

full amount owed plus any applicable interest, and to make an advance payment of the full amount of the estimated fee before the Council begins to process a new request or the pending request.

(5) When the Council acts under paragraphs (g)(1) through (4) of this section, the administrative time limits of twenty (20) days (excluding Saturdays, Sundays, and legal public holidays) from receipt of initial requests or appeals, plus extensions of these time limits, shall begin only after any applicable fees have been paid (in the case of paragraphs (g)(2), (g)(3), or (g)(4)), a written agreement to pay fees has been provided (in the case of paragraph (g)(1)), or a request has been reformulated (in the case of paragraphs (g)(1) or (g)(2)).

(h) *Form of payment.* Payment may be made by check or money order paid to the Treasurer of the United States.

(i) *Charging interest.* The Council may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. Interest charges will be assessed at the rate provided in 31 U.S.C. 3717 and will accrue from the date of the billing until payment is received by the Council. The Council will follow the provisions of the Debt Collection Act of 1982 (Pub. L. 97-365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(j) *Aggregating requests.* If the Council reasonably determines that a requester or a group of requesters acting together is attempting to divide a request into a series of requests for the purpose of avoiding fees, the Council may aggregate those requests and charge accordingly. The Council may presume that multiple requests involving related matters submitted within a thirty (30) calendar day period have been made in order to avoid fees. The Council shall not aggregate multiple requests involving unrelated matters.

Dated: April 3, 2012.

**Rebecca Ewing,**

*Acting Executive Secretary, Department of the Treasury.*

[FR Doc. 2012-8625 Filed 4-10-12; 8:45 am]

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## FINANCIAL STABILITY OVERSIGHT COUNCIL

### 12 CFR Part 1310

RIN 4030-AA00

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

**AGENCY:** Financial Stability Oversight Council.

**ACTION:** Final rule and interpretive guidance.

**SUMMARY:** Section 113 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) authorizes the Financial Stability Oversight Council (the “Council”) to determine that a nonbank financial company shall be supervised by the Board of Governors of the Federal Reserve System (the “Board of Governors”) and shall be subject to prudential standards, in accordance with Title I of the Dodd-Frank Act, if the Council determines that material financial distress at the nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the nonbank financial company, could pose a threat to the financial stability of the United States. This final rule and the interpretive guidance attached as an appendix thereto describe the manner in which the Council intends to apply the statutory standards and considerations, and the processes and procedures that the Council intends to follow, in making determinations under section 113 of the Dodd-Frank Act.

**DATES:** *Effective date:* May 11, 2012.

**FOR FURTHER INFORMATION CONTACT:** Lance Auer, Office of Domestic Finance, Treasury, at (202) 622-1262, or Eric Froman, Office of the General Counsel, Treasury, at (202) 622-1942.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

Section 111 of the Dodd-Frank Act (12 U.S.C. 5321) established the Financial Stability Oversight Council. Among the purposes of the Council under section 112 of the Dodd-Frank Act (12 U.S.C. 5322) are “(A) to identify risks to the financial stability of the United States that could arise from the material financial distress or failure, or ongoing activities, of large, interconnected bank holding companies or nonbank financial companies, or that could arise outside the financial services marketplace; (B) to promote market discipline, by eliminating expectations on the part of

shareholders, creditors, and counterparties of such companies that the Government will shield them from losses in the event of failure; and (C) to respond to emerging threats to the stability of the United States financial system.”

In the recent financial crisis, financial distress at certain nonbank financial companies contributed to a broad seizing up of financial markets and stress at other financial firms. Many of these nonbank financial companies were not subject to the type of regulation and consolidated supervision applied to bank holding companies, nor were there effective mechanisms in place to resolve the largest and most interconnected of these nonbank financial companies without causing further instability. To address any potential risks to U.S. financial stability posed by these companies, the Dodd-Frank Act authorizes the Council to determine that certain nonbank financial companies will be subject to supervision by the Board of Governors and prudential standards. The Board of Governors is responsible for establishing the prudential standards that will be applicable, under section 165 of the Dodd-Frank Act, to nonbank financial companies subject to a Council determination.

Title I of the Dodd-Frank Act defines a “nonbank financial company” as a domestic or foreign company that is “predominantly engaged in financial activities,” other than bank holding companies and certain other types of firms.<sup>1</sup> The Dodd-Frank Act provides that a company is “predominantly engaged” in financial activities if either (i) the annual gross revenues derived by the company and all of its subsidiaries from financial activities, as well as from the ownership or control of insured depository institutions, represent 85 percent or more of the consolidated annual gross revenues of the company; or (ii) the consolidated assets of the company and all of its subsidiaries related to financial activities, as well as related to the ownership or control of insured depository institutions, represent 85 percent or more of the consolidated assets of the company.<sup>2</sup> The Dodd-Frank Act requires the Board of Governors to establish the requirements for determining whether a company is “predominantly engaged in financial activities” for this purpose.<sup>3</sup>

The Council issued an advance notice of proposed rulemaking (the “ANPR”) on October 6, 2010 (75 FR 61653), in

<sup>1</sup> See 12 U.S.C. 5311(a)(4).

<sup>2</sup> See 12 U.S.C. 5311(a)(6).

<sup>3</sup> See 12 U.S.C. 5311(b).

which it requested public comment on the application of the statutory factors that the Dodd-Frank Act requires the Council to consider in determining whether a nonbank financial company should be supervised by the Board of Governors and subject to prudential standards. The ANPR posed 15 questions, all of which addressed the application of the statutory considerations that the Council must take into account in the process of determining whether a nonbank financial company should be subject to supervision by the Board of Governors and be subject to prudential standards (the "Determination Process").

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

In response to comments that the Council received on the First NPR, on October 18, 2011, the Council issued a second notice of proposed rulemaking (the "NPR") and proposed interpretive guidance (the "Proposed Guidance") (76 FR 64264) to provide (i) additional details regarding the framework that the Council intends to use in the process of assessing whether a nonbank financial company could pose a threat to U.S. financial stability, and (ii) further opportunity for public comment on the Council's proposed approach to the Determination Process.

The Council received 41 comment letters in response to the NPR and Proposed Guidance, of which 12 were from companies or trade associations in the insurance industry, eight were from companies or trade associations in the asset management industry, seven were from other financial or business trade associations, four were from specialty finance companies, and 10 were from law firms, advocacy groups, think tanks, and individuals.<sup>4</sup> (Comment letters are

<sup>4</sup>In addition, the Council received two comment letters dated March 8, 2012, requesting a public hearing or public roundtables on the NPR and Proposed Guidance. These letters also reiterated earlier substantive comments on the NPR and Proposed Guidance by a number of the letters' signatories. The writers acknowledged that these prior substantive comments were submitted and that the Council had received numerous comments to the NPR and Proposed Guidance on a wide range of concerns. In drafting the final rule and interpretive guidance, the Council has carefully considered all the comments received. Neither the Dodd-Frank Act nor the Administrative Procedure Act requires a public hearing on the NPR and Proposed Guidance prior to the issuance of the final rule and interpretive guidance. The letters requesting a hearing did not indicate why the

available online at <http://www.regulations.gov>.) In addition to issuing the ANPR, the First NPR, and the NPR and Proposed Guidance for public comment, staff of Council members and their agencies met with financial industry representatives to discuss the proposals. Meeting participants generally reiterated the views expressed in their comment submissions.

Commenters generally found that the NPR and Proposed Guidance provided helpful insight and transparency into the Council's approach to the Determination Process. Many commenters applauded the inclusion of a three-stage process for review of nonbank financial companies and the inclusion of sample metrics for the Council's analysis under its analytic framework. Some commenters suggested that the NPR and Proposed Guidance continued to provide an insufficient degree of certainty and transparency.<sup>5</sup>

As described below, the Council has carefully considered the comments received on the NPR and Proposed Guidance in developing the final rule and interpretive guidance.

## II. Comments on Scope and Implementation of Determination Authority

### A. Comments on Scope of Council Determinations

Many commenters addressed the types of nonbank financial companies that should be considered for determinations. Many commenters representing particular segments of the financial industry suggested that nonbank financial companies operating in those segments do not pose a threat to U.S. financial stability and should not generally be subject to a determination. For example, commenters representing the insurance industry argued that the products and services of regulated, traditional insurance companies are highly substitutable and that these companies operate without significant leverage or reliance on short-term debt and are subject to high levels of existing regulatory scrutiny. Commenters representing the asset management industry contended that asset managers are unlikely to pose a threat to U.S.

opportunity to submit written comments was inadequate for commenters to participate fully in the rulemaking process. Accordingly, the Council has determined that a public hearing or roundtable is not necessary prior to adopting the final rule and interpretive guidance.

<sup>5</sup>In addition, one commenter recommended that the Council abandon this rulemaking entirely; the Council has declined to do so, for the reasons described below. Consistent with the Council's intended approach, two other commenters recommended that the determination process be implemented as soon as possible.

financial stability, and some noted that the legal distinction between investment advisers and the funds they manage make the prudential standards contemplated by section 165 of the Dodd-Frank Act an inappropriate mechanism for addressing any threat posed by such firms. Others commented on behalf of financial guaranty insurers, captive finance companies, money market funds, and the Federal Home Loan Banks. The Council's determination with respect to a nonbank financial company will be based on an evaluation of whether the nonbank financial company meets the statutory standards, taking into account the statutory considerations set forth in section 113 of the Dodd-Frank Act. The Council does not intend to provide industry-based exemptions from potential determinations under section 113 of the Dodd-Frank Act, but the Council intends to give these comments due consideration in the Determination Process.<sup>6</sup>

In contrast, some commenters argued that the standard for determinations should be low, so that many nonbank financial companies may be subject to a determination. Other commenters suggested that particular types of nonbank financial companies, such as companies that serve as primary dealers or foreign banking organizations that reorganize their operations and deregister as bank holding companies in order to avoid new capital and liquidity requirements should automatically be considered by the Council.<sup>7</sup> As noted above, the Council's determination with respect to a nonbank financial company will be based on an application of the statutory standards, taking into account

<sup>6</sup>Pursuant to section 170 of the Dodd-Frank Act, the Board of Governors is authorized to promulgate regulations on behalf of, and in consultation with, the Council setting forth the criteria for exempting certain types or classes of nonbank financial companies from supervision by the Board of Governors. See 12 U.S.C. 5370.

<sup>7</sup>The Council notes that a foreign bank that is a bank holding company or that operates a branch or agency in the United States is subject to consolidated supervision by the Board of Governors and would be subject to the enhanced prudential standards to be adopted by the Board of Governors under section 165 of the Dodd-Frank Act, resolution planning requirements, and early remediation requirements to be adopted by the Board of Governors under section 166 of the Dodd-Frank Act if it has total consolidated worldwide assets of at least \$50 billion. See 76 FR 67323, at 67326 (Nov. 1, 2011) for a discussion of the application of resolution-planning requirements to foreign banks. A foreign bank that has a financial but not a banking presence in the United States may not be subject to consolidated supervision by the Board of Governors and consequently, may not be subject to these requirements, regardless of its size, unless the Council were to make a determination with respect to such company pursuant to section 113 of the Dodd-Frank Act.

the considerations set forth in section 113 of the Dodd-Frank Act, to the facts regarding that nonbank financial company.

As noted above under “Background,” Title I of the Dodd-Frank Act defines a “nonbank financial company” as a domestic or foreign company that is “predominantly engaged in financial activities,” with certain exceptions. The guidance notes that the Council intends to interpret the term “company” broadly with respect to nonbank financial companies and other companies in connection with section 113 of the Dodd-Frank Act, to include any corporation, limited liability company, partnership, business trust, association, or similar organization. In response to commenter concerns, the Council clarifies that it does not generally intend to encompass unincorporated associations within the definition of “company.” One commenter suggested that the rule include a definition of “company.” The Council has determined that adding this definition to the rule would not be consistent with the focus of the rule on issues of Council procedure and practice, but the Council’s intended interpretation of this term has been included in the interpretive guidance. Other commenters argued that the definition of “nonbank financial company” should include financial businesses owned by another company that engage in separate, unrelated financial transactions, or that open-end investment companies might not be included within the statutory definition of “nonbank financial company.” The Board of Governors has authority to issue regulations regarding the requirements for determining if a company is predominantly engaged in financial activities, and thus potentially a nonbank financial company, and has issued a proposed rule under this authority.

#### *B. Comments on Coordination With Other Regulatory Activities*

A number of commenters requested that the Council delay this rulemaking until other, related regulatory activities are completed. The other regulatory activities cited were (i) the requirements for determining if a company is “predominantly engaged in financial activities” under section 102 of the Dodd-Frank Act; (ii) the adoption of enhanced prudential standards applicable under section 165 of the Dodd-Frank Act to nonbank financial companies subject to a Council determination; (iii) the rule regarding the establishment of an intermediate holding company under section 626 of

the Dodd-Frank Act; (iv) the rules further defining “major swap participant” and “major security-based swap participant” under Title VII of the Dodd-Frank Act; (v) the Council’s regulations implementing the Freedom of Information Act (“FOIA”); (vi) safe harbors from Board of Governors supervision under section 170 of the Dodd-Frank Act; and (vii) recommendations of the Council for additional standards applicable to activities or practices under section 120 of the Dodd-Frank Act.

The regulatory activities cited by commenters are in various stages of the rulemaking process, including the Council’s FOIA regulations, which the Council adopted on April 3, 2012. The Council does not believe it is necessary or appropriate to postpone the adoption of this rule or the interpretive guidance until these other regulatory actions are completed. These rulemakings are not essential to the Council’s consideration of whether a nonbank financial company could pose a threat to U.S. financial stability, and the Council has the statutory authority to proceed with determinations under section 113 of the Dodd-Frank Act prior to the adoption of such rules.

In addition, several commenters urged the Council to coordinate the issuance of the rule and interpretive guidance with G-20-mandated efforts being undertaken by international bodies, such as the Financial Stability Board and the International Association of Insurance Supervisors, or to postpone the Determination Process until broader U.S. and international financial reforms have been implemented. Council members are working closely with their international counterparts on a number of initiatives, including the process for identifying globally systemically important financial institutions and financial market infrastructures. At the same time, the Council’s determinations under section 113 of the Dodd-Frank Act are an important part of the U.S. financial reform process, and the Council believes it is important for this framework to be in place as soon as practicable.

### **III. Description of the Rule and the Interpretive Guidance**

In developing the rule and interpretive guidance, the Council has carefully considered the comments received on the NPR and Proposed Guidance, as well as the language and legislative history of the Dodd-Frank Act. After this review, the Council is adopting the rule and interpretive guidance substantially as proposed, but

with a number of clarifications in response to commenter concerns.

The rule sets forth the procedures and practices for the Council’s determinations regarding nonbank financial companies, including the statutory considerations and procedures for information collection and hearings.

The interpretive guidance, which is attached as an appendix to the rule, addresses, among other things—

- Key terms and concepts related to the Council’s determination authority, including “material financial distress” and “threat to financial stability”;
- The uniform quantitative thresholds that the Council intends to use to identify nonbank financial companies for further evaluation;
- The six-category framework that the Council intends to use to consider whether a nonbank financial company meets either of the statutory standards for a determination, including examples of quantitative metrics for assessing each category; and
- The process that the Council intends to follow when considering whether to subject a nonbank financial company to supervision by the Board of Governors and prudential standards.

To foster transparency with respect to the Determination Process, the rule and interpretive guidance provide a detailed description of (i) the profile of those nonbank financial companies that the Council likely will evaluate for potential determination, so as to minimize uncertainty among nonbank financial companies, market participants, and other members of the public, and (ii) the factors that the Council intends to use when analyzing companies at various stages of the Determination Process, including examples of the metrics that the Council intends to use when evaluating a nonbank financial company under the six-category analytic framework. The Council’s ultimate assessment of whether a nonbank financial company meets a statutory standard for determination will be based on an evaluation of each of the statutory considerations, taking into account facts and circumstances relevant to each nonbank financial company.

The Council has numerous authorities and tools to carry out its statutory duty to monitor the financial stability of the United States. In addition to the Council’s determination authority under section 113 of the Dodd-Frank Act, the Council has the authority to make recommendations to primary financial regulatory agencies to apply new or heightened standards and safeguards for a financial activity or practice conducted by bank holding companies or nonbank financial companies under

the jurisdiction of such agencies if the Council determines that the conduct, scope, nature, size, scale, concentration, or interconnectedness of such activity or practice could create or increase the risk of significant liquidity, credit, or other problems spreading among bank holding companies and nonbank financial companies, U.S. financial markets, or low-income, minority, or underserved communities.<sup>8</sup> In addition, the Council may designate financial market utilities and payment, clearing and settlement activities that the Council determines are, or are likely to become, systemically important.<sup>9</sup> The Council expects that its response to any potential threat to financial stability will be based on an assessment of the circumstances.

Pursuant to section 115(a) of the Dodd-Frank Act, the Council may also make recommendations to the Board of Governors concerning the establishment and refinement of prudential standards and reporting and disclosure requirements applicable to nonbank financial companies supervised by the Board of Governors pursuant to section 113 of the Dodd-Frank Act. In making such recommendations, the Dodd-Frank Act also authorizes the Council to differentiate among companies on an individual basis or by category, taking into consideration their capital structure, riskiness, complexity, financial activities (including the financial activities of their subsidiaries), size, and any other risk-related factors that the Council deems appropriate. In addition, section 165 of the Dodd-Frank Act gives the Board of Governors the ability to tailor the application of the prudential standards on its own.

Several commenters supported the recognition in the NPR of the Council's numerous authorities and tools to carry out its statutory duties. Commenters also urged the Council to perform, in connection with each potential determination with respect to a nonbank financial company, a comparative cost-benefit analysis of the tools available to the Council to mitigate any identified threat posed by the company. Some commenters further suggested that the Council provide this analysis to the nonbank financial company, explaining why a determination is the best available tool to mitigate the threat. Section 113 of the Dodd-Frank Act sets forth the factors that the Council must consider in determining whether to subject a nonbank financial company to Board of Governors supervision and prudential standards. The relative cost

and benefit of such a determination is not one of these statutory considerations. Therefore, while the Council expects to consider its available regulatory tools in addressing any potential threat to financial stability, the Council does not intend to conduct cost-benefit analyses in making determinations with respect to individual nonbank financial companies.

The rule and interpretive guidance, as well as the Council's responses to the comments received, are discussed in greater detail below.

#### *A. Statutory Determination Standards and Considerations*

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

Pursuant to the provisions of the Dodd-Frank Act, the Council is required to consider the following statutory considerations when evaluating whether to make this determination with respect to a nonbank financial company:<sup>10</sup>

- (A) The extent of the leverage of the company;
- (B) The extent and nature of the off-balance-sheet exposures of the company;
- (C) The extent and nature of the transactions and relationships of the company with other significant nonbank financial companies and significant bank holding companies;
- (D) The importance of the company as a source of credit for households, businesses, and State and local governments and as a source of liquidity for the U.S. financial system;
- (E) The importance of the company as a source of credit for low-income, minority, or underserved communities, and the impact that the failure of such company would have on the availability of credit in such communities;

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

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

(H) The degree to which the company is already regulated by one or more primary financial regulatory agencies;

(I) The amount and nature of the financial assets of the company;

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

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

The Council intends to take into account all of the statutory considerations, separately and in conjunction with each other, when determining whether either of the statutory standards for determination has been met. The Council included each of the statutory considerations in the NPR and has retained this text in the rule. The interpretive guidance provides detail regarding the manner in which the Council intends to assess nonbank financial companies under the First and Second Determination Standards.<sup>11</sup> The interpretive guidance sets forth definitions of the terms "material financial distress," which is relevant to the First Determination Standard, and "threat to the financial stability of the United States," which is relevant to both determination standards.

Commenters requested further clarification of the Council's interpretation of certain relevant definitions underlying the First and Second Determination Standards, such as the addition of quantitative metrics to measure material financial distress and a threat to U.S. financial stability. In addition, two commenters recommended that "threat to the financial stability of the United States" be defined narrowly, as a high threshold for the Council's determinations. The Council believes that these definitions accurately reflect the statutory requirements and the nature of the threat that the Council's authority under section 113 of the Dodd-Frank Act seeks to mitigate. The interpretive guidance therefore includes these definitions as proposed.

<sup>10</sup> This list reflects the statutory considerations applicable to a determination with respect to a U.S. nonbank financial company. The Council is required to consider corresponding factors in making a determination with respect to a foreign nonbank financial company.

<sup>11</sup> While one commenter suggested that the Council should disregard the Second Determination Standard, the Council intends to evaluate nonbank financial companies under either the First or the Second Determination Standard, in accordance with section 113 of the Dodd-Frank Act, as the Council deems appropriate.

<sup>8</sup> See 12 U.S.C. 5330(a).

<sup>9</sup> See 12 U.S.C. 5463(a)(1).

The interpretive guidance also describes three channels the Council believes are most likely to facilitate the transmission of the negative effects of a nonbank financial company's material financial distress or activities to other firms and markets, thereby posing a threat to U.S. financial stability: (i) Exposure of creditors, counterparties, investors, or other market participants to a nonbank financial company; (ii) disruptions caused by the liquidation of a nonbank financial company's assets; and (iii) the inability or unwillingness of a nonbank financial company to provide a critical function or service relied upon by market participants and for which there are no ready substitutes.

A number of commenters requested further clarification of the three transmission channels. These commenters suggested that the Council provide identifying metrics and explicit links between the channels and the statutory considerations. To address these requests, the interpretive guidance provides some additional clarification describing how the Council expects its assessments under the First and Second Determination Standards to relate to the transmission channels and the statutory considerations. However, due to the unique threat that each nonbank financial company may pose to U.S. financial stability and the qualitative nature of the inquiry under the statutory considerations, it is not possible to provide broadly applicable metrics defining these channels or to identify universally applicable links between the channels and the statutory considerations.

Two commenters also objected to the inclusion in the third transmission channel of a nonbank financial company's ability or willingness to provide a critical function or service, arguing that regulators should not interfere with companies' business decisions in this regard. Substitutability is an important consideration for evaluating the importance of a financial company. If a nonbank financial company is the sole provider, or one of a small number of providers, of a critical market function or service, the Council believes that it is appropriate to consider the impact a decision by the company to cease providing that function or service could have on other market participants or market functioning and, thereby, on U.S. financial stability.

#### *B. Analytic Framework for Determinations*

As described in the Proposed Guidance, the Council has incorporated the statutory considerations for

evaluating whether a nonbank financial company meets either the First or Second Determination Standard into an analytic framework consisting of the following six categories: (i) Size, (ii) interconnectedness, (iii) substitutability, (iv) leverage, (v) liquidity risk and maturity mismatch, and (vi) existing regulatory scrutiny. Three of these six categories seek to assess the potential impact of a nonbank financial company's financial distress on the broader economy: size, interconnectedness, and substitutability. The remaining three categories seek to assess the vulnerability of a nonbank financial company to financial distress: leverage, liquidity risk and maturity mismatch, and existing regulatory scrutiny. The interpretive guidance contains the table from the Proposed Guidance that illustrates the relationship between the 10 statutory considerations and the six framework categories.

Most commenters addressed these six categories either in the context of a particular financial sector (as described above under "Comments on Scope and Implementation of Determination Authority") or with respect to the proposed uniform quantitative thresholds that the Council intends to use to identify nonbank financial companies for further evaluation (as described below under "The Stage 1 Thresholds"). Of the commenters that specifically addressed the analytic framework, several recommended that substitutability either be narrowed to focus on nonbank financial companies that provide a critical function or service, or be broadened to encompass circumstances such as oligopolies and potential future business changes. The Council is adopting the description of substitutability as proposed, because the Council believes it accurately delineates the primary factors that may cause a lack of substitutability to pose a threat to U.S. financial stability.

Several commenters also urged the Council to give significant weight in its evaluations to existing regulatory scrutiny. In particular, one commenter argued that a nonbank financial company operating internationally should only have one lead supervisor, to ensure consistent supervision. Several other commenters advised that the effectiveness of existing regulation, or a consideration of existing regulations in light of the potential threat posed by a particular nonbank financial company, should be evaluated. As existing regulatory scrutiny is one of the statutory considerations, the Council intends to evaluate this factor, together with each of the other statutory

considerations, in connection with any determination. In response to these comments, the interpretive guidance has been revised to clarify that the Council will consider both the existence and the effectiveness of consolidated supervision of a nonbank financial company.

A number of commenters provided detailed recommendations regarding the analysis of companies within particular industries under the six-category analytic framework in Stages 2 and 3. For example, commenters highlighted the differences between insurance companies and other types of nonbank financial companies. These comments addressed issues such as the importance of focusing on the unregulated, nontraditional activities undertaken by insurance companies, rather than on regulated activities. One commenter suggested that the analysis of interconnectedness of insurance companies should focus on interconnectedness within a financial services conglomerate and between a U.S. insurance company and foreign entities. Others recommended technical changes to the types of information described in the interpretive guidance that the Council may consider in evaluating insurance companies. With respect to all the comments on industry-specific analyses, the evaluation of any nonbank financial company under the six-category framework will be company-specific, and the description in the interpretive guidance is intended to indicate the types of information that the Council will consider. The Council has not revised the interpretive guidance to address these comments but intends to consider such factors, where appropriate.

In response to a commenter, the interpretive guidance clarifies that the risk of interest rate fluctuations and reinvestment risk may be considered in evaluating maturity mismatch of life insurance companies.

#### *C. Three-Stage Process for Evaluating Nonbank Financial Companies*

##### 1. Overview of the Three-Stage Process

The interpretive guidance provides a detailed description of the three-stage process that the Council intends to use to identify nonbank financial companies for determinations in non-emergency situations. Each stage of the Determination Process involves an analysis based on an increasing amount of information to determine whether a nonbank financial company meets the First or Second Determination Standard.

The first stage of the process ("Stage 1") is designed to narrow the universe

of nonbank financial companies to a smaller set of nonbank financial companies. In Stage 1, the Council intends to evaluate nonbank financial companies by applying uniform quantitative thresholds that are broadly applicable across the financial sector to a large group of nonbank financial companies. These Stage 1 thresholds represent the framework categories that are more readily quantified: Size, interconnectedness, leverage, and liquidity risk and maturity mismatch.<sup>12</sup> A nonbank financial company would be subject to additional review if it meets both the size threshold and any one of the other quantitative thresholds. The Council believes that the Stage 1 thresholds will help a nonbank financial company predict whether such company will be subject to additional review by the Council. Stage 1 does not reflect a determination by the Council that the nonbank financial companies identified during Stage 1 meet one of the Determination Standards. Rather, Stage 1 is intended to identify nonbank financial companies that should be subject to further evaluation in subsequent stages of review.

In the second stage of the process ("Stage 2"), the Council will conduct a comprehensive analysis, using the six-category analytic framework, of the potential for the nonbank financial companies identified in Stage 1 to pose a threat to U.S. financial stability. In general, this analysis will be based on a broad range of quantitative and qualitative information available to the Council through existing public and regulatory sources, including industry- and company-specific metrics beyond those analyzed in Stage 1, and any information voluntarily submitted by the company.

Based on the analysis conducted during Stage 2, the Council intends to identify the nonbank financial companies that the Council believes merit further review in the third stage ("Stage 3"). The Council will send a notice of consideration to each nonbank financial company that will be reviewed in Stage 3, and will give those nonbank financial companies an opportunity to submit materials within a time period specified by the Council (which will be not less than 30 days). Stage 3 will build on the Stage 2 analysis using quantitative and qualitative information collected directly from the nonbank financial company, generally by the

Office of Financial Research (the "OFR"), in addition to the information considered during Stages 1 and 2. The Council will determine whether to subject a nonbank financial company to Board of Governors supervision and prudential standards based on the results of the analyses conducted during this three-stage review process.

As discussed in the interpretive guidance, the Council does not believe that a determination decision can be reduced to a formula. Each determination will be made based on a company-specific evaluation and an application of the standards and considerations set forth in section 113 of the Dodd-Frank Act, and taking into account qualitative and quantitative information that the Council deems relevant to a particular nonbank financial company.

## 2. Stage 1

As described in the interpretive guidance, in Stage 1, the Council intends to apply quantitative thresholds to a broad group of nonbank financial companies to identify a set of nonbank financial companies that merit further evaluation.

Many commenters commended the inclusion of Stage 1 in the Proposed Guidance. A smaller number of commenters objected to the Stage 1 process generally, stating either that the thresholds will capture too many or too few nonbank financial companies, or that the thresholds are not focused on activities that could cause a threat to financial stability. In addition, several commenters proposed that nonbank financial companies should be subject to further review only if they exceed at least two Stage 1 thresholds, rather than only one, in addition to the total consolidated assets threshold (described below). One commenter suggested that Stages 1 and 2 could be combined in instances when it is clear that a nonbank financial company may meet either the First or Second Determination Standard. Based on its analysis, the Council believes the Stage 1 approach as proposed, with certain clarifications, is appropriate. Stage 1 is not intended to identify nonbank financial companies for a final determination. Instead, Stage 1 is a tool that the Council, nonbank financial companies, market participants, and other members of the public may use to assess whether a nonbank financial company will be subject to further evaluation by the Council. Any nonbank financial company that is selected for further evaluation during Stage 1 will be assessed more comprehensively during Stage 2 and, if appropriate, Stage 3. In

addition to its other benefits, the careful, company-specific analysis in Stages 2 and 3 avoids any possible "cliff effects" for nonbank financial companies that narrowly exceed the Stage 1 thresholds.

The Council considered several approaches for Stage 1 other than the thresholds-based approach described in the interpretive guidance. Alternatives that were considered included a weighting of various metrics according to relative importance, and a multi-step, quantitative analysis under which progression through the analysis would have required meeting certain thresholds in each step. These approaches attempted to tailor the Stage 1 analysis more specifically to the various types of nonbank financial companies and to customize the factors to address narrower concepts of a threat to U.S. financial stability. In contrast to these alternative approaches, the Council determined that the thresholds-based approach set forth in the interpretive guidance offers greater transparency, consistency, and ease of application for the Council, nonbank financial companies, market participants, and other members of the public, and requires less reliance on subjective assumptions. A tailored analysis will be performed, potentially using the approaches described above, with respect to individual nonbank financial companies, as appropriate, in Stages 2 and 3. This approach will enable the Council to engage in a flexible, company-specific analysis that will reflect the unique risks posed by each nonbank financial company.

In all instances, the Council reserves the right, at its discretion, to subject any nonbank financial company to further review if the Council believes that further analysis of the company is warranted to determine if the company could pose a threat to U.S. financial stability, irrespective of whether such company meets the thresholds in Stage 1. Several commenters commended the Council's reservation of authority, while others suggested that the Council's reservation of authority will generate uncertainty or was otherwise inappropriate. As noted above, the Stage 1 thresholds are intended only to identify nonbank financial companies for further evaluation. However, the Council recognizes that all relevant data are likely not available to assess all nonbank financial companies using the Stage 1 quantitative thresholds and that the thresholds are an imperfect mechanism to identify all nonbank financial companies of which further review is warranted. While the thresholds were designed to be uniform,

<sup>12</sup> The Council believes that quantitative thresholds measuring substitutability and existing regulatory scrutiny would not be appropriate and intends to rely on company-specific qualitative and quantitative analyses of these factors in Stages 2 and 3.

transparent, and readily calculable by the Council, nonbank financial companies, market participants, and other members of the public, the Council also recognizes that the thresholds may not adequately measure unique risks posed by particular nonbank financial companies.

Therefore, the Council retains its discretion to consider nonbank financial companies not identified by the Stage 1 thresholds for any reason, including a lack of available data in Stage 1.

Commenters also suggested that the Council should provide an explanation of the basis for the Council's evaluation of any nonbank financial company that is reviewed in Stage 2 but did not exceed the Stage 1 thresholds. Any nonbank financial company that the Council determines should be reviewed during Stage 3 will receive notice of this review. If the Council determines by vote to subject a nonbank financial company to a proposed determination, the Council will provide the nonbank financial company with notice and an explanation of the basis of the proposed determination, as described below.

Several commenters addressed the collection of data from nonbank financial companies in Stage 1. While some commenters sought clarification of how the Council would collect data for Stage 1, particularly in cases where the data underlying the Stage 1 thresholds is not available, others urged the Council expressly to reserve the right to collect data from nonbank financial companies in Stage 1, to avoid any failure to identify a nonbank financial company that should be evaluated further. A fundamental purpose of Stage 1 is to narrow the universe of nonbank financial companies, based on information available to the Council through existing public and regulatory sources, to a smaller set of companies that will be subject to company-specific evaluation in Stage 2. The Council recognizes that all relevant data are likely not available to assess all nonbank financial companies using the Stage 1 thresholds. Therefore, the Council may subject a nonbank financial company to further review in Stage 2 if the Council believes that further analysis is warranted, for any reason, to determine if the company could pose a threat to U.S. financial stability.

### 3. The Stage 1 Thresholds

In Stage 1, the Council intends to apply six quantitative thresholds to a broad group of nonbank financial companies. The thresholds are—

- \$50 billion in total consolidated assets;

- \$30 billion in gross notional credit default swaps outstanding for which a nonbank financial company is the reference entity;

- \$3.5 billion of derivative liabilities;
- \$20 billion in total debt outstanding;
- 15 to 1 leverage ratio of total consolidated assets (excluding separate accounts) to total equity; and
- 10 percent short-term debt ratio of total debt outstanding with a maturity of less than 12 months to total consolidated assets (excluding separate accounts).

A nonbank financial company will be evaluated in Stage 2 if it meets both the total consolidated assets threshold and any one of the other thresholds.

Many commenters provided detailed recommendations regarding the six Stage 1 thresholds. These comments generally fall into three categories: (i) The level of a threshold should be changed; (ii) the method of calculating a threshold should be refined; and (iii) a threshold generally is inappropriate. A smaller number of commenters suggested new Stage 1 thresholds.

Commenters suggested that the Council tailor the thresholds by industry to provide a more accurate indication of the threat to U.S. financial stability that could be posed by a nonbank financial company in a particular industry. The Council recognizes that the quantitative thresholds it has identified for application during Stage 1 may not provide a comprehensive means to identify nonbank financial companies for further review across all financial industries and companies. However, the Stage 1 thresholds provide a reasonable set of measures for identifying nonbank financial companies that, in general, warrant further review. In addition, because many nonbank financial companies engage in financial activities across multiple segments of the financial markets, the application of specialized industry-specific thresholds to nonbank financial companies is not generally useful. Industry- and company-specific considerations are better evaluated during Stages 2 and 3, when more detailed information can be collected and more tailored analysis can be performed.

Several commenters requested additional information on how the Stage 1 thresholds were selected and suggested alternative measures that could be used. The Council selected the Stage 1 thresholds based on their applicability to nonbank financial companies that operate in diverse financial industries and because the

data underlying these thresholds for a broad range of nonbank financial companies are generally available from existing public and regulatory sources. The Council reviewed distributions of various samples of nonbank financial companies and bank holding companies to inform its judgment regarding the appropriate thresholds and their quantitative levels. As discussed in the interpretive guidance, the Council also considered historical testing of the thresholds to assess whether they would have captured nonbank financial companies that encountered material financial distress during the financial crisis of 2007–2008. In this review, the Council focused separately on the period immediately before the crisis and also a number of years preceding it. While some commenters argued that historical analyses are not a sufficient justification for determining appropriate levels of thresholds, this approach, when combined with other analytical methods, can be a helpful tool for evaluating potential thresholds. After considering the comments on the Stage 1 thresholds, including those recommending the elimination of particular thresholds, the Council has determined to finalize the thresholds largely as proposed. The Stage 1 thresholds and their levels reflect the collective judgment of the Council members regarding the appropriate thresholds and their levels, in light of the statutory standards and considerations and an extensive review of applicable data and various analyses. The Stage 1 thresholds do not reflect a determination that the identified nonbank financial companies meet one of the Determination Standards, or that nonbank financial companies that do not meet the thresholds will not be designated. Rather, they are designed to identify nonbank financial companies for further evaluation based on the statutory standards and considerations.

While the Council will apply the Stage 1 thresholds to all types of nonbank financial companies, including, to the extent that the relevant data are available, to financial guarantors, asset management companies, private equity firms, and hedge funds, these and other types of companies may pose risks that are not well-measured by the quantitative thresholds approach.

With respect to hedge funds and private equity firms in particular, the Council intends to apply the Stage 1 thresholds, but recognizes that less data are generally available about these companies than about certain other types of nonbank financial companies. Beginning in June 2012, advisers to

hedge funds and private equity firms and commodity pool operators and commodity trading advisors will be required to file Form PF with the Securities and Exchange Commission (“SEC”) or the Commodity Futures Trading Commission (“CFTC”), as applicable, on which form such companies will make certain financial disclosures. Using these and other data, the Council will consider whether to establish an additional set of metrics or thresholds tailored to evaluate hedge funds and private equity firms and their advisers.

In addition, the Council, its member agencies, and the OFR are analyzing the extent to which there are potential threats to U.S. financial stability arising from asset management companies. This analysis is considering what threats exist, if any, and whether such threats can be mitigated by subjecting such companies to Board of Governors supervision and prudential standards, or whether they are better addressed through other regulatory measures. The Council may develop additional guidance regarding potential metrics and thresholds relevant to determinations regarding asset managers, as appropriate. Commenters voiced both support for and opposition to the implementation of new metrics and thresholds applicable to asset managers. While the Council intends to address such issues at a later date, consistent with the intention described above not to provide exemptions under section 113 of the Dodd-Frank Act for any type of nonbank financial company, the Council intends to evaluate asset managers under the current interpretive guidance.

Generally, as reporting requirements evolve and new information about certain industries and nonbank financial companies become available, the Council expects to review the quantitative thresholds as appropriate based on this new information. For example, the Council may consider credit exposure data proposed to be collected under section 165 of the Dodd-Frank Act by the Federal Deposit Insurance Corporation and the Board of Governors. Similarly, pursuant to reporting and disclosure requirements being implemented under section 728 of the Dodd-Frank Act,<sup>13</sup> the Council may consider swaps information reported to swap data repositories.

The Council recognizes that the Stage 1 threshold to measure a nonbank financial company’s derivative liabilities captures only the current exposure, rather than the current and

potential future exposure created by the nonbank financial company’s outstanding derivatives. The SEC and CFTC have proposed rules to further define the terms “major swap participant” (“MSP”) and “major security-based swap participant” (“MSBSP”) that contain a methodology to measure the potential future exposure created by an entity’s outstanding derivatives, with respect to certain institutions.

Once the final rules regarding reporting of data on swaps and security-based swaps come into effect, and data have been collected pursuant to those rules, the Council may revisit this Stage 1 threshold based on factors such as a nonbank financial company’s current and potential future exposure from its outstanding derivatives for purposes of determining whether some or all MSPs, MSBSPs, or other nonbank financial companies that are subject to the rules will be subject to further examination in Stage 2.

In addition, in response to comments, the Council has made several clarifying changes to the interpretive guidance with respect to the Stage 1 thresholds. The Proposed Guidance included a “loans and bonds outstanding” threshold of \$20 billion. A number of commenters requested a clarification of the types of obligations and instruments that would be included in the calculation of this threshold. In response to these comments, the Council has renamed this threshold “total debt outstanding.” The interpretive guidance now also specifies that this threshold will be defined broadly and regardless of maturity to include loans, bonds, repurchase agreements, commercial paper, securities lending arrangements, surplus notes (for insurance companies), and other forms of indebtedness. The interpretive guidance has also been revised to clarify that this definition of “total debt outstanding” will be used in calculating the short-term debt ratio threshold.

In response to questions from two commenters regarding the Council’s data source for the threshold relating to credit default swaps outstanding, the Council currently intends to calculate this threshold using data available through the Trade Information Warehouse, which is operated by a subsidiary of the Depository Trust & Clearing Corporation. If other sources for this data become available, the Council may use those sources instead of, or in addition to, this source.

Further, to respond to comments, the interpretive guidance clarifies that in calculating the derivative liabilities

threshold for nonbank financial companies that disclose the effects of master netting agreements and cash collateral held with the same counterparty on a net basis, the Council intends to calculate derivative liabilities after taking into account the effects of these arrangements. For nonbank financial companies that do not disclose the effects of these arrangements, derivative liabilities will equal the fair value of derivative contracts in a negative position. For Stages 2 and 3, the impact of netting will be considered as appropriate.

Several commenters suggested that embedded derivatives be excluded from the definition of derivative liabilities, particularly for insurance companies or insurance products. Under statutory accounting principles (“SAP”), derivative features within insurance products are not accounted for separately from the host contract. Under generally accepted accounting principles in the United States (“GAAP”), derivative features that are combined with traditional insurance products may be accounted for separately and included in a company’s derivative liabilities, depending on whether the contract as a whole is carried at fair value and other criteria. The Council is cognizant of these differences between reporting under GAAP and SAP. Embedded derivatives will be included in the calculation of the Stage 1 derivative liabilities threshold, in accordance with GAAP, when such information is available. The Council will, as appropriate, assess embedded derivatives in Stages 2 and 3 with respect to particular nonbank financial companies. The relative importance of embedded derivatives tied to insurance products will depend on their type and how they may contribute to the risk posed by a nonbank financial company, regardless of how they are reported.

A number of commenters questioned how the Council will calculate the Stage 1 thresholds for asset managers and investment advisers. The Council has included in the interpretive guidance a clarification that while the Council expects that its determinations will apply to individual legal entities, the Council has authority to assess nonbank financial companies in a manner that addresses the statutory considerations and such other factors as the Council deems appropriate. For example, in applying the Stage 1 thresholds to funds (whether or not they are registered investment companies), the interpretive guidance states that the Council may consider the aggregate risks posed by separate funds that are managed by the

<sup>13</sup> See 17 CFR 49.17.

same adviser, particularly if the funds' investments are identical or highly similar. When applying the Stage 1 thresholds to an asset manager, the Council's analysis will appropriately reflect the distinct nature of assets under management compared to the asset manager's own assets. As discussed above, the Council may in the future issue additional guidance regarding additional metrics and thresholds, potentially including factors related to assets under management, regarding asset managers.

With respect to the application of the Stage 1 thresholds to foreign nonbank financial companies, several commenters requested that the thresholds be calculated based solely on the companies' U.S. operations. To respond to this request, the interpretive guidance specifies that for purposes of evaluating any U.S. nonbank financial company, the Council intends to apply each of the Stage 1 thresholds based on the global assets, liabilities and operations of the company and its subsidiaries. In contrast, for foreign nonbank financial companies, the Council intends to calculate the Stage 1 thresholds based solely on the U.S. assets, liabilities and operations of the foreign nonbank financial company and its subsidiaries.

Several commenters also suggested that a nonbank financial company's subsidiaries should not be included in the Council's evaluation of the company, including for purposes of calculating the Stage 1 thresholds. Similarly, these commenters requested that the Stage 1 thresholds, as applied to foreign nonbank financial companies, should exclude the operations of any U.S. subsidiary that meets the definition of "U.S. nonbank financial company." The Dodd-Frank Act requires the Council to consider subsidiaries of nonbank financial companies in its analysis, and thus, the references to subsidiaries in the rule and interpretive guidance include subsidiaries. This conclusion is based in part on the statutory definition of "nonbank financial company," which is based on a calculation of the revenues or assets of the relevant company "and all of its subsidiaries."<sup>14</sup> Further, in light of the purposes of section 113 of the Dodd-Frank Act and the broad statutory considerations set forth in that provision, and the types of prudential standards to which nonbank financial companies subject to Council determinations are subject, a meaningful analysis must include not only a nonbank financial company's own

operations, but also those of its subsidiaries. To determine whether a subsidiary of a nonbank financial company should be included for purposes of calculating the Stage 1 thresholds, the interpretive guidance, as described below, specifies that the Council intends generally to apply the Stage 1 thresholds using applicable accounting standards or such other data as are available to the Council.

Numerous commenters suggested that the levels of the Stage 1 thresholds should be adjusted periodically over time, based on indexes such as inflation or economic growth. The Council believes that automatic adjustments to the threshold levels based on one or more particular indexes such as inflation could result in threshold levels that do not indicate the potential for a nonbank financial company to pose a threat to financial stability. Therefore, the interpretive guidance states that the Council intends to review the levels of the Stage 1 thresholds that are specified in dollars at least every five years and to adjust those thresholds as the Council may deem advisable.

A number of commenters requested a clarification of the calculation date for the Stage 1 thresholds, with several proposing that the calculations be based on multi-period averages to reduce volatility and mitigate the effects of any unusual or one-time items. The Council recognizes that certain events that may cause a nonbank financial company briefly to exceed one or more Stage 1 thresholds may not indicate an increased threat to U.S. financial stability. However, because such an analysis is by its nature fact-specific, the Council believes that the appropriate framework for consideration of such factors is in Stage 2. Therefore, the interpretive guidance provides that the Council intends to reapply the Stage 1 thresholds using the most recently available data on a quarterly basis, or less frequently for nonbank financial companies with respect to which quarterly data are unavailable.

Several commenters also requested a clarification of the financial reporting standards that the Council will apply in Stage 1. In response to this request, the Council has revised the interpretive guidance to provide that the Council intends generally to apply the Stage 1 thresholds using GAAP when such information is available, or otherwise to rely on SAP, international financial reporting standards, or such other data as are available to the Council. While commenters suggested that the Council should rely on SAP when analyzing insurance companies, the Council has determined generally to rely on GAAP

when such data are available in order to promote consistency and uniformity in the application of the Stage 1 thresholds. The Council expects to review financial statements prepared in accordance with SAP in Stages 2 and 3, if applicable.

#### 4. Analysis and Procedures in Stages 2 and 3

After a subset of nonbank financial companies has been identified in Stage 1, the Council intends in Stage 2 to conduct a robust analysis of the potential threat that each of those nonbank financial companies could pose to U.S. financial stability primarily based on information available to the Council through existing public and regulatory sources, including information possessed by the company's primary financial regulatory agency or home country supervisor, as appropriate. The evaluation of the risk profile and characteristics of each nonbank financial company in Stage 2 will be based on a wide range of quantitative and qualitative industry- and company-specific factors. This analysis will use the six-category analytic framework described above under "Analytic Framework for Determinations." To the extent data are available, the Council also intends in Stage 2 to consider the impact that resolving the nonbank financial company could have on U.S. financial stability.

Following Stage 2, nonbank financial companies that are selected for additional review in Stage 3 will receive notice that they are being considered for a proposed determination. Several commenters suggested that this notice should include an explanation of the basis of the Council's consideration, so that the nonbank financial company may present the Council with pertinent information. The Council believes that it would be premature to explain the basis of the nonbank financial company's identification for further consideration because the decision to review a nonbank financial company in Stage 3 does not represent a formal determination. The Council will provide the company with a written explanation of the basis of any proposed determination that it makes regarding the nonbank financial company after the Stage 3 review.

As discussed in greater detail in the interpretive guidance, during the Stage 3 review, the Council intends to analyze the nonbank financial company's potential to pose a threat to financial stability based on information obtained directly from the nonbank financial company and the information

<sup>14</sup> See 12 U.S.C. 5311(a)(6).

previously obtained by the Council during prior stages of review. In Stage 3, the Council likely will consider qualitative factors, including considerations that could mitigate or aggravate the potential of the nonbank financial company to pose a threat to U.S. financial stability, such as the nonbank financial company's resolvability, the opacity of its operations, its complexity, and the extent and nature of its existing regulatory scrutiny.

Several commenters requested an additional description of how the Council will perform its analysis in Stages 2 and 3, including a timetable for evaluations in Stages 2 and 3 and the relative weighting of particular metrics in the analysis. Commenters also suggested a variety of additional types of analysis the Council could perform in Stages 2 and 3, including trend analysis, risk-weighting of criteria, and analysis of economic cyclicality. Due to the diverse types of nonbank financial companies that may be evaluated in Stages 2 and 3 and the unique threats that these nonbank financial companies may pose to U.S. financial stability, the analysis and timing of review will depend on the particular circumstances of each nonbank financial company under consideration and the unique nature of the threat it may pose to U.S. financial stability.

While the interpretive guidance describes many metrics and factors that the Council may consider in evaluating nonbank financial companies, one commenter suggested that the Council should publicly disclose the use of any factors that are not specified in the interpretive guidance. The Council will include in any written notice of a proposed or final determination the basis of the proposed or final determination, whether or not the relevant metrics and factors are specified in the interpretive guidance. In accordance with section 112(a)(2)(N)(iv) of the Dodd-Frank Act, the basis for the Council's final determinations will be specified in the Council's annual report to Congress.

Commenters also cited a nonbank financial company's internal risk management program as a factor that the Council either should or should not consider in its evaluations. The interpretive guidance notes, as proposed, that the Council may analyze a nonbank financial company's risk-management procedures as one of many factors in Stage 3.

Several commenters also requested a clarification of the Council's assessment of resolvability. The interpretive guidance has been revised to clarify that

the evaluation of a nonbank financial company's resolvability may mitigate or aggravate the potential of a nonbank financial company to pose a threat to U.S. financial stability.

In response to a commenter's request for a clarification of one of the sample metrics specified in the Proposed Guidance, the interpretive guidance clarifies that the Council may consider total consolidated assets or liabilities as determined under GAAP or the nonbank financial company's applicable financial reporting standards, depending on the availability of data and the stage of the Determination Process.

Several commenters also requested that nonbank financial companies that are evaluated in Stage 2 receive notices at the beginning of Stage 2, or be permitted to participate in Stage 2 by submitting information to the Council. Pursuant to the rule, the Council will provide every nonbank financial company that will be reviewed in Stage 3 a notice of consideration and an opportunity to submit written materials to contest the Council's consideration of the nonbank financial company for a proposed determination. Stage 2 is intended to comprise the Council's initial company-specific analysis, based primarily on existing public and regulatory sources, and the Council believes that Stage 3 provides a sufficient opportunity for nonbank financial companies to participate in the Determination Process. In addition, commenters requested that a nonbank financial company be notified if it is evaluated in Stage 2 and will not be considered in Stage 3. Due to the preliminary nature of the Council's evaluation of a nonbank financial company in Stage 2, the Council does not currently intend to provide for such notices in Stage 2. The Council may, at its discretion, adjust its process for providing notifications to nonbank financial companies as it gains experience with the Determination Process.

Based on the analysis performed in Stages 2 and 3, the Council may consider whether to vote to subject a nonbank financial company to a proposed determination. Prior to making a proposed determination, the Council may (i) consult with the nonbank financial company's primary financial regulatory agency or home country supervisor, as appropriate, and (ii) consider the views of such entities.<sup>15</sup>

<sup>15</sup> However, the concurrence of the primary financial regulatory agency is not required prior to the Council's proposed or final determination with respect to a nonbank financial company. The Council's consultation with a nonbank financial company's primary financial regulatory agency does

Commenters urged the Council to consult closely with the primary state regulator for any U.S. nonbank financial company or the primary home country supervisor for any foreign nonbank financial company under consideration for a determination. Such consultation and coordination will be an important part of the Determination Process, and the Council believes this process is sufficiently incorporated into paragraphs (b), (c), and (d) of § 1310.20 of the rule.

As noted in the interpretive guidance, the Council expects to notify a nonbank financial company that has been evaluated in Stage 3 if the company, either before or after a proposed determination, ceases to be considered for determination.

#### 5. Process and Procedures Following a Proposed Determination

Following a proposed determination, the Council will issue a written notice of the proposed determination to the nonbank financial company that will provide an explanation of the basis of the proposed determination. The nonbank financial company may request a hearing to contest the proposed determination in accordance with section 113(e) of the Dodd-Frank Act and § 1310.21(c) of the rule.

In response to the public comments requesting more transparency regarding the Determination Process, the rule and interpretive guidance reflect certain clarifying changes.

Several commenters made suggestions as to whether the Council should publish the names of nonbank financial companies under consideration for a determination. Due to the preliminary nature of the Council's evaluation of a nonbank financial company prior to a final determination, and the potential for market participants to misinterpret such an announcement, the Council does not intend to publicly announce or otherwise disclose the name of any nonbank financial company that is under evaluation for a determination prior to a final determination with respect to such company. A statement that this is the Council's intention has been included in the interpretive guidance. In addition, in response to comments, the interpretive guidance specifies that, when practicable and consistent with the purposes of the Determination Process, the Council intends to provide a nonbank financial company with a notice of a final determination at least one business day before publicly announcing the final

not create any rights on the part of the nonbank financial company under consideration.

determination. This minimum time period is intended to allow nonbank financial companies to prepare any public communications and disclosures, but is relatively brief in order to avoid any potential market impact after the nonbank financial company is informed of the determination and before the determination is publicly announced.

One commenter recommended that the Council specify, in every notice of proposed and final determination, the regulatory approach the Council recommends to the Board of Governors with respect to the nonbank financial company. Under the Dodd-Frank Act, while the Council is authorized to make determinations regarding nonbank financial companies, the establishment of prudential standards applicable to such companies is within the purview of the Board of Governors, subject to any recommendations by the Council under section 115 of the Dodd-Frank Act. Therefore, in accordance with its statutory authority, the Council does not generally intend to make company-specific regulatory recommendations to the Board of Governors in connection with determinations.

One commenter requested that the Council clarify the registration procedures for companies that are subject to a final determination. Under section 114 of the Dodd-Frank Act, the Board of Governors is authorized to prescribe the forms for registration, including such information as the Board of Governors, in consultation with the Council, may deem necessary or appropriate. It is therefore appropriate for the registration procedures to be established by the Board of Governors, rather than by the Council.

#### *D. Status of the Interpretive Guidance and Other Legal Issues*

Several commenters questioned the Council's authority to issue the proposed rule and interpretive guidance, while other commenters requested that the Council clarify the legal status of the interpretive guidance. Section 111(e)(2) of the Dodd-Frank Act explicitly authorizes the Council to issue rules necessary for the conduct of the business of the Council, and specifies that such rules will constitute rules of agency organization, procedure, or practice. In accordance with this authority, the rule sets forth the procedures and practices that the Council will follow in the Determination Process and the manner in which nonbank financial companies may present themselves and their views to the Council.

Moreover, as the agency charged by Congress with responsibility for acting

under section 113 of the Dodd-Frank Act, the Council has the inherent authority to promulgate interpretive rules and interpretive guidance that explain and interpret the statutory factors that the Council will consider in the Determination Process.<sup>16</sup> The interpretive guidance simply describes the Council's interpretation of the statutory factors and provides transparency to the public as to how the Council intends to exercise its statutory grant of discretionary authority. The interpretive guidance does not impose duties on, or alter the rights or interests of, any company, nor does it relieve the Council of making specific determinations in accordance with the Dodd-Frank Act. Rather, the Council must review and determine whether to subject any particular nonbank financial company to Board of Governors supervision on a company-specific basis after review of all of the relevant factors. Moreover, by providing for transparency in the Determination Process, the rule and interpretive guidance promote an accountability that benefits the public and the nonbank financial companies subject to evaluation. Thus, notwithstanding arguments to the contrary by a small number of commenters, the Council has the necessary authority to issue the rule and interpretive guidance.

Some commenters requested either that the interpretive guidance be incorporated into the rule text, or that the Council commit to providing the public with notice and an opportunity to comment on any proposed changes to the interpretive guidance. These commenters sought to ensure that the Council's actions would be made consistently and fairly and that the public would have notice of any changes to the interpretive guidance. If the Council revises the interpretive guidance in the future, the Council may provide the public with notice and an opportunity to comment on those changes, as the Council determines appropriate.

One commenter argued that Title I of the Dodd-Frank Act violates the U.S. Constitution based on (i) the limited judicial review of Council

determinations under section 113(h) of the Dodd-Frank Act and (ii) the scope of the delegation of Congressional authority embodied by the regulation of nonbank financial companies under Title I of the statute. The Council disagrees with this assessment and does not believe that this rulemaking is the appropriate context to address these issues.

One commenter asserted that the Council had not satisfied the requirements of the Congressional Review Act (5 U.S.C. 801) in connection with this rulemaking. That statute provides that before a rule can take effect, the federal agency promulgating it must submit certain information to Congress and to the Comptroller General. No action was required to be taken by the Council in connection with the issuance of the NPR and Proposed Guidance, and the Council will comply fully with the statutory requirements in connection with the issuance of the rule and interpretive guidance.

## **IV. Section-by-Section Analysis**

### *A. Subpart A—General*

#### 1. § 1310.1 Authority and Purpose

This section sets forth the authority for and purpose of the rule.

#### 2. § 1310.2 Definitions

This section defines the terms relevant to the rule. One commenter requested a clarification of the definition of "member agencies." That term is defined, unchanged from the NPR, as an agency represented by a voting member of the Council under section 111(b)(1) of the Dodd-Frank Act.

### *B. Subpart B—Determinations*

#### 1. § 1310.10 Council Determinations Regarding Nonbank Financial Companies

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

Two commenters suggested that the Council clarify the circumstances under

<sup>16</sup> Courts have recognized that "an agency charged with a duty to enforce or administer a statute has inherent authority to issue interpretive rules informing the public of the procedures and standards it intends to apply in exercising its discretion." See, for example, *Production Tool v. Employment & Training Administration*, 688 F.2d 1161, 1166 (7th Cir. 1982). The Supreme Court has acknowledged that "whether or not they enjoy any express delegation of authority on a particular question, agencies charged with applying a statute necessarily make all sorts of interpretive choices." See *U.S. v. Mead*, 533 U.S. 218, 227 (2001).

which the Council will enlist the Board of Governors as an examiner under § 1310.10(c)(1) of the rule. In order to maintain consistency with section 112(d)(4) of the Dodd-Frank Act, the Council is adopting this section of the rule as proposed.

## 2. § 1310.11 Considerations in Making Proposed and Final Determinations

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

## 3. § 1310.12 Anti-Evasion Provision

This section sets forth the Council's authority to require that the financial activities of a company that is not a nonbank financial company be supervised by the Board of Governors and be subject to prudential standards if the Council determines that material financial distress related to, or the nature, scope, size, scale, concentration, interconnectedness, or mix of, the financial activities conducted directly or indirectly by a company would pose a threat to the financial stability of the United States, and the company is organized or operates in such a manner as to evade the application of Title I of the Dodd-Frank Act. This section defines "financial activities" as that term is defined in section 113(c)(5) of the Dodd-Frank Act.

Paragraph (d) is intended to clarify the application of subpart C. This section provides that, in accordance with section 113(c)(4) of the Dodd-Frank Act, the provisions of subpart C governing information collection (including the confidentiality provisions), consultation, notice and opportunity for an evidentiary hearing, emergency waivers or modifications, and reevaluation and rescission of determinations will apply in the context of the Council's anti-evasion authority. The information-collection authority of the Council with respect to companies in this context derives from the authority of the Council to receive information from the OFR, member agencies, and the Federal Insurance Office, and from the authority of the OFR, on behalf of the Council, to require the submission of periodic and other reports from any financial company, under sections 112(a)(2)(A), 112(d)(1), (2), and (3), and 154(b) of the Dodd-Frank Act.

Companies that are engaged in financial activities, but that are

organized or operated in such a manner as to evade the application of Title I of the Dodd-Frank Act, may be subject to a determination by the Council under the anti-evasion authority in section 113(c) of the Dodd-Frank Act. In exercising its anti-evasion authority with respect to a U.S. nonbank financial company or foreign nonbank financial company, the Council must consider the relevant statutory factors applicable to a U.S. or foreign nonbank financial company, respectively. The Council may make such a determination either on its own initiative or at the request of the Board of Governors. Commenters requested that the rule further define the scope of the Council's anti-evasion authority. In addition, one commenter recommended that the rules should permit the supervision of internal financial activities of a nonbank financial company that has been the subject of a Council determination under its anti-evasion authority. Because § 1310.12 of the rule reflects the statutory authorities under section 113(c), and the Council believes such consistency is appropriate, the Council has not revised this section as suggested by commenters.

### *C. Subpart C—Information Collection; Proposed and Final Determinations; Evidentiary Hearings*

## 1. § 1310.20 Council Information Collection; Consultation; Coordination; Confidentiality

This section sets forth the Council's authority to collect information with respect to nonbank financial companies and its responsibilities in consulting and coordinating with regulators and maintaining the confidentiality of submitted information. Paragraph (a) sets forth the Council's ability to collect information from the OFR, member agencies, the Federal Insurance Office, and other Federal and State financial regulatory agencies. Pursuant to its statutory authority, the Council may also receive and request the submission of data or information from its voting and non-voting members. Paragraph (b) sets forth the Council's ability to collect information from nonbank financial companies. These two paragraphs implement the provisions of section 112 of the Dodd-Frank Act relating to the Council's authority to obtain information and collect financial data. Paragraph (c), which has been revised for consistency with section 113(g) of the Dodd-Frank Act, provides that the Council will consult with a nonbank financial company's primary financial regulatory agency in a timely manner. Paragraph (d) provides that the Council

will consult with appropriate foreign regulatory authorities, to the extent appropriate, in accordance with section 113(i) of the Dodd-Frank Act. Paragraph (e) implements the confidentiality requirements provided in section 112(d)(5) of the Dodd-Frank Act.

Several commenters requested that information submitted by nonbank financial companies be treated as exempt from disclosure under the FOIA. Commenters also requested that further confidentiality provisions be added to the rule, such as incorporating the Council's separate FOIA rule into the rule, committing to limiting the collection of sensitive information, and protections for information that has been collected. The Council is sensitive to these concerns. Under § 1310.20(e)(3) of the rule, the FOIA and the applicable exemptions thereunder apply to any data or information submitted under the rule. In addition, the Council's FOIA rule will apply to data and information received by the Council. The Council expects that nonbank financial companies' submissions will likely contain or consist of "trade secrets and commercial or financial information obtained from a person and privileged or confidential" and information that is "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." These types of information are subject to withholding under exemptions 4 and 8 of the FOIA (5 U.S.C. 552(b)(4) and (8)). To the extent that nonbank financial companies' submissions contain or consist of data or information not subject to an applicable FOIA exemption, that data or information would be releasable under the FOIA.

In response to commenters' concerns regarding confidentiality, the Council has modified § 1310.20 of the rule to clarify that the protections under that section apply to data, information, and reports (i) collected from federal and state financial regulatory agencies other than the OFR, member agencies, and the Federal Insurance Office and (ii) voluntarily submitted by any nonbank financial company that is being considered for a determination. This change also addresses another commenter's assertion that the Council lacks statutory authority to collect information from federal or state financial regulatory agencies other than the OFR, member agencies and the Federal Insurance Office,<sup>17</sup> because the

<sup>17</sup> One of the statutory Council's duties, under section 112(a)(2)(A), is to "collect information from member agencies, other Federal and State financial

Council expects that the OFR will participate as necessary in the information-collection and review process pursuant to its authority under sections 112(d) and 154(b) of the Dodd-Frank Act. Further, it should be noted that all members of the Council, including both its voting and non-voting members, will treat records of the Council in accordance with the Council's FOIA rule. When the Council and its members provide non-public information to each other in connection with Council functions and activities, the recipients generally intend to treat such information as confidential and not publicly to disclose such information without the consent of the providing party. However, such information may be used by the recipients for enforcement, examination, resolution planning, or other purposes, subject to any appropriate limitations on the disclosure of such information to third parties, taking into account factors including the need to preserve the integrity of the supervision and examination process. The Council believes that the additional confidentiality restrictions suggested by commenters generally would not materially increase the confidentiality of information collected by the Council, due to requirements under the FOIA, or would harmfully constrain the Council's ability to perform its evaluations of nonbank financial companies.

Commenters also recommended that the Council rely to the extent possible on existing regulatory sources and on information in the form it is reported to regulators, to minimize the burden of information requests. The Council generally agrees with these comments, and in accordance with the Council's statutory obligation under section 112(d)(3)(B) of the Dodd-Frank Act intends, whenever possible, to rely on information available from the OFR or any 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 the collection of information under this section of the rule will be performed in a manner that attempts to minimize burdens for affected nonbank financial companies.

## 2. § 1310.21 Proposed and Final Determinations; Notice and Opportunity for an Evidentiary Hearing

This section sets forth the procedural rights of a nonbank financial company being considered for a proposed or final

determination, the time period within which the Council will act after it notifies the nonbank financial company that it is being considered for a proposed determination, and the nonbank financial company's rights to a hearing after a proposed determination. Paragraph (a) provides that the Council will deliver written notice to a nonbank financial company that it is being considered for a proposed determination and will provide the nonbank financial company an opportunity to submit written materials to contest the proposed determination. Paragraph (a) clarifies that the nonbank financial company may submit any written materials to contest the proposed determination, including materials concerning whether the nonbank financial company meets the standards for a determination. In response to comments, paragraph (a) provides that the Council will provide a nonbank financial company at least 30 days to respond to the notice of consideration. Commenters had requested a longer minimum period for responses, but based on the types and volume of information the Council expects to request, the subsequent opportunity for a nonbank to provide additional information following any proposed determination, and the Council's authority in individual cases to grant a longer period for a response, the Council believes a 30-day minimum is appropriate.

Paragraph (b) provides that the Council will provide a nonbank financial company with written notice of a proposed determination, including an explanation of the basis of the proposed determination. Paragraphs (c), (d), and (e) set forth the procedures for an evidentiary hearing following a proposed determination, pursuant to section 113(e) of the Dodd-Frank Act, and provide the time period within which the Council will make a final determination. These paragraphs also provide that the Council will make public any final determination that it makes. While not specified in the rule, the Council expects to notify the relevant nonbank financial company if the Council has not made a final determination with respect to the company within the time period set forth in paragraph (d) or (e), as applicable. In response to comments, the Council has clarified paragraph (c) to provide that the hearing would be nonpublic. However, the Council has not revised the rule as requested by several commenters to provide a nonbank financial company with a right to an oral hearing. Instead, the rule

maintains consistency with section 113(e)(2) of the Dodd-Frank Act, which grants the Council sole discretion as to the format of any hearing. Paragraph (c)(1) has also been revised to clarify that, consistent with the definition of "hearing date," a hearing may be before the Council or its representatives.

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

## 3. § 1310.22 Emergency Exception to § 1310.21

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

making a determination under this section. These consultations will be conducted in such time and manner as the Council may deem appropriate. Several commenters requested that the Council clarify or limit the scope of this section of the rule. To maintain consistency with the Council's statutory authority under section 113(f) of the Dodd-Frank Act, and to avoid imposing unwarranted restrictions on the Council's ability to respond to emergency situations, the Council is adopting this section as proposed. In response to comments, the Council has clarified paragraph (c) to provide that the hearing under this section would be nonpublic, and the Council has revised paragraph (d) to clarify that while the Council will publicly announce final determinations under § 1310.10(a), the Council will not publicly announce determinations regarding waivers or modifications under § 1310.22(c). Paragraph (c)(1) has also been revised to clarify that, consistent with the definition of "hearing date," a hearing may be before the Council or its representatives.

#### 4. § 1310.23 Council Reevaluation and Rescission of Determinations

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

In response to comments requesting clarification of the process for reevaluations, paragraph (b) provides new procedural protections for nonbank financial companies. Pursuant to paragraph (b), the Council will notify each nonbank financial company subject to a currently effective determination prior to the Council's annual reevaluation. The nonbank financial company will be provided an opportunity to submit written materials to the Council to contest the determination. Because increased information about any nonbank financial company subject to a previous determination will be available to the Council through the Board of Governors, and the Council will have previously performed a comprehensive analysis of any such company, a replication in full of the Council's evaluation in Stages 2 and 3 will not be necessary. Instead, the Council expects that its reevaluations will focus on any material changes with respect to the nonbank financial company or the markets in which it operates since the Council's previous

review. Commenters also suggested that nonbank financial companies be permitted to request additional reevaluations. Due to the relatively frequent mandatory reevaluations, such additional reevaluations should rarely be necessary. In the event of an extraordinary change that materially decreases the threat a nonbank financial company poses to U.S. financial stability relatively soon after a previous reevaluation, the Council may, at its sole discretion, consider a request from such company for a reevaluation prior to the next annual reevaluation. New paragraph (d) provides that upon a rescission of a determination with respect to a nonbank financial company, the Council will notify the company and publicly announce the rescission.

#### V. Regulatory Flexibility Act

The Council certifies that this final rule will not have a significant economic impact on a substantial number of small entities. The economic impact of this rule is not expected to be significant. The final rule would apply only to nonbank financial companies that could pose a threat to the financial stability of the United States. Size is an important factor, although not the exclusive factor, in assessing whether a nonbank financial company could pose a threat to financial stability. The Council expects that few, if any, small companies (as defined for purposes of the Small Business Act) could pose a threat to financial stability. Therefore, the Council does not expect the rule to directly affect a substantial number of small entities. Accordingly, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. 601–612) is not required.

#### VI. Paperwork Reduction Act

The collection of information contained in this final rule has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control 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 in this final rule is found in § 1310.20, § 1310.21, § 1310.22, and § 1310.23.

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 this final rule is 1,000 hours. We estimate the cost associated with this information collection to be \$450,000. In making this estimate, the Council estimates that due to the nature of the information likely to be requested, approximately 75 percent of the burden in hours will be carried by nonbank financial companies internally at an average cost of \$400 per hour, and the remainder will be carried by outside professionals retained by nonbank financial companies at an average cost of \$600 per hour. In addition, in determining these estimates, the Council considered its obligation under § 1310.20(b) of the rule to, whenever possible, rely on information available from the OFR or any 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 rule will be performed in a manner that attempts to minimize burdens for affected nonbank financial companies. The aggregate burden will be subject to the number of nonbank financial companies that are evaluated in Stage 3, 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 nonbank financial companies provide to the Council during the Determination Process.

Several commenters asserted that the Paperwork Reduction Act disclosure in the NPR did not comply with the statute, citing a requirement to provide the public with notice and an opportunity to comment on the proposed collection of information, including an estimate of the burden that will result from the collection of information. The NPR cited the sections of the proposed rule that related to the collection of information, described the types of information expected to be collected and the frequency of collections, provided an estimate of the total annual reporting burden, and enabled the public to assess the likely respondents. The NPR therefore complied with the requirements of the Paperwork Reduction Act.

#### VII. Executive Orders 12866 and 13563

Presidential Executive Order 12866, "Regulatory Planning and Review,"<sup>18</sup> and Executive Order 13563, "Improving

<sup>18</sup> Available at <http://www.gpo.gov/fdsys/pkg/WCPD-1993-10-04/pdf/WCPD-1993-10-04-Pg1925.pdf>.

Regulation and Regulatory Review,”<sup>19</sup> direct certain agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a “significant regulatory action” although not economically significant under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

Several commenters suggested that the Council should, or is required to, conduct a cost-benefit analysis, such as a review of the impact of the rule on the economy and on different sectors of the financial services industry. These commenters argued that a cost-benefit analysis would enhance transparency and ensure that costs are minimized, and may be required under Executive Orders 12866 and 13563. In addition, commenters questioned the determination that this rule is not economically significant under section 3(f) of Executive Order 12866. That section defines “significant regulatory action” to include a regulatory action (which may include a proposed rule of agency procedure or practice) that is likely to result in a rule that may raise certain novel legal or policy issues. Based on this determination, which is made by the Office of Management and Budget, the Council is not required to conduct a cost-benefit analysis in connection with this rulemaking. The rule and the interpretive guidance are limited to descriptions of the processes and procedures that the Council intends to follow in making determinations under section 113 of the Dodd-Frank Act, the manner in which nonbank financial companies may present themselves and their views to the Council, the Council’s interpretation of the statutory factors, and how the Council intends to exercise its statutory grant of discretionary authority. The rights and obligations of nonbank financial companies that the Council is considering for a determination, or for a reevaluation and potential rescission of a determination, arise directly from section 113 of the Dodd-Frank Act. The rights and obligations of nonbank

financial companies that the Council has been determined shall be supervised by the Board of Governors arise from other sections of the Dodd-Frank Act and the rules promulgated thereunder, such as the enhanced prudential standards to be established by the Board of Governors and the resolution plans required under section 165 of the Dodd-Frank Act. Based on data currently available to the Council through existing public and regulatory sources, the Council has estimated that fewer than 50 nonbank financial companies meet the Stage 1 thresholds.

#### List of Subjects in 21 CFR Part 1310

Nonbank financial companies.

#### Financial Stability Oversight Council

##### Authority and Issuance

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

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

Sec.

##### Subpart A—General

- 1310.1 Authority and purpose.
- 1310.2 Definitions.

##### Subpart B—Determinations

- 1310.10 Council determinations regarding nonbank financial companies.
- 1310.11 Considerations in making proposed and final determinations.
- 1310.12 Anti-evasion provision.

##### Subpart C—Information Collection; Proposed and Final Determinations; Evidentiary Hearings

- 1310.20 Council information collection; consultation; coordination; confidentiality.
  - 1310.21 Proposed and final determinations; notice and opportunity for an evidentiary hearing.
  - 1310.22 Emergency exception to § 1310.21.
  - 1310.23 Council reevaluation and rescission of determinations.
- Appendix A to Part 1310—Financial Stability Oversight Council Guidance for Nonbank Financial Company Determinations

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

##### Subpart A—General

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

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

(b) *Purpose.* The principal purposes of this part are to set forth the standards and procedures governing Council determinations under section 113 of the Dodd-Frank Act (12 U.S.C. 5323), including whether material financial distress at a nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the nonbank financial company, could pose a threat to the financial stability of the United States, and whether a nonbank financial company shall be supervised by the Board of Governors and shall be subject to prudential standards in accordance with Title I of the Dodd-Frank Act.

###### § 1310.2 Definitions.

The terms used in this part have the following meanings—

*Board of Governors.* The term “Board of Governors” means the Board of Governors of the Federal Reserve System.

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

*Council.* The term “Council” means the Financial Stability Oversight Council.

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

*Foreign nonbank financial company.* The term “foreign nonbank financial company” means a company (other than a company that is, or is treated in the United States as, a bank holding company) that is—

- (1) Incorporated or organized in a country other than the United States; and
- (2) “Predominantly engaged in financial activities,” as that term is defined in section 102(a)(6) of the Dodd-Frank Act (12 U.S.C. 5311(a)(6)) and pursuant to any requirements for determining if a company is predominantly engaged in financial activities as established by regulation of the Board of Governors pursuant to section 102(b) of the Dodd-Frank Act (12 U.S.C. 5311(b)), including through a branch in the United States.

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

- (1) The date on which the Council has received all of the written materials timely submitted by a nonbank financial company for a hearing that is conducted without oral testimony pursuant to § 1310.21 or § 1310.22, as applicable;

<sup>19</sup> Available at <http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf>.

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

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

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

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

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

*Primary financial regulatory agency.* The term “primary financial regulatory agency” means—

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

(2) The Commission, with respect to—

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

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

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

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

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

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

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

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

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

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

(xi) The Public Company Accounting Oversight Board established under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 *et seq.*);

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

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

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

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

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

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

commodity trading advisor or introducing broker to be registered under that Act;

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

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

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

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

(viii) Any swap execution facility, swap data repository, swap dealer, or major swap participant registered with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*) with respect to the swap activities of the person that require such person to be registered under that Act; and

(ix) Any registered entity as defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a), with respect to the activities of the registered entity that require the registered entity to be registered under that Act;

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

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

*Prudential standards.* The term “prudential standards” means enhanced supervision and regulatory standards established by the Board of Governors under section 165 of the Dodd-Frank Act (12 U.S.C. 5365).

*Significant companies.* The terms “significant nonbank financial

company” and “significant bank holding company” have the meanings ascribed to such terms by regulation of the Board of Governors issued under section 102(a)(7) of the Dodd-Frank Act (12 U.S.C. 5311(a)(7)).

*U.S. nonbank financial company.* The term “U.S. nonbank financial company” means a company (other than a bank holding company; a Farm Credit System institution chartered and subject to the provisions of the Farm Credit Act of 1971 (12 U.S.C. 2001 *et seq.*); a national securities exchange (or parent thereof), clearing agency (or parent thereof, unless the parent is a bank holding company), security-based swap execution facility, or security-based swap data repository registered with the Commission; a board of trade designated as a contract market by the Commodity Futures Trading Commission (or parent thereof); or a derivatives clearing organization (or parent thereof, unless the parent is a bank holding company), swap execution facility, or swap data repository registered with the Commodity Futures Trading Commission), that is—

(1) Incorporated or organized under the laws of the United States or any State; and

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

## Subpart B—Determinations

### § 1310.10 Council determinations regarding nonbank financial companies.

(a) *Determinations.* The Council may determine that a nonbank financial company shall be supervised by the Board of Governors and shall be subject to prudential standards, in accordance with Title I of the Dodd-Frank Act, if the Council determines that material financial distress at the nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the nonbank financial company, could pose a threat to the financial stability of the United States.

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

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

(2) Require the vote of not fewer than two-thirds of the voting members of the

Council then serving, including the affirmative vote of the Chairperson of the Council.

(c) *Back-up examination by the Board of Governors.* (1) If the Council is unable to determine whether the financial activities of a U.S. nonbank financial company, including a U.S. nonbank financial company that is owned by a foreign nonbank financial company, pose a threat to the financial stability of the United States, based on information or reports obtained by the Council under § 1310.20, including discussions with management, and publicly available information, the Council may request the Board of Governors, and the Board of Governors is authorized, to conduct an examination of the U.S. nonbank financial company and its subsidiaries for the sole purpose of determining whether the nonbank financial company should be supervised by the Board of Governors for purposes of Title I of the Dodd-Frank Act (12 U.S.C. 5311–5374).

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

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

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

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

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

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

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

(5) The importance of the U.S. nonbank financial company and its subsidiaries as a source of credit for low-income, minority, or underserved communities, and the impact that the

failure of such U.S. nonbank financial company would have on the availability of credit in such communities;

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

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

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

(9) The amount and nature of the financial assets of the U.S. nonbank financial company and its subsidiaries;

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

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

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

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

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

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

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

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

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

ownership of assets under management is diffuse;

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

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

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

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

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

#### **§ 1310.12 Anti-evasion provision.**

(a) *Determinations.* In order to avoid evasion of Title I of the Dodd-Frank Act (12 U.S.C. 5311–5374) or this part, the Council, on its own initiative or at the request of the Board of Governors, may require that the financial activities of a company shall be supervised by the Board of Governors and subject to prudential standards if the Council determines that—

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

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

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

(2) The company is organized or operates in such a manner as to evade the application of Title I of the Dodd-Frank Act (12 U.S.C. 5311–5374) or this part.

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

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

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

(c) *Definition of covered financial activities.* For purposes of this section, the term “financial activities”—

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

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

(3) Does not include internal financial activities conducted for the company or any affiliate thereof, including internal treasury, investment, and employee benefit functions.

(d) *Application of other provisions.*

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

#### **Subpart C—Information Collection; Proposed and Final Determinations; Evidentiary Hearings**

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

(a) *Information collection from the Office of Financial Research, member agencies, the Federal Insurance Office, and other Federal and State financial regulatory agencies.* The Council may receive, and may request the submission of, such data or information from the Office of Financial Research, member agencies, the Federal Insurance Office, and (acting through the Office of Financial Research, to the extent the Council determines necessary) other Federal and State financial regulatory agencies as the Council deems necessary to carry out the provisions of Title I of the Dodd-Frank Act (12 U.S.C. 5311–5374) or this part.

(b) *Information collection from nonbank financial companies.* (1) The Council may, to the extent the Council determines appropriate, direct the Office of Financial Research to require the submission of periodic and other reports from any nonbank financial company, including a nonbank financial company that is being considered for a proposed or final determination under

§ 1310.10(a), for the purpose of assessing the extent to which a nonbank financial company poses a threat to the financial stability of the United States.

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

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

(4) The Council may, to the extent the Council determines appropriate, accept the submission of any data, information, and reports voluntarily submitted by any nonbank financial company that is being considered for a proposed or final determination under § 1310.10(a), for the purpose of assessing the extent to which a nonbank financial company poses a threat to the financial stability of the United States.

(c) *Consultation.* The Council shall 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 supervision by the Board of Governors under § 1310.10(a) in a timely manner before the Council makes any final determination under § 1310.10(a) with respect to such nonbank financial company.

(d) *International coordination.* In exercising its duties under this part with respect to foreign nonbank financial companies and cross-border activities and markets, the Council, acting through its Chairperson or other authorized designee, shall consult with appropriate foreign regulatory authorities, to the extent appropriate.

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

(2) *Retention of privilege.* The submission of any non-publicly available data or information under this part shall not constitute a waiver of, or otherwise affect, any privilege arising under Federal or State law (including

the rules of any Federal or State court to which the data or information is otherwise subject.

(3) *Freedom of Information Act.* Section 552 of Title 5, United States Code, including the exceptions thereunder, and any regulations thereunder adopted by the Council, shall apply to any data, information, and reports submitted under this part.

**§ 1310.21 Proposed and final determinations; notice and opportunity for an evidentiary hearing.**

(a) *Written notice of consideration of determination; submission of materials.* Before providing a nonbank financial company written notice of a proposed determination pursuant to paragraph (b) of this section, the Council shall provide the nonbank financial company—

(1) Written notice that the Council is considering whether to make a proposed determination with respect to the nonbank financial company under § 1310.10(a);

(2) An opportunity to submit written materials, within such time as the Council determines to be appropriate (which shall be not less than 30 days after the date of receipt by the nonbank financial company of the notice described in paragraph (a)(1)), to the Council to contest the Council's consideration of the nonbank financial company for a proposed determination, including materials concerning whether, in the nonbank financial company's view, material financial distress at the nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the nonbank financial company, could pose a threat to the financial stability of the United States; and

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

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

(c) *Evidentiary hearing.* (1) Not later than 30 days after the date of receipt by a nonbank financial company of the notice of proposed determination under paragraph (b) of this section, the

nonbank financial company may request, in writing, an opportunity for a nonpublic, written or oral evidentiary hearing before the Council or its representatives to contest the proposed determination under § 1310.10(a).

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

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

(1) Determine whether to make a final determination under § 1310.10(a);

(2) Notify the nonbank financial company, in writing, of any final determination of the Council under § 1310.10(a), which notice shall contain a statement of the basis for the decision of the Council; and

(3) If the Council makes a final determination under § 1310.10(a), publicly announce the final determination of the Council.

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

(1) Determine whether to make a final determination under § 1310.10(a);

(2) Notify the nonbank financial company, in writing, of any final

determination of the Council under § 1310.10(a), which notice shall contain a statement of the basis for the decision of the Council; and

(3) If the Council makes a final determination under § 1310.10(a), publicly announce the final determination of the Council.

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

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

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

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

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

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

(b) *Consultation.* (1) In making a determination under paragraph (a) of this section with respect to a nonbank financial company, the Council shall consult with the primary financial regulatory agency, if any, for such nonbank financial company, in such

time and manner as the Council may deem appropriate.

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

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

(2) Upon receipt of a timely request for an evidentiary hearing under paragraph (c)(1), the Council shall fix a time (not later than 15 days after the date of receipt by the Council of the request) and place at which the nonbank financial company may appear, personally or through counsel, for a nonpublic evidentiary hearing at which the nonbank financial company may submit written materials (or, at the sole discretion of the Council, oral testimony and oral argument) regarding the waiver or modification under this section.

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

(1) Make a final determination regarding the waiver or modification under this § 1310.22;

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

(3) If the Council makes a final determination under § 1310.10(a), publicly announce the final determination of the Council.

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

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

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

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

(a) *Reevaluation and rescission.* The Council shall, not less frequently than annually—

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

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

(b) *Notice of reevaluation; submission of materials.* The Council shall provide written notice to each nonbank financial company subject to a currently effective determination prior to the Council's reevaluation of such determination under paragraph (a) of this section and shall provide such nonbank financial company an opportunity to submit written materials, within such time as the Council determines to be appropriate (which shall be not less than 30 days after the date of receipt by the nonbank financial company of such notice), to the Council to contest the determination, including materials concerning whether, in the nonbank financial company's view, material financial distress at the nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the nonbank financial company, could pose a threat to the financial stability of the United States.

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

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

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

(d) *Notice of rescission.* If the Council rescinds a determination with respect to any nonbank financial company under paragraph (a) of this section, the Council shall notify the nonbank financial company, in writing, of such rescission and publicly announce such rescission.

## 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”)<sup>1</sup> authorizes the Financial Stability Oversight Council (the “Council”) to determine that a nonbank financial company will be supervised by the Board of Governors of the Federal Reserve System (the “Board of Governors”) and be subject to prudential standards in accordance with Title I of the Dodd-Frank Act if either of two standards is met. Under the first standard, the Council may subject a nonbank financial company to supervision by the Board of Governors and prudential standards if the Council determines that “material financial distress” at the nonbank financial company could pose a threat to the financial stability of the United States. Under the second standard, the Council may determine that a nonbank financial company will be supervised by the Board of Governors and subject to prudential standards if the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the nonbank financial company could pose a threat to U.S. financial stability. Section 113 of the Dodd-Frank Act also lists 10 considerations that the Council must take into account in making a determination.<sup>2</sup>

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

Section III of this document outlines the process that the Council intends to follow in non-emergency situations when determining whether to subject a nonbank financial company to Board of Governors supervision and prudential standards. Section III also provides a detailed description of the analysis that the Council intends to conduct during each stage of its review. In the first stage of the process, the Council will apply six uniform quantitative thresholds to nonbank financial companies to identify those nonbank financial companies that will be subject to further evaluation by the Council. Because the Council is relying in the first stage on quantitative thresholds using

<sup>1</sup> See 12 U.S.C. 5323.

<sup>2</sup> In addition to these considerations, the Council may consider any other risk-related factors that the Council deems appropriate. 12 U.S.C. 5323(a)(2)(K) and (b)(2)(K).

information available through existing public and regulatory sources, nonbank financial companies should be able to assess whether they will be subject to further evaluation by the Council. During the second stage of the evaluation process, the Council will analyze the identified nonbank financial companies using a broad range of information available to the Council primarily through existing public and regulatory sources. The third stage of the process will involve a comprehensive analysis of those nonbank financial companies using information collected directly from the nonbank financial company, as well as the information used in the first two stages.

## II. Council Determination Authority and Framework

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

The Council intends to interpret the term "company" broadly with respect to nonbank financial companies and other companies in connection with section 113 of the Dodd-Frank Act, to include any corporation, limited liability company, partnership, business trust, association, or similar organization.

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

### a. Threat to the Financial Stability of the United States

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

In evaluating a nonbank financial company under one of the Determination Standards, the Council intends to assess how a nonbank financial company's material financial distress or activities could be transmitted to, or otherwise affect, other firms or markets, thereby causing a broader impairment of financial intermediation or of financial market functioning. An impairment of financial intermediation and financial market functioning can occur through several channels. The Council has identified the following channels as most likely to facilitate

the transmission of the negative effects of a nonbank financial company's material financial distress or activities to other financial firms and markets:

- *Exposure.* A nonbank financial company's creditors, counterparties, investors, or other market participants have exposure to the nonbank financial company that is significant enough to materially impair those creditors, counterparties, investors, or other market participants and thereby pose a threat to U.S. financial stability. In its initial analysis of nonbank financial companies with respect to this channel, the Council expects to consider metrics including total consolidated assets, credit default swaps outstanding, derivative liabilities, total debt outstanding, and leverage ratio.

- *Asset liquidation.* A nonbank financial company holds assets that, if liquidated quickly, would cause a fall in asset prices and thereby significantly disrupt trading or funding in key markets or cause significant losses or funding problems for other firms with similar holdings. This channel would likely be most relevant for a nonbank financial company whose funding and liquid asset profile makes it likely that it would be forced to liquidate assets quickly when it comes under financial pressure. For example, this could be the case if a large nonbank financial company relies heavily on short-term funding. In its initial analysis of nonbank financial companies with respect to this channel, the Council expects to consider metrics including total consolidated assets and short-term debt ratio.

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

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

The Council intends to continue to evaluate additional transmission channels and may, 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.

### b. First Determination Standard: Material Financial Distress

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

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

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

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

### d. Analytic Framework for Statutory Considerations

As required by section 113 of the Dodd-Frank Act, the Council's determination will be based on its judgment that a firm meets one of the Determination Standards described above. In evaluating whether a firm meets one of the Determination Standards, the Council will consider each of the statutory considerations. The discussion below outlines the analytic framework that

the Council intends to use to organize its evaluation of a nonbank financial company under the statutory considerations and provides additional detail on the key data and analyses that the Council intends to use to assess the considerations.

1. Grouping of Statutory Considerations Into Six-Category Framework

The Dodd-Frank Act requires the Council to consider 10 considerations (described below) when evaluating the potential of a nonbank financial company to pose a threat to U.S. financial stability. The statute also authorizes the Council to consider “any other risk-related factors that the Council deems appropriate.” These statutory considerations will help the Council to evaluate whether one of the Determination Standards, as described in sections II.b and II.c above, has been met. The Council has developed an analytic framework that groups all relevant factors, including the 10 statutory considerations and any additional risk-related factors, into six categories: size, interconnectedness, substitutability, leverage,

liquidity risk and maturity mismatch, and existing regulatory scrutiny. The Council expects to use these six categories to guide its evaluation of whether a particular nonbank financial company meets either Determination Standard. However, the Council’s ultimate determination decision regarding a nonbank financial company will not be based on a formulaic application of the six categories. Rather, the Council intends to analyze a nonbank financial company using quantitative and qualitative data relevant to each of the six categories, as the Council determines is appropriate with respect to the particular nonbank financial company.

Each of the six categories reflects a different dimension of a nonbank financial company’s potential to pose a threat to U.S. financial stability. Three of the six categories—size, substitutability, and interconnectedness—seek to assess the potential impact of the nonbank financial company’s financial distress on the broader economy. Material financial distress at nonbank financial companies that are large,

provide critical financial services for which there are few substitutes, or are highly interconnected with other financial firms or markets are more likely to have a financial or operational impact on other companies, markets, and consumers that could pose a threat to the financial stability of the United States. The remaining three categories—leverage, liquidity risk and maturity mismatch, and existing regulatory scrutiny of the nonbank financial company—seek to assess the vulnerability of a nonbank financial company to financial distress. Nonbank financial companies that are highly leveraged, have a high degree of liquidity risk or maturity mismatch, and are under little or no regulatory scrutiny are more likely to be more vulnerable to financial distress.

Each of the statutory considerations in sections 113(a)(2) and (b)(2) of the Dodd-Frank Act would be considered as part of one or more of the six categories. This is reflected in the following table, using the considerations relevant to a U.S. nonbank financial company for illustrative purposes.<sup>3</sup>

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

2. Six-Category Framework

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

Interconnectedness

Interconnectedness captures direct or indirect linkages between financial companies that may be conduits for the transmission of the effects resulting from a nonbank financial company’s material financial distress or activities. Examples of

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

if that company encountered material financial distress.

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

- Counterparties’ exposures to a nonbank financial company, including derivatives, reinsurance, loans, securities borrowing and lending, and lines of credit that facilitate settlement and clearing activities.
- Number, size, and financial strength of a nonbank financial company’s counterparties, including the proportion of its counterparties’ exposure to the nonbank financial company relative to the counterparties’ capital.
- Identity of a nonbank financial company’s principal contractual counterparties, which reflects the concentration of the nonbank financial

<sup>3</sup> The corresponding statutory considerations for a foreign nonbank financial company would be

considered under the relevant categories indicated in the table.

company's assets financed by particular firms and the importance of the nonbank financial company's counterparties to the market.

- Aggregate amounts of a nonbank financial company's gross or net derivatives exposures and the number of its derivatives counterparties.

- The amount of gross notional credit default swaps outstanding for which a nonbank financial company or its parent is the reference entity.

- Total debt outstanding, which captures a nonbank financial company's sources of funding.

- Reinsurance obligations, which measure the reinsurance risk assumed from non-affiliates net of retrocession.

#### Substitutability

Substitutability captures the extent to which other firms could provide similar financial services in a timely manner at a similar price and quantity if a nonbank financial company withdraws from a particular market. Substitutability also captures situations in which a nonbank financial company is the primary or dominant provider of services in a market that the Council determines to be essential to U.S. financial stability. An example of the manner in which the Council may determine a nonbank financial company's substitutability is to consider its market share. The Council's evaluation of a nonbank financial company's market share regarding a particular product or service will include assessments of the ability of the nonbank financial company's competitors to expand to meet market needs; the costs that market participants would incur if forced to switch providers; the timeframe within which a disruption in the provision of the product or service would materially affect market participants or market functioning; and the economic implications of such a disruption. Concern about a potential lack of substitutability could be greater if a nonbank financial company and its competitors are likely to experience stress at the same time because they are exposed to the same risks. The Council may also analyze a nonbank financial company's core operations and critical functions and the importance of those operations and functions to the U.S. financial system and assess how those operations and functions would be performed by the nonbank financial company or other market participants in the event of the nonbank financial company's material financial distress. The Council also intends to consider substitutability with respect to any nonbank financial company with global operations to identify the substitutability of critical market functions that the company provides in the United States in the event of material financial distress of a foreign parent company.

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

- The market share, using the appropriate quantitative measure (such as loans originated, loans outstanding, and notional transaction volume) of a nonbank financial company and its competitors in the market under consideration.

- The stability of market share across the firms in the market over time.

- The market share of the company and its competitors for products or services that serve a substantially similar economic function as the primary market under consideration.

#### Size

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

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

- Total consolidated assets or liabilities, as determined under generally accepted accounting principles in the United States ("GAAP") or the nonbank financial company's applicable financial reporting standards, depending on the availability of data and the stage of the determination process.

- Total risk-weighted assets, as appropriate for different industry sectors.

- Off-balance sheet exposures where a nonbank financial company has a risk of loss, including, for example, lines of credit. For foreign nonbank financial companies, this would be evaluated based on the extent and nature of U.S.-related off-balance sheet exposures.

- The extent to which assets are managed rather than owned by a nonbank financial company and the extent to which ownership of assets under management is diffuse.
- Direct written premiums, as reported by insurance companies. This is the aggregate of direct written premiums reported by insurance entities under all lines of business and serves as a proxy for the amount of insurance underwritten by the insurance entities.

- Risk in force, which is the aggregate risk exposure from risk underwritten in insurance related to certain financial risks, such as mortgage insurance.

- Total loan originations, by loan type, in number and dollar amount.

#### Leverage

Leverage captures a company's exposure or risk in relation to its equity capital. Leverage amplifies a company's risk of financial distress in two ways. First, by increasing a company's exposure relative to capital, leverage raises the likelihood that a company

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

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

- Total assets and total debt measured relative to total equity, which is intended to measure financial leverage.

- Gross notional exposure of derivatives and off-balance sheet obligations relative to total equity or to net assets under management, which is intended to show how much off-balance sheet leverage a nonbank financial company may have.

- The ratio of risk to statutory capital, which is relevant to certain insurance companies and is intended to show how much risk exposure a nonbank financial company has in relation to its ability to absorb loss.

- Changes in leverage ratios, which may indicate that a nonbank financial company is rapidly increasing its risk profile.

#### Liquidity Risk and Maturity Mismatch

Liquidity risk generally refers to the risk that a company may not have sufficient funding to satisfy its short-term needs, either through its cash flows, maturing assets, or assets salable at prices equivalent to book value, or through its ability to access funding markets. For example, if a company holds assets that are illiquid or that are subject to significant decreases in market value during times of market stress, the company may be unable to liquidate its assets effectively in response to a loss of funding. In order to assess liquidity, the Council may examine a nonbank financial company's assets to determine if it possesses cash instruments or readily marketable securities, such as Treasury securities, which could reasonably be expected to have a liquid market in times of distress. The Council may also review a nonbank financial company's debt profile to determine if it has adequate long-term funding, or can otherwise mitigate liquidity risk. Liquidity problems also can arise from a company's inability to roll maturing debt or to satisfy margin calls, and from demands for additional collateral, depositor withdrawals, draws on committed lines, and other potential draws on liquidity.

A maturity mismatch generally refers to the difference between the maturities of a company's assets and liabilities. A maturity mismatch affects a company's ability to survive a period of stress that may limit its access to funding and to withstand shocks in the yield curve. For example, if a company relies on short-term funding to finance

longer-term positions, it will be subject to significant refunding risk that may force it to sell assets at low market prices or potentially suffer through significant margin pressure. However, maturity mismatches are not confined to the use of short-term liabilities and can exist at any point in the maturity schedule of a nonbank financial company's assets and liabilities. For example, in the case of a life insurance company, liabilities may have maturities of 30 years or more, whereas the market availability of equivalently long-term assets may be limited, exposing the company to interest rate fluctuations and reinvestment risk.

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

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

#### Existing Regulatory Scrutiny

The Council will consider the extent to which nonbank financial companies are already subject to regulation, including the consistency of that regulation across nonbank financial companies within a sector, across different sectors, and providing similar services, and the statutory authority of those regulators.

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

- The extent of state or federal regulatory scrutiny, including processes or systems for peer review; inter-regulatory coordination and cooperation; and whether existing regulators have the ability to impose detailed and timely reporting obligations, capital and liquidity requirements, and enforcement actions, and to resolve the company.
- Existence and effectiveness of consolidated supervision, and a determination of whether and how non-regulated entities and groups within a nonbank financial company are supervised on a group-wide basis.

- For entities based outside the United States, the extent to which a nonbank financial company is subject to prudential standards on a consolidated basis in its home country that are administered and enforced by a comparable foreign supervisory authority.

#### III. The Determination Process

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

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

In the second stage ("Stage 2"), the nonbank financial companies identified in Stage 1 will be analyzed and prioritized, based on a wide range of quantitative and qualitative information available to the Council primarily through public and regulatory sources. The Council will also begin the consultation process with the primary financial regulatory agencies or home country supervisors, as appropriate. As part of that consultation process, the Council intends to 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. The Council also intends to fulfill its statutory obligation to rely whenever possible on information available through the Office of Financial Research (the "OFR"), member agencies, or the nonbank financial company's primary financial regulatory agencies before requiring the submission of reports from any nonbank financial company.<sup>4</sup>

Following Stage 2, nonbank financial companies that are selected for additional review will receive notice that they are being considered for a Proposed Determination and will be subject to in-depth evaluation during the third stage of review ("Stage 3"). Stage 3 will involve the evaluation of information collected directly from the nonbank financial company, in addition to the information considered during Stages 1 and 2. At the end of Stage 3, the Council may consider whether

to make a Proposed Determination with respect to the nonbank financial company. If a Proposed Determination is made by the Council, the nonbank financial company may request a hearing in accordance with section 113(e) of the Dodd-Frank Act and § 1310.21(c) of the Council's rule.<sup>5</sup>

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

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

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

In the Stage 1 quantitative analysis, the Council intends to apply thresholds that relate to the framework categories of size, interconnectedness, leverage, and liquidity risk and maturity mismatch. These thresholds were selected based on (1) their applicability to nonbank financial companies that operate in different types of financial markets and industries, (2) the meaningful initial assessment that such thresholds provide regarding the potential for a nonbank financial company to pose a threat to financial stability in diverse financial markets, and (3) the current availability of data. These thresholds are intended to measure both the susceptibility of a nonbank financial company to financial distress and the potential for that nonbank financial company's financial distress to spread throughout the financial system. A nonbank financial company will be evaluated further in Stage 2 if it meets both the total consolidated assets threshold and any one of the other thresholds.<sup>6</sup> The thresholds are:

<sup>5</sup> See 12 CFR 1310.21(c).

<sup>6</sup> While the Council expects that its determinations under section 113 of the Dodd-Frank Act will be with respect to individual legal entities, the Council has authority to assess nonbank financial companies, and their relationships with other nonbank financial companies and market participants, in a manner

<sup>4</sup> See 12 U.S.C. 5322(d)(3).

- *Total Consolidated Assets.* The Council intends to apply a size threshold of \$50 billion in total consolidated assets. This threshold is consistent with the Dodd-Frank Act threshold of \$50 billion in assets for subjecting bank holding companies to enhanced prudential standards.

- *Credit Default Swaps Outstanding.* The Council intends to apply a threshold of \$30 billion in gross notional credit default swaps (“CDS”) outstanding for which a nonbank financial company is the reference entity. Gross notional value equals the sum of CDS contracts bought (or equivalently sold). If the amount of CDS sold on a particular nonbank financial company is greater than \$30 billion, this indicates that a large number of institutions may be exposed to that nonbank financial company and that if the nonbank financial company fails, a significant number of financial market participants may be affected. This threshold was selected based on an analysis of the distribution of outstanding CDS data for nonbank financial companies included in a list of the top 1,000 CDS reference entities.

- *Derivative Liabilities.* The Council intends to apply a threshold of \$3.5 billion of derivative liabilities. Derivative liabilities equal the fair value of derivative contracts in a negative position. For nonbank financial companies that disclose the effects of master netting agreements and cash collateral held with the same counterparty on a net basis, the Council intends to calculate derivative liabilities after taking into account the effects of these arrangements. This threshold serves as a proxy for interconnectedness, as a nonbank financial company that has a greater level of derivative liabilities would have higher counterparty exposure throughout the financial system.

- *Total Debt Outstanding.* The Council intends to apply a threshold of \$20 billion in total debt outstanding. The Council will define total debt outstanding broadly and regardless of maturity to include loans (whether secured or unsecured), bonds, repurchase agreements, commercial paper, securities lending arrangements, surplus notes (for insurance companies), and other forms of indebtedness. This threshold serves as a proxy for interconnectedness, as nonbank financial companies with a large amount of outstanding debt are generally more interconnected with the broader financial system, in part because financial institutions hold a large proportion of outstanding debt. An analysis of the distribution of debt outstanding for a sample of nonbank financial companies was performed to determine the \$20 billion threshold. Historical testing of this threshold demonstrated that it would have captured

that addresses the statutory considerations and such other factors as the Council deems appropriate. For example, for purposes of applying the six thresholds to investment funds (including private equity firms and hedge funds), the Council may consider the aggregate risks posed by separate funds that are managed by the same adviser, particularly if the funds’ investments are identical or highly similar. In performing this analysis, the Council may use data reported on Form PF with the Securities and Exchange Commission or the Commodity Futures Trading Commission.

many of the nonbank financial companies that encountered material financial distress during the financial crisis in 2007–2008, including Bear Stearns, Countrywide, and Lehman Brothers.

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

- *Short-Term Debt Ratio.* The Council intends to apply a threshold ratio of total debt outstanding (as defined above) with a maturity of less than 12 months to total consolidated assets (excluding separate accounts) of 10 percent. An analysis of the historical distribution of the short-term debt ratios of large financial institutions was used to determine the 10 percent threshold. Historical testing of this threshold demonstrated that it would have captured a number of the nonbank financial companies that faced short-term funding issues during the financial crisis, including Bear Stearns and Lehman Brothers.

The Council intends generally to apply the Stage 1 thresholds using GAAP when such information is available. If GAAP information with respect to a nonbank financial company is not available, the Council may rely on data reported under statutory accounting principles, international financial reporting standards, or such other data as are available to the Council.

For purposes of evaluating any U.S. nonbank financial company, the Council intends to apply each of the Stage 1 thresholds based on the global assets, liabilities and operations of the company and its subsidiaries. In contrast, for purposes of evaluating any foreign nonbank financial company, the Council intends to calculate the Stage 1 thresholds based solely on the U.S. assets, liabilities and operations of the foreign nonbank financial company and its subsidiaries.

The Council intends to reapply the Stage 1 thresholds to nonbank financial companies using the most recently available data on a quarterly basis, or less frequently for nonbank financial companies with respect to which quarterly data are unavailable.

The Council intends to review the appropriateness of both the Stage 1 thresholds and the levels of the thresholds that are specified in dollars as needed, but at least every five years, and to adjust the thresholds and levels as the Council may deem advisable.

The Stage 1 thresholds are intended to identify nonbank financial companies for

further evaluation by the Council and to help a nonbank financial company predict whether such company will be subject to additional review. Because the uniform quantitative thresholds may not capture all types of nonbank financial companies and all of the potential ways in which a nonbank financial company could pose a threat to financial stability, the Council may initially evaluate any nonbank financial company based on other firm-specific qualitative or quantitative factors, irrespective of whether such company meets the thresholds in Stage 1.

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

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

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

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

#### *c. Stage 3: Review of Stage 3 Pool*

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

to U.S. financial stability. The analytic framework consisting of the six categories set forth above, and the metrics used to measure each of the six categories, will assist the Council in assessing the extent to which the transmission of material financial distress is likely to occur.

Each nonbank financial company in the Stage 3 Pool will receive a notice (a "Notice of Consideration") that the nonbank financial company is under consideration for a Proposed Determination. The Notice of Consideration likely will include a request that the nonbank financial company provide information that the Council deems relevant to the Council's evaluation, and the nonbank financial company will be provided an opportunity to submit written materials to the Council.<sup>7</sup> This information will generally be collected by the OFR.<sup>8</sup> Before requiring the submission of reports from any nonbank financial company that is regulated by a member agency or any primary financial regulatory agency, the Council, acting through the OFR, will coordinate with such agencies and will, whenever possible, rely on information available from the OFR or such agencies. Council members and their agencies and staffs will maintain the confidentiality of such information in accordance with applicable law.

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

In evaluating qualitative factors during Stage 3, the Council expects to have access, to a greater degree than during earlier stages of review, to information relating to factors that are not easily quantifiable or that may not directly cause a company to pose a threat to financial stability, but could mitigate or aggravate the potential of a nonbank financial company to pose a threat to the United States. Such factors may include the opacity of the nonbank financial company's operations, its complexity, and the extent to which it is subject to existing regulatory scrutiny and the nature of such scrutiny.

The Stage 3 analysis will also include an evaluation of a nonbank financial company's resolvability, which may mitigate or aggravate the potential of a nonbank financial company to pose a threat to U.S. financial stability. An evaluation of a nonbank financial company's resolvability entails an assessment of the complexity of the nonbank

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

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

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

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

A nonbank financial company that is subject to a Proposed Determination may request a nonpublic hearing to contest the Proposed Determination in accordance with section 113(e) of the Dodd-Frank Act. If the nonbank financial company requests a hearing in accordance with the procedures set forth in § 1310.21(c) of the Council's rule,<sup>9</sup> the Council will set a time and place for such hearing. The Council will (after a hearing, if a hearing is requested), determine by a vote of two-thirds of the voting members of the Council (including the affirmative vote of the Chairperson) whether to subject such company to supervision by the Board of Governors and prudential standards. The Council will provide the nonbank financial company with written notice of the Council's final determination, including an explanation of the basis for the Council's decision. When practicable and consistent with the purposes of the determination process, the Council intends to provide a nonbank financial company with a 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.<sup>10</sup> The Council does not intend to publicly announce the name of any nonbank financial company that is under evaluation for a determination prior to a final determination with respect to such company. In accordance with section 113(h) of the Dodd-Frank Act, a nonbank financial company that is subject to a final determination may bring an action in U.S. district court for an order requiring that the determination be rescinded.

Dated: April 3, 2012.

**Rebecca Ewing,**

*Acting Executive Secretary, Department of the Treasury.*

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 71

[Docket No. FAA-2012-0099; Airspace Docket No. 12-ASO-11]

#### Amendment of Class D Airspace; Cocoa Beach, FL

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule, technical amendment.

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**SUMMARY:** This action amends Class D airspace at Cape Canaveral Skid Strip, Cocoa Beach, FL, by correcting the geographic coordinates of the airport to aid in the navigation of our National Airspace System and by removing the

<sup>9</sup> See 12 CFR 1310.21(c).

<sup>10</sup> See 12 CFR 1310.21(d)(3), 1310.21(e)(3) and 1310.22(d)(3).

<sup>7</sup> See section 1310.21(a) of the rule.

<sup>8</sup> Under section 112(d) of the Dodd-Frank Act, if the Council is unable to determine whether a U.S. nonbank financial company poses a threat to U.S. financial stability based on such information, the Council may request that the Board of Governors conduct an examination of the nonbank financial company to determine whether it should be supervised by the Board of Governors.