enable the primary financial regulator appropriately to engage with the Council.[32]

Other commenters suggested that the Council should not only engage with a company's primary financial regulator during the designation process, but should defer to the primary financial regulator's views. The Council firmly supports close engagement with primary financial regulators, but deferring to those regulators during a review under section 113 of the Dodd-Frank Act would not fulfill the Council's duty to determine whether a company under review meets the statutory standard for designation. The Council values the role of primary financial regulators due to their expertise regarding their regulated entities or markets, but Congress charged the Council with making determinations regarding threats to U.S. financial stability. The Council will engage with primary financial regulators and take their views into account, but ultimately the Council itself is responsible for determining whether a nonbank financial company meets the statutory standard for designation.

Some commenters called for additional clarity regarding the staff-level process for identifying nonbank financial companies for preliminary evaluation, or recommended that the Council adopt uniform quantitative thresholds, such as those in the 2012 Interpretive Guidance, to identify companies for review in Stage 1. The Council believes that the process set forth in the Final Guidance under ''Identification of Company for Review in Stage 1'' appropriately explains the Council's process. To the extent commenters seek information regarding the substantive analyses the Council and staff representing Council members expect to use in considering risks that relate to a company that may be considered in Stage 1, those analyses are described in the Analytic Framework. While quantitative thresholds such as those in the 2012 Interpretive Guidance[33] provide some clarity regarding companies that are most likely to come under review for potential designation, even that previous guidance noted that firms not captured

[30] Dodd-Frank Act section 165(a)(2)(A), 12 U.S.C. 5365(a)(2)(A).

[31] See, *e.g.,* Dodd-Frank Act sections 112(a)(2)(A), (C), (D), (E), (F), (I), and (K), 12 U.S.C. 5322(a)(2)(A), (C), (D), (E), (F), (I), and (K).

[32] The Proposed Guidance refers to the notice provided to companies in Stage 1 in both section II.a, which provides an overview of the determination process, and section II.b, which describes Stage 1 in detail. The Final Guidance clarifies these references by specifying that the description in section II.a refers to the notice provided in section II.b.

[33] Uniform quantitative thresholds were not included in the 2019 Interpretive Guidance.

by the thresholds could also be reviewed. Further, the Council believes that in light of the distinct nature of nonbank financial companies in diverse sectors of the financial system, uniform quantitative thresholds do not adequately align with the range of risks that nonbank financial companies' material financial distress or activities could pose. Because the activities of nonbank financial companies continuously evolve, uniform thresholds that are applicable across the financial sector may also become obsolete or less relevant to specific risks. The Council believes the approach described in the Final Guidance and the Analytic Framework will be more conducive to identifying firms for consideration for designation than uniform quantitative thresholds such as those that the Council applied in Stage 1 under the 2012 Interpretive Guidance.

A few commenters recommended that the guidance prohibit the Council from delegating its authority to commence a review of a company in Stage 1.[34] Some commenters further contended that a Council vote on commencing Stage 1 is legally required by either the Dodd-Frank Act or the Administrative Procedure Act (APA). However, while the Dodd-Frank Act specifies that the Council may not delegate its vote to designate a company, it contains no such requirement regarding earlier steps in the process, such as commencing Stage 1. Indeed, the statute itself does not contemplate any procedural safeguards for companies under review prior to a Council vote on a Proposed Determination; Stage 1 and Stage 2 are investigatory processes the Council has voluntarily adopted to enhance its analytic rigor and to promote transparency. The APA likewise contains no requirement related to the delegation of authority to commence Stage 1, which involves only the interlocutory decision to initiate an investigatory process and does not determine any rights or obligations of any person or entity or cause any legal consequences. The Final Guidance does not prohibit a delegation of the vote to commence Stage 1, but it also does not mandate such a delegation. Moreover, under the Final Guidance the Council itself will vote multiple times during the designation process, including voting on commencing Stage 2, a Proposed Designation, and a Final Designation, and potentially the determination that the administrative record in Stage 2 is complete.

D. Substantive Analyses

The Council has issued a separate document—the Analytic Framework—that describes in detail the Council's approach for identifying, assessing, and responding to potential risks to financial stability. The Analytic Framework explains how the Council analyzes risks to financial stability, regardless of both the origin of a particular risk (including whether the risk arises from widely conducted activities or from individual entities) and which of the Council's authorities may be used to address the risk. The Council believes that the Analytic Framework provides new public transparency into how the Council expects to consider risks to financial stability. Among other things, the Analytic Framework interprets terms that broadly frame the Council's work, including ''financial stability'' and ''threat to financial stability.'' Therefore, while the 2012 Interpretive Guidance and the 2019 Interpretive Guidance discussed both nonbank financial company designation procedures and also substantive analytic factors and standards the Council applies in its assessment of nonbank financial companies, the Final Guidance is limited to the Council's procedures related to nonbank financial company designations.[35] The substantive factors the Council considers in analyzing potential risks to financial stability are addressed in the Analytic Framework. The Council believes that publishing its procedures for nonbank financial company designations (the Final Guidance) separately from its explanation of how it substantively assesses potential financial stability risks (the Analytic Framework) enhances public transparency and provides clarity regarding the range of authorities the Council uses to respond to risks.[36]

1. Analytic Factors

The 2019 Interpretive Guidance described both the Council's procedures and analytic factors that the Council expected to apply in nonbank financial company designations. For example, that guidance described channels the Council deemed 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. These descriptions do not appear in the Final Guidance and will not be included in Appendix A to 12 CFR part 1310. Instead, a description of the analyses the Council expects to apply, both within and outside of the designation context, appears in its separately issued Analytic Framework.

Some commenters supported separating the Council's guidance on the nonbank financial company designation process from the discussion of the substantive analyses it uses to consider risks to financial stability, citing, among other things, the procedural nature of the Proposed Guidance (and by extension, the Final Guidance) and the benefits of establishing a unified framework for considering risks without regard to their origin. Additional commenters noted that adopting a broadly applicable Analytic Framework will help the Council and regulators take a consistent approach, regardless of the origin of a particular risk, and will provide transparency that may help nonbank financial companies identify and mitigate risks that might otherwise lead the firms to be considered for potential designation under the Final Guidance.

Other commenters argued that the Final Guidance should retain a description of the Council's analysis specifically applicable to nonbank financial company designations.[37] As explained above, the Council believes that issuing separate documents regarding the procedural aspects of the nonbank financial company designation process and the Council's substantive

[34] In accordance with the Council's Rules of Organization, the Council may delegate authority, including to its Deputies Committee, to implement and take any actions under the Final Guidance, except with respect to actions that are expressly nondelegable under the Dodd-Frank Act, the Council's Rules of Organization, or the Final Guidance.

[35] The Final Guidance retains the 2019 Interpretive Guidance's interpretations of ''company'' and ''material financial distress,'' key terms in section 113 of the Dodd-Frank Act that are left undefined in the statute. The Final Guidance also includes the 2019 Interpretive Guidance's interpretation of ''nonbank financial company supervised by the Board of Governors,'' a term defined in the Dodd-Frank Act. The preamble to the Proposed Guidance noted the Council's proposal to retain its 2019 interpretation of this statutory term, and the Proposed Guidance contained language from the 2019 Interpretive Guidance regarding the practical implications of that interpretation. Consistent with the Proposed Guidance, the Final Guidance states that ''the Council intends to interpret 'nonbank financial company supervised by the Board of Governors' as including any nonbank financial company that acquires, directly or indirectly, a majority of the assets or liabilities of a company that is subject to a final determination of the Council.''

[36] Comments on the Proposed Analytic Framework are addressed in the preamble to the Analytic Framework.

[37] At least one commenter stated that the Analytic Framework should be appended to the 2012 Rule—the Council's procedural rule on nonbank financial company designations—by incorporating it into the appendix to 12 CFR part 1310. The Analytic Framework explains how the Council approaches risks to financial stability generally, so it would not appropriately be appended to the 2012 Rule, which is focused exclusively on nonbank financial company designations.

analysis of risks to financial stability is the better approach. 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 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.[38] The Council may consider those risk factors and transmission channels in activities-based reviews, entity-specific analyses, or other work.[39] 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.

A number of commenters addressed the relationship between the statutory standards and statutory considerations for nonbank financial company designations, on one hand, and the vulnerabilities, sample metrics, and transmission channels described in the Analytic Framework, on the other hand. Some commenters questioned whether the Analytic Framework would displace the statutory standards and considerations established by section 113 of the Dodd-Frank Act, and other commenters asked for more detail regarding how the Council would apply the Analytic Framework's vulnerabilities, sample metrics, and transmission channels in the nonbank financial company designation context. Some commenters stated that the Proposed Analytic Framework and the Proposed Guidance did not provide enough detail on how the Council considers risks to financial stability.

With respect to nonbank financial company designations, 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. Consistent with the statutory requirements, the Council will apply the statutory standard and each of the 10 statutory considerations in evaluations of nonbank financial companies for potential designation.

At the same time, 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. Accordingly, the vulnerabilities and transmission channels described in the Analytic Framework will inform the Council's assessment of the designation standard and mandatory considerations under section 113. As the Proposed Guidance and Final Guidance note, in the designation process, including to identify companies for potential review in Stage 1, the Council and its staff-level committees expect to consider the vulnerabilities, types of sample metrics, and transmission channels described in the Analytic Framework.

Other commenters asked for greater detail on how the Council would assess the vulnerabilities described in the Analytic Framework. As also discussed in the preamble to the Analytic Framework, the Council has addressed these requests by adding further details to several listed vulnerabilities in the Analytic Framework regarding the types of sample metrics the Council expects to use to assess them.

Some commenters noted that the vulnerabilities described in the Analytic Framework do not restate the 10 mandatory considerations in section 113 of the Dodd-Frank Act, and several objected to the vulnerabilities on that basis. A purpose of the Analytic Framework, however, is to provide transparency into how the Council considers risks to financial stability in general. Repetition of the statutory language applicable to nonbank financial company designations specifically would not further that goal. In the context of a review of a nonbank financial company under section 113 of the Dodd-Frank Act, the vulnerabilities and transmission channels described in the Analytic Framework clarify the statutory considerations. For example:

- The section 113 considerations of leverage and concentration are both listed as vulnerabilities in the Analytic Framework, and the Analytic Framework provides additional insight into these issues.
- The section 113 consideration of ''the extent and nature of the transactions and relationships of the company with other significant nonbank financial companies and significant bank holding companies'' may relate to the ''interconnections'' vulnerability and ''exposures'' transmission channel in the Analytic Framework, among others.
- The section 113 consideration of ''the amount and types of the liabilities of the company, including the degree of reliance on short-term funding'' may relate to a number of vulnerabilities in the Analytic Framework, including ''leverage,'' ''liquidity risk and maturity mismatch,'' ''interconnections,'' and ''inadequate risk management,'' as well as the ''exposures'' and ''asset liquidation'' transmission channels, among others.
- The section 113 considerations of ''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'' and ''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'' may relate to the ''interconnections'' and ''concentration'' vulnerabilities and ''critical function'' transmission channel in the Analytic Framework, among others.
- The section 113 consideration of ''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'' may relate to the ''interconnections'' and ''concentration'' vulnerabilities in the Analytic Framework, among others, and each of the transmission channels.
- The section 113 consideration of ''the degree to which the company is already regulated by 1 or more primary financial regulatory agencies'' may relate to the vulnerability of ''inadequate risk management,'' among others, and each of the transmission channels in the Analytic Framework.

Although the Analytic Framework provides transparency into how the Council considers risks in general, the Council stresses that any determination regarding a nonbank financial company under section 113 of the Dodd-Frank Act will be made based on the statutory

[38] As discussed in section II.G below, the ''vulnerabilities'' described in the Analytic Framework do not imply an intention to consider a company's likelihood of material financial distress. The vulnerabilities described in the Analytic Framework are characteristics that most commonly contribute to risks to financial stability. They are not meant to relate to the likelihood of a company's material financial distress. Although some commenters equated a company's ''vulnerability'' with the company's likelihood of material financial distress, that is not how the Council uses the term in the Analytic Framework or the Final Guidance.

[39] Consistent with its longstanding precedent, the identified transmission channels are non-exhaustive. See 2019 Interpretive Guidance, 84 FR at 71,763 (Dec. 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 at 21,657 (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.'').

standard and considerations prescribed by Congress.

Several commenters suggested that the Council should state explicitly how it intends to weight the various statutory considerations or the vulnerabilities, including by stating whether some are more important than others. Some commenters stated that, unless the Council explains how it will consider relevant statutory considerations and vulnerabilities with sufficient detail to allow any nonbank financial company to avoid designation, the Final Guidance and Analytic Framework provide inadequate notice to companies under consideration. However, the Council must consider all of the mandatory considerations Congress set forth in section 113 of the Dodd-Frank Act, and the relevance of any particular consideration will depend on the relevant facts and circumstances. Thus, an explicit weighting scheme, determined outside the context of a specific designation, may not be suitable to analyze a range of companies or conditions. The Dodd-Frank Act itself provides notice to companies regarding the standards and considerations the Council will rely on to make determinations under section 113. Further, the Dodd-Frank Act provides that a nonbank financial company under consideration for designation must receive a written notice and an explanation of the basis of any Proposed Determination in advance of an opportunity for a hearing.[40] The Final Guidance (and Analytic Framework) go far beyond these statutory minimums to provide insight into how the Council considers risks in general and opportunities for a company under review to understand how the Council considers the threat the company's material financial distress or activities could pose to financial stability.

The Council notes that it routinely provides public transparency regarding how it assesses various particular financial stability risks. For example, since 2020, the Council has issued reports or statements regarding secondary mortgage market activities,[41] money market mutual funds,[42] climate-related financial risk,[43] nonbank financial intermediation,[44] and digital assets,[45] in addition to its annual reports, all of which detail the Council's views about various risks to financial stability and in many cases recommend steps for mitigation.

2. ''Threat'' To Financial Stability

Under section 113 of the Dodd-Frank Act, the Council may designate a nonbank financial company if the Council determines that the company's material financial distress or activities ''could pose a threat to the financial stability of the United States.'' [46] Under the Proposed Guidance, the Council proposed 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. In response to public comments on this approach, the Council has included, in the Analytic Framework as adopted in final form, an interpretation of ''threat to financial stability'' [47] that is based on the interpretation of ''financial stability'' set forth in the Analytic Framework.

A number of commenters stated that they supported the Council's interpretation of ''threat to the financial stability of the United States'' in the 2019 Interpretive Guidance and recommended that the Council define this term in the Final Guidance. Some commenters urged the Council to retain the interpretation of this term set forth in the 2019 Interpretive Guidance or to revert to the interpretation in the 2012 Interpretive Guidance.[48] The Council believes the interpretation of ''threat to the financial stability of the United States'' in the 2019 Interpretive Guidance imposed an inappropriately high threshold, as discussed below. One commenter stated that the interpretation of ''financial stability'' in the Proposed Analytic Framework was at odds with the Financial Stability Board's interpretation of the term. The Council agrees that coordination with international bodies is important, but this consideration cannot supersede the Council's statutorily specified duties. In contrast, a number of commenters expressed concern that the 2019 definition eroded the Council's preventative role in risk mitigation. Some commenters stated that the 2019 definition effectively precluded the Council from fulfilling its statutory duties to respond to potential or emerging threats to financial stability. Some commenters noted that while the Dodd-Frank Act calls on the Council to determine whether there ''could'' be a threat to financial stability, the 2019 definition required the Council to determine that the economy ''would'' be severely damaged.[49]

The Council appreciates this feedback and agrees that providing an interpretation of ''threat to financial stability'' provides clarity to nonbank financial companies and other stakeholders. As commenters noted, providing such an interpretation helps companies understand the substantive analytic approach the Council will use

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

[41] Council Statement on Activities-Based Review of Secondary Mortgage Market Activities (Sept. 25, 2020), available at *https://home.treasury.gov/system/files/261/Financial-Stability-Oversight-Councils-Statement-on-Secondary-Mortgage-Market-Activities.pdf.*

[42] Council Statement on Money Market Fund Reform (June 11, 2021), available at *https://home.treasury.gov/system/files/261/FSOC_Statement_6-11-21.pdf.*

[43] Council Report on Climate-Related Financial Risk (Oct. 21, 2021), available at *https://home.treasury.gov/system/files/261/FSOC-Climate-Report.pdf;* see also Fact Sheet: The Financial Stability Oversight Council and Progress in Addressing Climate-Related Financial Risk (July 28, 2022), available at *https://home.treasury.gov/system/files/261/FSOC_20220728_Factsheet_Climate-Related_Financial_Risk.pdf.*

[44] Council Statement on Nonbank Financial Intermediation (Feb. 4, 2022), available at *https://home.treasury.gov/system/files/261/FSOC_Nonbank_Financial_Intermediation.pdf.*

[45] Council Report on Digital Asset Financial Stability Risks and Regulation (Oct. 3, 2022), available at *https://home.treasury.gov/system/files/261/FSOC-Digital-Assets-Report-2022.pdf.*

[46] Dodd-Frank Act section 113(a)(1), 12 U.S.C. 5323(a)(1). The Dodd-Frank Act separately sets forth the same statutory standard for the designation of foreign nonbank financial companies. Dodd-Frank Act section 113(b)(1), 12 U.S.C. 5323(b)(1). In the context of foreign nonbank financial companies, section 113 also lists the considerations that the Council must take into account, which are similar to the considerations applicable to U.S. nonbank financial companies, in some cases limited to the foreign nonbank financial companies' U.S. business or activities. See Dodd-Frank Act section 113(b)(2), 12 U.S.C. 5323(b)(2). The Final Guidance and this preamble do not generally distinguish between U.S. nonbank financial companies and foreign nonbank financial companies, and the Council intends for the Final Guidance to apply in the same manner to both types of companies.

[47] The Council's statutory responsibilities related to financial stability are generally focused on the United States (see, *e.g.,* Dodd-Frank Act section 112(a)(1)(A), 12 U.S.C. 5322(a)(1)(A) (''to identify risks to the financial stability of the United States''); 112(a)(1)(C), 5322(a)(1)(C) (''to respond to emerging threats to the stability of the United States financial system''); 112(a)(2)(A), 5322(a)(2)(A) (''to assess risks to the United States financial system''); 112(a)(2)(C), 5322(a)(2)(C) (''to identify potential threats to the financial stability of the United States''); 112(a)(2)(G), 5322(a)(2)(G) (''identify gaps in regulation that could pose risks to the financial stability of the United States''); 112(a)(2)(H), 5322(a)(2)(H) (''require supervision by the Board of Governors for nonbank financial companies that may risks to the financial stability of the United States'')). References to the United States may be omitted herein solely for ease of reading.

[48] The 2012 Interpretive Guidance stated 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.'' 77 FR at 21,657 (April 11, 2012).

[49] See also Dodd-Frank Act section 112(a)(2)(H), 12 U.S.C. 5322(a)(2)(H) (setting forth the Council's duty to ''require supervision . . . for nonbank financial companies that *may* pose risks to . . . financial stability'' (emphasis added)).

for designations under section 113 of the Dodd-Frank Act and provides an indication of the significance of a potential threat to financial stability that may warrant a designation under section 113.

The Proposed Analytic Framework interpreted ''financial stability,'' and the Council continues to view that interpretation as appropriate. The interpretation of ''threat to financial stability'' is, by its nature, closely related to the interpretation of ''financial stability,'' and can best be understood when considering these two terms together. Further, threats to financial stability will be evaluated within the framework of the Council's efforts to identify, assess, and respond to potential risks to financial stability, as set forth in the Analytic Framework. Therefore, the Analytic Framework offers the opportunity to situate the Council's interpretation of a threat to financial stability, whether posed by a nonbank financial company or originating from other sources, within the Council's broader approach.

As noted above, many commenters expressed varying views regarding whether the Council should maintain the definition of ''threat to the financial stability of the United States,'' found in the 2019 Interpretive Guidance, as ''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.'' [50] The Council views the 2019 definition as unwarranted, and, as many commenters noted, the 2019 definition contrasts sharply with the statutory standard under section 113 of the Dodd-Frank Act. In light of the Council's statutory duty to act to address potential threats to financial stability, the purpose of the designation authority in mitigating the risks of financial crises, and the uncertainty inherent in predicting future financial market developments, requiring the Council to determine that a nonbank financial company's material financial distress or activities could inflict ''severe damage'' on the broader economy creates an unduly high threshold for Council action. The Council must be able to 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.

Some commenters stated that the interpretation of ''financial stability'' in the Proposed Analytic Framework would unduly lower the standard for designation under section 113 of the Dodd-Frank Act. The Council disagrees. The standard for designation is set forth in section 113 itself. The Analytic Framework's interpretation of ''financial stability'' does not expand the statutory standard. Rather, the Analytic Framework describes how the Council considers financial stability and threats to it. However, in response to public comments, the Council has included in the Analytic Framework, as adopted in final form, an interpretation of ''threat to financial stability'' that is based on the proposed interpretation of ''financial stability'' and that includes an indication of the significance of a threat to financial stability: Events or conditions that could substantially impair the ability of the financial system to support economic activity would constitute a threat to financial stability. This approach clarifies that a designation under section 113 would not be justified if a nonbank financial company's material financial distress or activities could only cause immaterial impairments of the financial system.

Some commenters indicated that the lack of concrete guidance on an interpretation of ''threat to the financial stability of the United States'' may dissuade nonbank financial companies from engaging in innovation and could lead to concentration risks. The Council notes that the definition of ''threat to the financial stability of the United States'' in the 2019 Interpretive Guidance did not specify particular activities or risk factors that could result in a designation under section 113 of the Dodd-Frank Act, but instead indicated the significance of a risk that could fall within the statutory standard for designation. The interpretation in the Analytic Framework, while reflecting different terminology than the 2019 Interpretive Guidance, maintains this type of approach. For nonbank financial companies that wish to understand the activities or business characteristics that could lead to a potential designation under section 113—or that wish to mitigate the risks their material financial distress or activities could pose to financial stability—the Council encourages those companies to consider how the vulnerabilities and transmission channels described in the Analytic Framework may apply to their companies.

3. Suitability of Designation

The Final Guidance sets forth the process the Council expects to follow when considering nonbank financial companies for potential designation. The Council's analytic approach to identifying, assessing, and responding to risks to financial stability and the substantive considerations it will take into account in determining whether to designate a company for prudential standards and supervision by the Federal Reserve are set forth in section 113 of the Dodd-Frank Act and the Analytic Framework. Neither the Proposed Guidance nor the Final Guidance addresses the suitability of designation with respect to any particular entity, sector, or circumstances. Nevertheless, the Council received a number of comments regarding the suitability of designation for certain sectors, entities, or circumstances as well as the merits and disadvantages of entity-based designation in general.

Several commenters stated that designation under section 113 of the Dodd-Frank Act is not generally a suitable response to a threat to financial stability. Some stated that designation would result in regulation that may be ill-fitting for some types of nonbank financial companies, their products or services, or for financial risk channels that are different from those of bank holding companies. Some commenters stated that designations under section 113 are generally inadvisable because they would distort or disrupt markets or increase burdens for the designated nonbank financial company. However, the Dodd-Frank Act authorizes the Council to designate nonbank financial companies if their material financial distress or activities could pose a threat to financial stability. Further, the statute requires the Federal Reserve to adopt regulatory requirements applicable to a designated nonbank financial company and provides for the Federal Reserve to differentiate ''among companies on an individual basis or by category, taking into consideration their capital structure, riskiness, complexity, financial activities (including the financial activities of their subsidiaries), size, and any other risk-related factors that the Board of Governors deems appropriate.'' [51] Therefore, the Council will not reject in advance the use of its statutory authority and is adopting the Final Guidance to explain the process it would use in considering nonbank financial companies for designation.

As noted above, Congress created the designation authority based on lessons learned from the financial crisis in 2007–09, when financial distress at large, complex, highly interconnected, highly leveraged, and inadequately regulated nonbank financial companies

[50] 84 FR at 71,763 (Dec. 30, 2019).

[51] Dodd-Frank Act section 165(a)(2)(A), 12 U.S.C. 5365(a)(2)(A).

devastated the financial system. Potential risks to financial stability may often be addressed by existing regulators; however, if one or more nonbank financial companies, though their material financial distress or activities, could pose a threat to financial stability, Congress determined that designation of the relevant companies for Federal Reserve supervision and prudential standards is an appropriate response.

Some commenters stated that the Proposed Guidance does not set forth with sufficient clarity the analyses the Council will conduct during the designation process or the prudential standards that will apply after designation. While the Council appreciates these comments, the Final Guidance does not address the substantive analytic factors to be used in designations because the Council has issued a separate document—the Analytic Framework—regarding its analytic approach for identifying and assessing potential risks to U.S. financial stability more broadly. Further, as noted above, Congress assigned responsibility to the Federal Reserve to determine the prudential standards that apply to a designated nonbank financial company, although the Council can recommend standards.

Other commenters stated that the Council should make climate-related financial risks a factor in the designation analysis of a nonbank financial company that may be subject to physical or transition climate-related risks. The Council appreciates these comments and has published a number of analyses regarding the emerging and increasing risks that climate change poses to the financial system. However, the Council believes that potential risks related to climate change may be assessed under the vulnerabilities, sample metrics, and transmission channels in the Analytic Framework. For example, to the extent that climate-related financial risks could result in defaults on a company's outstanding obligations, those risks may be considered, in part, through the ''interconnections'' vulnerability and the ''exposures'' transmission channel.

Some commenters requested that the Council tailor the Final Guidance to one or more particular industries. As noted above, the Final Guidance does not set forth the substantive analyses the Council intends to apply in designation determinations. Instead, the Analytic Framework explains 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 the risk. This approach seeks to strengthen the Council's ability to identify, assess, and respond to risks to U.S. financial stability, regardless of whether those risks originate from individual companies or widely conducted activities. The Council further notes that it expects to take into account relevant differences among various sectors, markets, or activities in the designation process, and to consult with a company's existing primary financial regulator. For example, the Council would take into account the extent to which assets are managed rather than owned by the company.[52]

Finally, some commenters stated that entity-based designation is not suitable for their industry, including life insurers, property and casualty insurers, reinsurers, asset managers, nonbank mortgage lenders, nonbank mortgage servicers, mutual funds (including money market mutual funds), private funds, fintech companies (including certain payment providers), and issuers of asset-backed securities. These commenters indicated that the Council should exclude certain types of companies from potential review. As it did in the 2019 Interpretive Guidance, the Council declines to categorically exclude any particular financial sectors or types of nonbank financial companies from its assessment of potential threats to financial stability. The Council expects that any analysis of a nonbank financial company for potential designation will be tailored to reflect the unique attributes of the company and its existing regulatory framework, but assessing the suitability of designation of any class of nonbank financial companies would be premature. The substantive rigor under the Analytic Framework, the transparency under the Final Guidance, and the Council's adherence to the statutory requirements for designations will provide nonbank financial companies under review for potential designation with ample opportunities to raise risk-related factors during the Council's evaluation.

E. Activities-Based Approach

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, and the statute does not prioritize among the Council's authorities. For example, pursuant to section 113 of the Dodd-Frank Act, the Council may determine that an individual nonbank financial company will be subject to supervision by the Federal Reserve and prudential standards if the Council determines that the company's material financial distress or activities could pose a threat to financial stability. The Dodd-Frank Act also gives the Council various authorities to make nonbinding recommendations to regulators.[53]

The Council's response to a particular risk to financial stability depends 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, in cases where the financial system relies on the ongoing financial activities of a small number of entities, such that the impairment of one of the entities could threaten financial stability, or where a particular financial company's material financial distress or activities could pose a threat to financial stability, entity-based action may be appropriate.

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,[54] many in the form of an activities-based approach. The Council has also used entity-specific approaches in designating eight financial market utilities in 2012 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.

However, the statute does not contemplate that one of the Council's authorities takes precedence over others, or that the Council must make recommendations to existing regulators before commencing a review of a company for potential designation. 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,

[52] See Dodd-Frank Act section 113(a)(2)(F), 12 U.S.C. 5323(a)(2)(F).

[53] See, *e.g.,* Dodd-Frank Act sections 112(a)(2)(D), (F), (I), (K), and (N), 12 U.S.C. 5322(a)(2)(D), (F), (I), (K), and (N).

[54] See, *e.g.,* Council 2022 Annual Report, available at *https://home.treasury.gov/system/files/261/FSOC2022AnnualReport.pdf.*

interconnected, and highly leveraged nonbank financial companies could threaten the stability of the U.S. financial system. Many commenters cited the failure of American International Group (AIG), where regulators had not identified or addressed the risk the company ultimately posed to financial stability. In light of the experience during the financial crisis in 2007–09, the Dodd-Frank Act recognizes that relying on existing regulators is not sufficient in some circumstances. Congress did not structure the Dodd-Frank Act to deprioritize the Council's nonbank financial company designation authority.

Nonetheless, the 2019 Interpretive Guidance stated that the Council would identify, assess, and address potential risks and threats to U.S. financial stability through a process that began with what it called an ''activities-based approach.'' Under that guidance, the activities-based approach meant the Council would rely on existing regulators to address potential threats to financial stability before the Council could consider designating a nonbank financial company.[55] The 2019 Interpretive Guidance further generally limited the use of designations under section 113 of the Dodd-Frank Act to cases where a potential risk or threat could not be adequately addressed by existing regulators. The Council received many comments favoring the prioritization of an activities-based approach over entity-specific designation, and many other comments advocating for the removal of the prioritization. The Final Guidance does not include the statement that the Council will first rely on existing regulators to address risks to financial stability before considering a nonbank financial company for potential designation.

The Council believes that rescinding the prioritization of an activities-based approach will better enable the Council to respond to threats to financial stability irrespective of their source. The Council agrees with the many commenters that stated that the Council should work closely with federal and state regulators. As discussed above and below, the Council engages extensively with federal and state financial regulatory agencies to identify, assess, and respond to risks to financial stability. The Council appreciates the expertise and experience, noted by many commenters, of primary financial regulators. The Council agrees with commenters that collaborating with existing regulators is critical. Under the Final Guidance, the Council will maintain its previous commitment to engaging extensively with existing regulators.

Some commenters noted that other bodies, including the Financial Stability Board, have focused in recent years on an activities-based approach, and encouraged the Council to do the same. Some commenters also stated that an activities-based approach is the most effective means of addressing risks to the financial system. The Council believes that the availability of its full range of authorities is important to enable it to address the full range of potential risks to financial stability. In many respects, the Council agrees with reasons identified by commenters for supporting efforts by existing regulators to address potential risks to financial stability. For example, as commenters noted, in appropriate circumstances such actions can enable the mitigation of risks that arise from the activities of numerous financial companies in a particular sector or from financial products that are offered on a widespread basis. Other commenters stated that addressing risks through generally applicable regulatory requirements may increase fairness and reduce competitive disadvantages by promoting consistent treatment across firms. Some commenters stated that action by existing regulators may also be quicker than a Council designation process followed by the adoption of prudential standards by the Federal Reserve. The Council appreciates these points.

Some commenters suggested that the prioritization of an activities-based approach is appropriate, in part, because the Council is not a primary financial regulator and should defer to the judgment of primary financial regulators. During any designation review, the Council will consider the ''degree to which the company is already regulated by 1 or more primary financial regulatory agencies,'' [56] but the statute does not prioritize this factor among the list of required considerations. While the Council engages routinely with primary financial regulators, as discussed above, Congress gave the Council itself the responsibility to reach judgments under the standard set forth in section 113 of the Dodd-Frank Act regarding potential threats to financial stability.

Other commenters highlighted the benefits of nonbank financial company designations compared to other ways to respond to a potential threat to financial stability. Many commenters pointed out that designation may be more appropriate when a threat to U.S. financial stability arises from the material financial distress or activities of a particular nonbank financial company, and that in the event of such a risk, a designation may be a more targeted solution that does not impact all firms in the same market. Designation may also be more suitable when a large, complex, interconnected nonbank financial company is subject to varying levels of regulation across financial markets and regulatory jurisdictions. As some commenters stated, the potential impact of a nonbank financial company's material financial distress or activities on financial stability is frequently related to the interconnections and combination of financial risks across multiple business lines within a single company and the company's existing regulation and risk-management practices.

One commenter also noted more holistic benefits of nonbank financial company designations. Designation may be a more effective deterrent against companies' actions that increase potential risks to financial stability because some companies may be able to avoid activities-based rules through regulatory arbitrage. Moreover, one commenter noted that designation, whose resulting regulatory regime includes resolution-planning requirements, supports the success of the Orderly Liquidation Authority under Title II of the Dodd-Frank Act, which is designed to limit the consequences of insolvencies when they do occur. Commenters also noted that the Council's nonbank financial company designation process enables firms to respond quickly, and that the Council can reconsider a previous designation if there are changes that reduce the potential threat to financial stability.

Some commenters asserted that the Proposed Guidance indicates that the Council intends to prioritize an entity-based approach. This is incorrect. The Council does not intend to favor any of its statutory authorities over others. The Proposed Guidance and the Final Guidance focus on the nonbank financial company designation authority simply because the sole purpose of the guidance is to establish the Council's process for designating nonbank financial companies. Other Council

[55] One commenter cited an estimate from two former Chairpersons of the Council and two former Chairs of the Federal Reserve Board that the nonbank financial company designation process under the 2019 Interpretive Guidance would take six years or more.

[56] Dodd-Frank Act section 113(a)(2)(H), 12 U.S.C. 5323(a)(2)(H).

materials, including the Analytic Framework, describe how the Council may apply other authorities.

F. Cost-Benefit Analysis

Although the Dodd-Frank Act does not require a cost-benefit analysis prior to the designation of a nonbank financial company, the 2019 Interpretive Guidance stated that the Council would perform a quantitative cost-benefit analysis, whenever possible,[57] as a prerequisite to designation. Under the Proposed Guidance, the Council would not conduct a cost-benefit analysis prior to a designation of a nonbank financial company. The Council received and considered numerous comments both favoring retention of cost-benefit analysis as a step in the designation process and advocating its removal. As described below, the Council does not believe that a cost-benefit analysis of individual designation determinations is legally required or reasonably estimable, useful, or appropriate in this context. Therefore, the Final Guidance does not contemplate the Council conducting a cost-benefit analysis prior to a nonbank financial company designation.

Section 113 of the Dodd-Frank Act sets forth the standard for designation, which directs the Council to determine whether ''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 the financial stability of the United States.'' [58] The Dodd-Frank Act also sets forth the list of considerations ''the Council shall consider'' ''[i]n making a determination'' to designate a nonbank financial company under section 113.[59] Subsection 113(a)(2) lists 10 explicit and mandatory considerations—including the company's leverage, transactions with other financial companies, assets under management, and existing regulation—as well as a permissive eleventh consideration: ''any other risk-related factors that the Council deems appropriate.'' [60]

The designation standard and the statutory considerations are focused on the threat a nonbank financial company's material financial distress or activities could pose to U.S. financial stability. Section 113 establishes a structure for the Council's evaluation of a company and the risks it could pose to financial stability. This statutory structure does not contain, nor does it require the Council to perform, a cost-benefit analysis. The statute instructs the Council to focus on potential threats to financial stability, not the costs of designation to the company under review or to others. The potential costs and benefits of designation depend, among other things, on financial conditions, market behaviors, and the risk and magnitude of potential future financial crises that are inestimable with reasonable precision. Congress determined that when a nonbank financial company meets the statutory standard, designation is justified. The Council declines to second-guess that legislative judgment.

Some commenters noted that neither the costs nor the benefits of designation appear in the considerations listed in section 113 of the Dodd-Frank Act, and that they are not similar to any of the listed considerations. The absence of a cost-benefit analysis requirement in section 113 contrasts with other provisions of the Dodd-Frank Act that do require cost-benefit analysis.[61] As several commenters noted, this contrast demonstrates that Congress did not intend for the Council to perform a cost-benefit analysis when making determinations under section 113.

Further, some commenters noted that while Congress granted the Council discretion to consider other factors it ''deems appropriate,'' these too must be ''risk-related.'' [62] Thus, under the text of section 113 of the Dodd-Frank Act, whether cost-benefit analysis is a prerequisite to designation depends on two inquiries: (1) is cost-benefit analysis a ''risk-related factor,'' and (2) does ''the Council deem[ ] appropriate'' the consideration of costs and benefits in a designation? The answer to both is no.

Having considered the public comments on the Proposed Guidance, the Council does not believe that cost-benefit analysis, or its results or components, are ''risk-related factors,'' and does not expect to consider them. The Council believes the statutory reference to ''any other risk-related factors'' 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 a nonbank financial company's material financial distress or activities.[63] Cost-benefit analysis is unlike any of the 10 explicit considerations the Council must take into account prior to designating a nonbank financial company. Each of the mandatory considerations—for example, a company's leverage, off-balance-sheet exposures, and importance as a source of credit—all directly inform the threat a company's material financial distress or activities could pose to U.S. financial stability. Analysis of the costs and benefits of designation does not have that character. The Council acknowledges that there would be costs to a designated nonbank financial company associated with the Federal Reserve's prudential standards and supervision, but the Council does not believe that those costs would be ''risk-related factors.'' [64]

Some commenters contended that the costs of designation could be so great as to increase the threat to financial stability that a company's material financial distress or activities could pose. Thus, these commenters stated, the costs of designation should also be considered a risk-related factor. However, the Council does not believe that commenters on the Proposed Guidance identified a credible scenario in which the costs of designation could be relevant to the assessment of the threat a company's material financial distress or activities could pose to financial stability.[65] That is, while commenters noted that costs of designation hypothetically could affect a company's financial position, they did not convincingly demonstrate that such costs could affect the threat to financial stability posed by the company's

[57] The 2019 Interpretive Guidance further provided, ''If such benefits or costs cannot be quantified in this manner, the Council will explain why such benefits or costs could not be quantified.'' 84 FR at 71,765 (Dec. 30, 2019).

[58] Dodd-Frank Act sections 113(a)(1) (with respect to U.S. nonbank financial companies) and (b)(1) (with respect to foreign nonbank financial companies), 12 U.S.C. 5323(a)(1) and (b)(1).

[59] Dodd-Frank Act section 113(a)(2), 12 U.S.C. 5323(a)(2).

[60] *Id.*

[61] See, *e.g.,* Dodd-Frank Act sections 1013(d)(7)(A)(i)(IV) and 1022(b)(2)(A)(i), 12 U.S.C. 5493(d)(7)(A)(i)(IV) and 5512(b)(2)(A)(i).

[62] See Dodd-Frank Act section 113(a)(2)(K), 12 U.S.C. 5323(a)(2)(K).

[63] This interpretation is also consistent with how the word ''risk'' is used in surrounding provisions of the Dodd-Frank Act. See, *e.g.,* Dodd-Frank Act sections 112, 115, 120, 121, and 123, 12 U.S.C. 5322, 5325, 5330, 5331, and 5333.

[64] Under section 165 of the Dodd-Frank Act, the Federal Reserve has authority to establish prudential standards applicable to designated nonbank financial companies, and the Council may recommend standards under section 115 of the Dodd-Frank Act. 12 U.S.C. 5325 and 5365.

[65] While, for the reasons described in this section, the Council does not expect to consider any anticipated costs of designation, under the Final Guidance a company under review may submit to the Council any information the company deems relevant to the Council's evaluation under the statutory standard for designation. Consistent with section 113(a)(2)(K) of the Dodd-Frank Act, 12 U.S.C. 5323(a)(2)(K), the Final Guidance does not preclude the Council from considering any risk-related factors, including factors that the Council later determines to be risk-related, if the Council deems their consideration appropriate.

material financial distress, were it to occur, or activities. Moreover, the purpose of the prudential standards and Federal Reserve supervision applicable to a designated nonbank financial company is to mitigate the threat to financial stability that the company's material financial distress or activities could pose. For example, even if they were costly to implement, risk-based capital requirements, leverage limits, or liquidity requirements reduce risks posed by companies to the financial system. Notwithstanding the potential costs of a Council designation, Congress set out a process by which companies should be evaluated and, if they meet the statutory standard, subject to prudential standards and Federal Reserve supervision.

Other commenters contended that costs accruing to the market more generally (*e.g.,* potential competitive harms) or the results of a cost-benefit analysis assessing the effect of designation on the broader economy could be ''risk-related factors.'' However, the standard Congress chose for nonbank financial company designations indicates that such costs and cost-benefit analysis are not ''risk-related factors.'' The Council does not believe that cost-benefit analysis indicates whether a company's material financial distress or activities ''could pose a threat to the financial stability of the United States,'' the standard for designation under section 113. As noted above, in adopting this statutory standard, Congress determined that if a company meets the standard, based on the considerations Congress identified, the designation is justified.[66]

Even if the cost of designation or the results of cost-benefit analysis were ''risk-related factors,'' the Council does not deem appropriate their consideration as a prerequisite to designation. A cost-benefit analysis aimed at assessing the incremental costs resulting from a designation and the potential benefits from mitigating the threat a company's material financial distress or activities could pose to financial stability would be impossible to perform with reasonable precision. This is in part because, as some commenters noted, it is not feasible to estimate with any certainty the likelihood, magnitude, or timing of a future financial crisis. The costs to financial stability arising from the material financial distress or activities of a nonbank financial company will depend on the state of the economy, the financial system, and innumerable other factors at the time. The costs of any particular future financial crisis, and thus the benefits of its prevention or mitigation through designation or other measures, cannot be predicted. Even estimates of the costs of past crises (which approximate the benefits of their avoidance), in terms of reductions in gross domestic product (GDP), greater government expenses, increases in unemployment, or other factors, vary widely on the order of trillions of dollars.[67]

The costs of designation to the designated company, the market, or others are also likely to evade useful estimation. These costs will depend critically on the applicable regulatory regime, which the Dodd-Frank Act directs the Federal Reserve, not the Council, to adopt.[68] Generally, specific regulatory requirements for previously 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. Moreover, those requirements, along with the company's behavior in response to them and relevant market conditions, may vary over time. 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 designation would yield a useful assessment. As noted by commenters, the infrequency and heterogeneity of past financial crises, combined with the unpredictable nature of financial markets and uncertain future evolution of financial firms and activities, do not provide a reliable basis for conducting an informative cost-benefit analysis. A cost-benefit analysis in this context is likely to produce results that are highly sensitive to discretionary assumptions and thus not helpful to decision-making. Accordingly, it is not surprising that Congress declined to prescribe a cost-benefit analysis as a prerequisite to designation.

Some commenters also asserted that a cost-benefit analysis before a designation is legally required by the district court's decision in *MetLife, Inc.* v. *Financial Stability Oversight Council (MetLife),*[69] the Supreme Court's decision in *Michigan* v. *EPA,*[70] or the APA.[71] The Council disagrees.

The district court in *MetLife* rescinded one of the Council's previous designations under section 113 of the Dodd-Frank Act because, among other reasons, the Council did not consider the costs of the designation. However, as the *MetLife* court noted: ''This Court is one of 94 United States District Courts, comprising several hundred judges, and its Opinion is not binding on others; the Opinion stands on its own persuasive value, to the extent it has any.'' [72] Furthermore, the *MetLife* court's

[66] See also Dodd-Frank Act section 112(a)(2)(H), 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 pursuant to section 113'' (emphasis added)).

[67] One study cited by a commenter estimated the costs of a recent financial crisis to exceed an entire year of GDP. See Josh Bivens, ''Why is recovery taking so long—and who's to blame?,'' Economic Policy Institute (Aug. 11, 2016), *https://www.epi.org/publication/why-is-recovery-taking-so-long-and-who-is-to-blame* (estimating the cumulative output gap in the economy at 133% of GDP). Other commenters cited a study that describes the large range of financial-crisis cost estimates, often differing by trillions of dollars, and notes the unsuitability of cost-benefit analysis for regulation aimed at improving financial stability. See John Coates IV, ''Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications,'' The Yale Law Journal (Jan.-Feb. 2015), *https://www.yalelawjournal.org/article/cost-benefit-analysis-of-financial-regulation.*

[68] One commenter cited an estimate that AIG would have faced annual compliance costs between $100 million and $150 million related to its previous designation. The Council takes no position on the accuracy of this estimate, but notes that it is orders of magnitude smaller than the likely costs of a financial crisis.

[69] 177 F. Supp. 3d 219, 239–42 (D.D.C. 2016).

[70] 576 U.S. 743 (2015).

[71] One commenter also contended that a statement in the Proposed Guidance acknowledging that the guidance was subject to the procedures described in Executive Order 12866 (E.O. 12866), which generally directs agencies to consider the relevant costs and benefits of ''regulations'' and ''regulatory actions,'' undermines the Council's view that cost-benefit analysis is not a requirement of the designation process. However, E.O. 12866 defines ''regulation'' to mean ''an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency,'' and defines ''regulatory action'' as ''any substantive action by an agency . . . that promulgates or is expected to lead to the promulgation of a final rule or regulation.'' E.O. 12866 sections 3(e) and (f). The Council's designation determinations under section 113 of the Dodd-Frank Act are neither ''regulations'' nor ''regulatory actions.'' Determinations under section 113 are thus not subject to E.O. 12866.

[72] *MetLife* v. *Financial Stability Oversight Council,* Order, Dkt. No. 129,15–cv–45 (D.D.C. Feb. 28, 2018) (declining to vacate portion of opinion rescinding MetLife's designation); *see also Pears* v. *Mobile Cnty.,* 645 F. Supp. 2d 1062, 1076 (S.D. Ala. 2009) (''It is black-letter law that the decision of one federal district court is not binding on another federal district court, or even on the same judge in another case.'') (collecting cases). The *MetLife* decision has limited significance even for MetLife itself. In the final settlement agreement between the Council and MetLife in 2018, the Council maintained that its designation of MetLife complied with applicable law, and 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.

holding appears to rely, in part, on its assessment that a company's likelihood of material financial distress was a required consideration under the Council's guidance in effect at that time.[73] As discussed below, the Final Guidance makes clear that the Council does not expect to consider the likelihood of a nonbank financial company's material financial distress; as a result, to the extent *MetLife's* reasoning relied on that requirement, it would not apply. In addition, while the court in *MetLife* viewed costs as a risk-related factor, it failed to take into account that the Council did not ''deem'' the cost of designation an appropriate risk-related factor to consider. Consistent with section 113(a)(2)(K) of the Dodd-Frank Act, because the Council did not deem cost appropriate to consider, its consideration was not required for the statutory reasons described above.

Other commenters stated that *Michigan* v. *EPA* requires the Council to perform cost-benefit analyses of its designations. In *Michigan,* the Supreme Court considered whether cost-benefit analysis was required by a provision of the Clean Air Act directing the EPA to regulate certain hazardous emissions only if EPA found that ''such regulation is appropriate and necessary.'' [74] The Court held that the requirement to determine that the regulation was '''appropriate and necessary' requires at least some attention to cost.'' Notably, the Court stated that it was not concluding the statute required EPA ''to conduct a formal cost-benefit analysis.'' [75]

While section 113 of the Dodd-Frank Act also uses the word ''appropriate,'' the context is entirely different. First, the phrase ''any other risk-related factors that the Council deems appropriate'' is permissive, not mandatory.[76] Unlike the EPA, which was directed to act only when it found that regulation was ''appropriate and necessary,'' [77] under the Dodd-Frank Act, the Council has clear statutory authority to choose which ''other risk-related factors'' to consider by deeming them appropriate, or not. Second, section 113's permissive reference to ''appropriate'' is limited to ''risk-related factors,'' rather than other considerations that could conceivably influence agency decision-making, such as cost-benefit analysis. This interpretation of section 113 is consistent with the Supreme Court's decision in *Michigan* v. *EPA,* in which it noted that ''[t]here are undoubtedly settings in which the phrase 'appropriate and necessary' does not encompass cost.'' [78] Similarly, and more recently, the Court of Appeals for the D.C. Circuit has rejected the claim that the word ''appropriate'' necessarily requires consideration of economic costs, in part, because the Supreme Court in *Michigan* v. *EPA* ''was careful to emphasize that its reading of 'appropriate' was dependent on the statutory context . . . .'' [79]

Several commenters argued that the APA's general prohibition on arbitrary and capricious agency action could require the Council to perform cost-benefit analysis, regardless of the standard and requirements set forth in the Dodd-Frank Act. However, the APA contains no such mandate, and the Supreme Court has long held that the APA's text sets forth the ''maximum procedural requirements'' courts may impose.[80] Reading additional requirements into the APA ''would violate the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure.'' [81]

A number of commenters stated that cost-benefit analysis is generally a helpful agency practice because it disciplines agency decision-making and leads to better policy outcomes. The Council takes no view on these propositions in general, but as discussed above, does not believe cost-benefit analysis would generally be appropriate in the context of nonbank financial company designations such that it should be a prerequisite to designation. Under the Analytic Framework, the Council anticipates that its analyses, including in the context of a designation under section 113 of the Dodd-Frank Act, will be rigorous, data-driven, and transparent. Other commenters contended that cost-benefit analysis is necessary to ensure that designation will promote U.S. financial stability or generally do more good than harm. The Council disagrees. Under the statutory standard in section 113, the Council has authority to designate a nonbank financial company only if the company's material financial distress or activities could pose a threat to U.S. financial stability. Thus, the promotion of U.S. financial stability is already embedded in the designation standard.

In addition, these commenters did not acknowledge the fact that the prudential standards will be developed by the Federal Reserve, and some presume it would regulate nonbank financial companies in a way that actually increases risks to financial stability. However, under its statutory mandate, the Federal Reserve would seek to establish prudential standards that would ''prevent or mitigate risks to the financial stability of the United States.'' [82] The Federal Reserve will also take into consideration companies' ''capital structure, riskiness, complexity, financial activities (including the financial activities of their subsidiaries), size, and any other risk-related factors that the Board of Governors deems appropriate.'' [83]

G. Likelihood of Material Financial Distress

As part of the evaluation of a company being considered for designation, the 2019 Interpretive Guidance provided that ''the Council will assess the likelihood of the company's material financial distress.'' [84] The Final Guidance removes this ''likelihood assessment'' from the Council's designation procedures.[85]

[73] See *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'' and citing Council's ''own Guidance'' as obligating the Council to consider associated ''risk'').

[74] See *Michigan* v. *EPA,* 576 U.S. 743, 747, 751 (2015); 42 U.S.C. 7412.

[75] *Id.* at 759.

[76] Dodd-Frank Act section 113(a)(2)(K), 12 U.S.C. 5323(a)(2)(K); see also *Webster* v. *Doe,* 486 U.S. 592, 600 (1988) (statutory grant of agency authority to ''deem'' actions ''necessary or advisable'' ''fairly exudes deference to [the agency],'' ''appears to . . . foreclose'' judicial review, and ''strongly suggests that [the statute's] implementation 'was committed to agency discretion by law.' '').

[77] See *Michigan* v. *EPA,* 576 U.S. 743, 747, 751 (2015).

[78] *Id.* at 752.

[79] *Murray Energy Corp.* v. *EPA,* 936 F.3d 597, 622 (D.C. Cir. 2019).

[80] *Perez* v. *Mortg. Bankers Ass'n,* 575 U.S. 92, 100, 102 (2015) (''Beyond the APA's minimum requirements, courts lack authority 'to impose upon an agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good.''') (quoting *Vermont Yankee Nuclear Power Corp.* v. *Nat. Res. Def. Council, Inc.,* 435 U.S. 519, 549 (1978)).

[81] *Id.* at 102.

[82] Dodd-Frank Act section 165(a)(1), 12 U.S.C. 5365(a)(1).

[83] Dodd-Frank Act section 165(a)(2)(A), 12 U.S.C. 5365(a)(2)(A).

[84] 84 FR at 71,766–67 (Dec. 30, 2019).

[85] The Council for many years consistently expressed the view that neither the Dodd-Frank Act nor the 2012 Interpretive Guidance contemplated the consideration of the likelihood of a nonbank financial company's material financial distress. The district court in *MetLife* held that, notwithstanding the Council's arguments to the contrary, the 2012 Interpretive Guidance required an assessment of the likelihood of a company's material financial distress. The 2019 Interpretive Guidance altered the Council's approach by stating that the Council would consider this factor. The Final Guidance conforms to the Council's previous understanding that this factor should not be taken into account. To the extent that the 2012 Interpretive Guidance could reasonably be interpreted as committing the Council to consider this factor, the Council is now

Continued

The Council believes that assessing the likelihood of a company's material financial distress (referred to by some commenters as a company's ''vulnerability'' to financial distress) is neither required nor appropriate. As described below, such an assessment does not appear in relevant provisions of the Dodd-Frank Act, fits poorly with the statutory standard for designation, compromises the preventative nature of the designation authority, and could cause the very financial instability that a designation is intended to avert. Further, history provides myriad examples of the futility of predicting, years in advance, the likelihood of any specific financial company's material financial distress. Accordingly, the Council unequivocally declines to include any requirement to assess a company's likelihood of, or vulnerability to, material financial distress before a designation under section 113 of the Dodd-Frank Act.

Congress authorized the Council to designate a company under section 113 of the Dodd-Frank Act 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.'' [86] This standard (one of two statutory designation standards under section 113) instructs the Council to determine whether a company's material financial distress could pose a threat to financial stability—not to assess how likely such distress is to occur. Thus, under section 113, the Council presupposes a company's material financial distress, and then evaluates what consequences for U.S. financial stability could follow.[87] If those consequences ''could pose a threat'' to U.S. financial stability, designation is warranted. The first determination standard, thus, does not require or contemplate an assessment of how likely a company is to experience material financial distress. Put differently, the assessment under the first designation standard is binary. If a company's material financial distress, were it to occur, could pose a threat to financial stability, then the company meets the standard for designation; if not, the first standard for designation is not met. The likelihood of the company's material financial distress is not relevant to the statutory standard for designation.

Moreover, none of the 10 statutory considerations the Council must consider in making a determination under section 113 includes such a likelihood assessment. As some commenters pointed out, the Council's designation determinations take into account these statutory considerations, not the probability of material financial distress. Further, the 10 statutory considerations inform the Council's determination whether the statutory standard has been met; they do not alter the statutory standard.

Some commenters contended that the 10 considerations in section 113 of the Dodd-Frank Act imply that the Council must consider a nonbank financial company's likelihood of material financial distress. As noted above, the 10 considerations do not contain any language relating to such a likelihood assessment. Moreover, reading such a requirement into the statute would conflict, in different ways, with each of the two alternative statutory standards for designation. As noted above, the first designation standard turns on whether a company's material financial distress could pose a threat to financial stability, not how likely such distress is to occur. Section 112 of the Dodd-Frank Act underscores that the Council's duty is to designate ''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.'' [88] By assigning the duty to designate nonbank financial companies that may pose risks ''in the event'' of their material financial distress or failure, section 112 emphasizes that the Council takes material financial distress or failure as a given and assesses what risks could flow from it.

In contrast, the second designation standard under section 113 provides for designation of a company if the Council determines that ''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.'' [89] This second standard does not take into account or depend on the effects of a company's material financial distress, much less an assessment of its likelihood. For that reason, the 2019 Interpretive Guidance specified that the Council would undertake a likelihood assessment only under the first designation standard—not when the Council considers a company under the second designation standard.[90] But the 10 statutory considerations apply to the second designation standard as well as the first designation standard. Therefore, to interpret the 10 statutory considerations as requiring the Council to assess a company's likelihood of material financial distress would contradict the plain meaning of section 113 by collapsing the two statutory designation standards—the second of which is not related to a company's material financial distress—into one.

A number of commenters supported the Council's interpretation as proposed. Some commenters stated that proceeding with a designation only after a determination that the company's material financial distress is likely would alter the statutory standard—authorizing designation only when a company's material financial distress ''does threaten'' financial stability, rather than when it ''could pose a threat'' to financial stability.

Further, the designation authority 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.[91] As some commenters underscored, permitting designation to occur only when the Council determines that a company is likely to fail, or has a reasonable or foreseeable likelihood of failure, would be damaging to financial stability. Waiting to act until there is an estimable likelihood of a company's failure would negate the purpose of the Council's designation authority, which is to mitigate risks before they actually threaten financial stability. The designation process under the Final Guidance will 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

clarifying that it does not interpret the Dodd-Frank Act, the Final Guidance, or the Analytic Framework to contemplate an assessment of the likelihood of a company's material financial distress.

[86] Dodd-Frank Act section 113(a)(1), 12 U.S.C. 5323(a)(1). See also Dodd-Frank Act section 113(b)(1) (with respect to foreign nonbank financial companies), 12 U.S.C. 5323(b)(1).

[87] Some commenters suggested that the Council should define ''material financial distress.'' Both the Proposed Guidance and Final Guidance provide that 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. This interpretation is unchanged from both the 2012 Interpretive Guidance and the 2019 Interpretive Guidance.

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

[89] Dodd-Frank Act section 113(a)(1), 12 U.S.C. 5323(a)(1). See also Dodd-Frank Act section 113(b)(1) (with respect to foreign nonbank financial companies), 12 U.S.C. 5323(b)(1).

[90] See 84 FR at 71,754 and 71,767 (Dec. 30, 2019).

[91] See Dodd-Frank Act section 112(a)(1)(C), 12 U.S.C. 5322(a)(1)(C).

stability. For these tools to be most effective, they must be in place well before material financial distress appears on the horizon.

Some commenters argued that a likelihood assessment will help the Council identify which companies are suitable for designation. But there are good reasons that Congress chose not to require the Council to consider the likelihood of a nonbank financial company's material financial distress, and the Council does not believe it would be a useful consideration. As other commenters noted, companies that seem unlikely to experience financial distress may nonetheless experience material financial distress and rapidly threaten financial stability. 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, on September 10, 2008, Lehman Brothers reported shareholder equity—which is a measure of solvency—of $28 billion as of the end of August.[92] Two days later, on September 12, 2008, ''experts from the country's biggest commercial investment banks . . . could not agree whether or not'' Lehman Brothers was solvent.[93] The next business day, Monday, September 15, 2008, Lehman Brothers declared bankruptcy. The collapse of Long-Term Capital Management in 1998, which one commenter attributed to significant leverage and a lack of regulation, was similarly rapid.[94] 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. Several commenters noted that even without the undue hurdles to designation imposed by the 2019 Interpretive Guidance, the designation process will likely remain lengthy, and stated that it is unrealistic to expect the Council to estimate the likelihood of a company's material financial distress potentially years in advance. The Council agrees.

Finally, if the Council can only designate a company by taking into account the likelihood of the company's material financial distress, public awareness of a designation (or its mere possibility) could create a perception that the Council views the company as relatively likely to fail, causing a run on the company by its creditors and counterparties.[95] This is an important reason why bank supervisory ratings are confidential, in acknowledgement of the risk that the 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.

Some commenters interpreted a discussion of this issue in the preamble to the Proposed Guidance as indicating that designation under any procedures could cause a run on the nonbank financial company under consideration or otherwise give rise to material financial distress or financial instability. Some suggested that the Council should always consider the potential for designation itself to lead to material financial distress at the company. That is not the Council's view. Rather, the Council believes that its evaluation of a company's likelihood of material financial distress, or determination regarding the likelihood of a company's material financial distress as part of a designation, could trigger a run on the company. As evidenced by the four previous examples of the Council's use of the nonbank financial company designation authority, designation is unlikely to have that effect in the absence of a likelihood assessment; instead, designation leads to the establishment of prudential requirements and supervision by the Federal Reserve, which serve to mitigate the risks arising from material financial distress at the designated company.

Some commenters contended that the Council must assess a company's likelihood of material financial distress because a company with no likelihood of distress could not possibly ''pose a threat'' to financial stability. These commenters misread the first designation standard. As noted above, that standard presupposes material financial distress at the company under consideration. Congress instructed the Council to take material financial distress as a given and assess the consequences. That a company might have a low likelihood of material financial distress does not change the inquiry under the statutory standard.

Furthermore, the contention that a likelihood assessment is necessary because some companies are immune to material financial distress rests on a factual assumption the Council rejects. As discussed above, and as some commenters noted, there is little ability to predict, years in advance, the likelihood of any specific financial company's material financial distress, and history has revealed that even financial companies viewed as strong and stable can rapidly weaken and fail.[96] Moreover, material financial distress may arise unpredictably from shocks generated outside of the financial system. For example, even companies with excellent financial risk management may experience material financial distress as a result of operational risks such as cyberattacks or other information technology failures.[97]

Some commenters stated that, in the absence of a likelihood assessment, two companies that have vastly different probabilities of material financial distress (or of threatening financial stability) will receive equivalent treatment in the designation process. These concerns are misplaced. In a designation process, the Council determines whether a company's material financial distress or activities could pose a threat to financial stability. The supervisory regime and prudential requirements to mitigate that threat are established by the Federal Reserve, generally following the designation. As noted above, in developing prudential standards applicable to designated

[92] 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.*

[93] *Id.*

[94] The more recent failures of Silicon Valley Bank and Signature Bank in March 2023 further underscore how quickly and unexpectedly a financial company can become insolvent.

[95] While a likelihood assessment would presumably not be treated differently than other elements of the designation process with respect to the Council's confidentiality procedures, a company under consideration for designation may publicly disclose that it is under review, either voluntarily or pursuant to otherwise applicable disclosure requirements. Further, under the Final Guidance the Council will publicly announce all Final Determinations.

[96] Expected default frequencies (EDF) from Moody's Credit Edge and Kamakura default probability (KDP) are two off-the-shelf metrics of the likelihood of default. During the 2007–09 financial crisis, both metrics provided little lead time ahead of material financial distress. EDFs rose above 5 percent for Fannie Mae and Freddie Mac in February 2008, about seven months before they were put into conservatorship. Lehman Brothers' EDF rose above 5 percent in June 2008, roughly two months before its bankruptcy. AIG's EDF remained below 5 percent until the day the Federal Reserve stepped in to rescue the firm. Similar patterns were observed at commercial banks. As summarized by the Federal Deposit Insurance Corporation (FDIC), ''Throughout 2006, only about one-half of 1 percent of banks were on the problem list, the lowest percentage for any year for which these data are available (1980–2017), suggesting, incorrectly as it turned out, that the risk profile of the banking industry was at a historic low.'' FDIC, *Crisis and Response: An FDIC History, 2008–2013,* at 106 (2017).

[97] Operational risks associated with inadequate or failed internal processes, people, and systems, or from external events, are inherent in most financial company products, activities, processes, and systems. An operational failure could result in material financial distress at a company if the failure impedes the company's ability to provide key products or services.

nonbank financial companies, the Federal Reserve is required to differentiate among companies on an individual basis or by category, taking into consideration their capital structure, riskiness, complexity, financial activities, size, and any other risk-related factors that the Federal Reserve deems appropriate.[98]

Other commenters stated that the Council must assess a company's likelihood of material financial distress under the first designation standard because, in their view, the court's decision in *MetLife* requires it. As noted in section II.F above, as a district court opinion, *MetLife* is not binding on any other court or the Council (outside of the specific orders entered in that proceeding). More fundamentally, the court in *MetLife* held that the Council's failure to assess the likelihood of MetLife's material financial distress was contrary to the 2012 Interpretive Guidance, which the court interpreted to require a likelihood assessment.[99] The *MetLife* court did not hold that a likelihood assessment was required by the Dodd-Frank Act or any other source of law beyond the 2012 Interpretive Guidance. Because the Final Guidance unequivocally eliminates any statement that the Council will assess a company's likelihood of material financial distress, this element of the *MetLife* decision does not apply.

Some commenters contended that the vulnerabilities or other factors described in the Proposed Analytic Framework implied an obligation to consider a company's likelihood of financial distress. The Council disagrees and does not intend to interpret the Analytic Framework in that manner. The Analytic Framework does not add to or modify the standard for designation. Rather, the Analytic Framework describes how the Council considers risks to financial stability generally, regardless of the tool used to address those risks. The "vulnerabilities" described in the Analytic Framework do not imply an intention to consider a company's likelihood of material financial distress.

Some commenters argued that in the absence of a likelihood assessment, the Council will inappropriately designate companies without considering all of the relevant factors or any mitigation by the company or its regulators, and in circumstances such that designation will harm economic growth or impair financial stability. Some commenters argued that because designation is an important action, the Council should read into the statutory standard additional requirements, including the likelihood assessment, that Congress did not expressly adopt. For the reasons described above, the Council does not view a likelihood assessment as relevant to the statutory standard, related to the statutory considerations, or appropriate in a designation analysis.

H. Other Comments Received

The public comments on the Proposed Guidance were largely focused on the relatively small number of topics addressed above. However, the Council received and considered some comments addressing other issues. For example, one commenter stated that the Council should not designate nonbank financial companies during any period in which Congress is considering legislation related to financial stability. The Council believes that, pending any future legislation, the Council has a current statutory duty to carry out its responsibilities as directed by existing law.

Another commenter suggested that following the failures of certain banks in the first half of 2023, the Council should table the Proposed Guidance and instead prioritize the identification and assessment of risks potentially affecting banks. The Council believes that the recent stress in the banking sector underscores the importance of actionable, durable, and transparent procedures for addressing potential threats to financial stability, consistent with the Final Guidance and the Analytic Framework.

Some commenters who are commissioners of Council member agencies, but are not their chairs, expressed concern that only the chairs of their respective agencies are members of the Council. The Council appreciates the contributions of member agencies that are led by multi-member bodies, and notes that the composition of the Council is dictated by the Dodd-Frank Act.

One commenter stated that any Council member's public comments about potential designations could suggest prejudgment of the outcome before required procedural steps have occurred. The Council notes that it has reached no conclusions regarding the analysis of any nonbank financial company under the Final Guidance and the Analytic Framework and notes that the procedures in the Final Guidance are designed to provide many opportunities for companies under consideration to engage with staff of Council members and member agencies and to present relevant information to inform the views of the Council and its members.

Several commenters expressed general support for the Proposed Guidance. Their reasons included that the changes proposed would help curb risks at nonbank entities, demonstrate the Council's commitment to promoting financial innovation while safeguarding financial stability, and restore the Council's ability to fulfill its mission. Commenters who expressed general opposition to the Proposed Guidance largely focused on changes from the 2019 Interpretive Guidance, arguing that the Council should retain elements of the 2019 Guidance that the proposal omitted. These points are discussed in the sections above.

Other commenters expressed support for the Proposed Guidance while also urging the Council to take immediate steps to respond to perceived risks to financial stability. The Council believes the Final Guidance provides the Council with the ability to use its statutory designation authority in applicable circumstances while providing important procedural safeguards and ample opportunities for engagement with companies under review and their primary financial regulators.

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

The Council has numerous authorities and tools under the Dodd-Frank Act to carry out its statutory purposes.[100] 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 intends to take in the determination process.[101] The Council also has authority to issue procedural rules[102] and policy

[98] Dodd-Frank Act section 165(a)(2)(A), 12 U.S.C. 5365(a)(2)(A).

[99] 177 F. Supp. 3d at 233–39.

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

[101] 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, *Prod. Tool* v. *Employment & Training Admin.,* 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." *U.S.* v. *Mead,* 533 U.S. 218, 227 (2001).

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

statements.[103] The Final 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 Final Guidance sets forth rules of agency organization, procedure, or practice, the Council has concluded that the Final Guidance does not have binding effect and does not impose duties on, or alter the rights or interests of, any person. Further, the Final Guidance does not change the statutory standards for the Council's actions 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 Final Guidance also does not limit the ability of the Council to take emergency action under section 113(f) of the Dodd-Frank Act if the Council determines that such action is necessary or appropriate to prevent or mitigate threats posed by a nonbank financial company to U.S. financial stability. As a result, the Council has concluded that the notice and comment requirements of the APA would not apply.[104] However, in the Council's rule codified at 12 CFR 1310.3, the Council voluntarily committed that it would not amend or rescind Appendix A to 12 CFR 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.[105] Consequently, the Council followed those procedures with respect to the Final Guidance.

It is the Council's intention that each portion of the Final Guidance, and the rescission of the 2019 Interpretive Guidance, should continue in effect if all or any other portion of the Final Guidance is held unlawful or otherwise set aside by a court. Further, if any portion of the Analytic Framework is held unlawful or otherwise set aside by a court, the Council intends that each portion of the Final Guidance that is not also held unlawful or otherwise set aside by a court should continue in effect. While the Final Guidance as a whole sets forth the process the Council intends to follow when considering a nonbank financial company for designation under section 113 of the Dodd-Frank Act, the Council would expect to follow any of the Final Guidance's remaining portions if other portions were no longer in effect, and for the reasons described above would not expect to follow any aspect of the 2019 Interpretive Guidance (other than with respect to those aspects of the Final Guidance that are identical to the 2019 Interpretive Guidance). Similarly, the Council would expect to apply the Analytic Framework even if the Final Guidance, or any part of it, were no longer in effect.

IV. Paperwork Reduction Act

The collection of information contained in the Final Guidance has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 [106] under control number 1505–0244. 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 Final 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 Final Guidance is 1,000 hours. We estimate the cost associated with this information collection to be $562,500.

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 $500 per hour, and the remainder will be carried by outside professionals retained by financial companies at an average cost of $750 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 OFR 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 Final 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.

The Proposed Guidance requested comment on the estimates and other assumptions in the proposed collection of information, but the Council received no comments in response to the questions presented.

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, as amended by Executive Order 14094, the Office of Information and Regulatory Affairs within the Office of Management and Budget has determined that the Final Guidance is a ''significant regulatory action.'' Accordingly, the Office of Management and Budget has reviewed the Final Guidance.

VI. Congressional Review Act

Pursuant to the Congressional Review Act,[107] the Office of Information and Regulatory Affairs designated this rule as a major rule as defined by 5 U.S.C. 804(2).

List of Subjects in 12 CFR Part 1310

Brokers, Investments, Securities.

The Financial Stability Oversight Council is amending 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:

[103] See *Ass'n of Flight Attendants-CWA, AFL–CIO* v. *Huerta,* 785 F.3d 710 (D.C. Cir. 2015).

[104] See 5 U.S.C. 553(b)(A).

[105] 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, including documents that are referred to in but are not a part of the Final Guidance, such as the Council's separately issued Analytic Framework, hearing procedures, bylaws, and committee charters, are not subject to section 1310.3's requirements.

[106] 44 U.S.C. 3507(d).

[107] 5 U.S.C. 801 *et seq.*

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) [1] 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 regarding nonbank financial company determinations.[2]

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.[3] 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 company [4] 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 as provided below and subject to a preliminary analysis, based on quantitative and qualitative information available to the Council primarily through public and regulatory sources. During Stage 1, the Council will permit, but not require, the company to submit relevant information. The Council will also consult with the company's primary financial regulatory agency [5] 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 agency before requiring the submission of reports from any nonbank financial company.[6]

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.[7] 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 Analytic 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, types of metrics, and transmission channels 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 Committee [8] 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) [9] to conduct an initial analysis of

[1] 12 U.S.C. 5323.

[2] See 12 CFR part 1310.

[3] 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, 12 U.S.C. 5323(f).

[4] 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 interpret "nonbank financial company supervised by the Board of Governors" as including any nonbank financial company that acquires, directly or indirectly, a majority of the assets or liabilities of a company that is subject to a final determination of the Council. 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 of this appendix A, 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.

[5] 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.

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

[7] See 12 CFR 1310.21(c).

[8] The Council's Deputies Committee is composed of senior officials from each Council member and member agency. See Bylaws of the Deputies Committee of the Financial Stability Oversight Council, available at *https://fsoc.gov.*

[9] 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.*

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.

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, which may enable the company to act to mitigate any risks to financial stability and thereby potentially avoid becoming subject to a Council determination.

The Council will also consider in Stage 1 information available from relevant existing regulators of the company. Under the Dodd-Frank Act, the Council is required to consult with the primary financial regulatory agency, if any, for each nonbank financial company or subsidiary of a nonbank financial company that is being considered for a determination before the Council makes any Final Determination with respect to such company.[10] 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 distress[11] 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.[12] This information will generally be collected by the OFR.[13] 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

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

[11] 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.

[12] See 12 CFR 1310.21(a).

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

U.S. financial stability using the regulator's existing authorities; as noted above, if the Council believes regulators' or the company's actions adequately address the potential risks to U.S. financial stability the Council has identified, the Council would expect to discontinue its consideration of the company for a potential determination under section 113 of the Dodd-Frank Act.

Before making a Proposed Determination regarding a nonbank financial company, the Council will notify the company when the Council believes that the evidentiary record regarding the company is complete.[14] The Council will notify any nonbank financial company in Stage 2 if the company ceases to be considered for a determination. Any nonbank financial company that ceases to be considered at any time in the Council's determination process may be considered for a potential determination in the future at the Council's discretion, consistent with the processes described above.

d. Proposed and Final Determinations

Proposed Determination

Based on the analysis performed in Stage 2, a nonbank financial company may be considered for a Proposed Determination. A Proposed Determination requires a vote, on a nondelegable basis, of two-thirds of the voting members of the Council then serving, including an affirmative vote by the Chairperson of the Council.[15] 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.[16] Promptly after the Council votes to make a Proposed Determination regarding a company, the Council will provide the company's primary financial regulatory agency or home country supervisor with the nonpublic written explanation of the basis of the Council's Proposed Determination (subject to appropriate protections for confidential information).

Hearing

A nonbank financial company that is subject to a Proposed Determination may request a nonpublic hearing to contest the Proposed Determination in accordance with section 113(e) of the Dodd-Frank Act and § 1310.21(c) of the Council's rule regarding nonbank financial company determinations.[17] If the nonbank financial company requests a hearing in accordance with the procedures set forth in § 1310.21(c), the Council will set a time and place for such hearing. The Council has published hearing procedures on its website.[18] 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.[19] The Council will also provide the company's primary financial regulatory agency or home country supervisor with the nonpublic written explanation of the basis of the Council's Final Determination (subject to appropriate protections for confidential information). The Council expects that its explanation of the basis for any Final Determination will highlight the key risks that led to the determination and include guidance regarding the factors that were important in the Council's determination. When practicable and consistent with the purposes of the determination process, the Council will provide a nonbank financial company with notice of a Final Determination at least one business day before publicly announcing the determination pursuant to § 1310.21(d)(3), § 1310.21(e)(3), or § 1310.22(d)(3) of the Council's rule.[20] 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.[21]

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.[22] 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.[23] 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.

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

[14] See 12 CFR 1310.21(a)(3).

[15] 12 CFR 1310.10(b).

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

[17] See 12 CFR 1310.21(c).

[18] 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*.

[19] 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).

[20] See 12 CFR 1310.21(d)(3) and (e)(3) and 1310.22(d)(3).

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

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

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

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

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

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

Nellie Liang

Under Secretary for Domestic Finance.

[FR Doc. 2023–25053 Filed 11–16–23; 8:45 am]

BILLING CODE 4810–AK–P–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 744

[Docket No. 231114–0268]

RIN 0694–AJ47

Entity List Removal

AGENCY: Bureau of Industry and Security, Department of Commerce.

ACTION: Final rule.

SUMMARY: In this rule, the Bureau of Industry and Security (BIS) amends the Export Administration Regulations (EAR) by removing one entity under the destination of the People's Republic of China (China).

DATES: This rule is effective November 16, 2023.

FOR FURTHER INFORMATION CONTACT: Chair, End-User Review Committee, Office of the Assistant Secretary for Export Administration, Bureau of Industry and Security, Department of Commerce, Phone: (202) 482–5991, Email: *ERC@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Entity List (supplement no. 4 to part 744 of the EAR (15 CFR parts 730–774)) identifies entities for which there is reasonable cause to believe, based on specific and articulable facts, that the entities have been involved, are involved, or pose a significant risk of being or becoming involved in activities contrary to the national security or foreign policy interests of the United States, pursuant to § 744.11(b). The EAR impose additional license requirements on, and limit the availability of, most license exceptions for exports, reexports, and transfers (in-country) when a listed entity is a party to the transaction. The license review policy for each listed entity is identified in the ''License Review Policy'' column on the Entity List, and the impact on the availability of license exceptions is described in the relevant **Federal Register** document that added the entity to the Entity List. The Bureau of Industry and Security (BIS) places entities on the Entity List pursuant to parts 744 (Control Policy: End-User and End-Use Based) and 746 (Embargoes and Other Special Controls) of the EAR.

The End-User Review Committee (ERC), composed of representatives of the Departments of Commerce (Chair), State, Defense, Energy and, where appropriate, the Treasury, makes all decisions regarding additions to, removals from, or other modifications to the Entity List. The ERC makes all decisions to add an entry to the Entity List by majority vote and makes all decisions to remove or modify an entry by unanimous vote.

Entity List Decisions

Removal From the Entity List

The ERC determined to remove the Ministry of Public Security's Institute of Forensic Science of China from the Entity List pursuant to a removal proposal and review that the ERC conducted in accordance with procedures described in supplement no. 5 to part 744 of the EAR. Prior to removal from the Entity List by this rule, the Ministry of Public Security's Institute of Forensic Science of China was listed under the destination of China.

Export Control Reform Act of 2018

On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which included the Export Control Reform Act of 2018 (ECRA) (50 U.S.C. 4801–4852). ECRA provides the legal basis for BIS's principal authorities and serves as the authority under which BIS issues this rule.

Rulemaking Requirements

1. This rule has been determined to be not significant for purposes of Executive Order 12866.

2. Notwithstanding any other provision of law, no person is required to respond to or be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This regulation involves an information collection approved by OMB under control number 0694–0088, Simplified Network Application Processing System. BIS does not anticipate a change to the burden hours associated with this collection as a result of this rule. Information regarding the collection, including all supporting materials, can be accessed at *https://www.reginfo.gov/public/do/PRAMain.*

3. This rule does not contain policies with federalism implications as that term is defined in Executive Order 13132.

4. Pursuant to section 1762 of the Export Control Reform Act of 2018, this action is exempt from the Administrative Procedure Act (5 U.S.C.