April 26, 2023

Financial Stability Oversight Council

Proposed Guidance Could Facilitate New Nonbank SIFI Designations

SUMMARY

On April 21, 2023, the Financial Stability Oversight Council ("*FSOC*" or "*Council*") voted unanimously to propose (1) amendments to its existing interpretive guidance governing the designation of nonbank financial companies for supervision by the Federal Reserve Board and application of prudential standards ("*Proposed Interpretive Guidance*")[1] and (2) an "analytic framework" for identifying, assessing, and responding to financial stability risks ("*Proposed Analytic Framework*").[2] Comments on both proposals are due 60 days after their publication in the *Federal Register*.

The Proposed Interpretive Guidance would replace the FSOC's existing designation guidance, which was finalized in 2019 ("*2019 Interpretive Guidance*"),[3] and includes both procedural and substantive modifications that could facilitate new nonbank SIFI designations. The Proposed Interpretive Guidance reverts, in several significant respects, to the approach embodied in the initial 2012 designation guidance ("*2012 Interpretive Guidance*").[4] It also appears to be designed to address the grounds on which the FSOC's prior designation of MetLife, Inc. was previously struck down in court,[5] including by omitting any requirement to conduct a cost-benefit analysis or an assessment of the likelihood of a company's material financial distress prior to making a designation.

In remarks accompanying the release of the Proposed Interpretive Guidance, Treasury Secretary Janet Yellen argued that elements of the 2019 Interpretive Guidance "have made it difficult [for the FSOC] to use its nonbank designation authority" and "created inappropriate hurdles" that have resulted in a designation process that "could take six years to complete."[6] Accordingly, she said the FSOC is proposing revisions to "restore the effectiveness of this authority" while maintaining "strong procedural protections" for companies under review, including "ample opportunities to be heard" and engagement with a company's primary regulator.[7] Although Secretary Yellen acknowledged that there may be instances in which systemic risks could emanate from "widely conducted activities in a particular sector or market," she said there may be

other instances in which systemic risks could emanate from a "particular entity – one that might not be within the jurisdiction of a regulator with *adequate prudential or supervisory authorities*."[8] In these cases, she continued, an "entity-focused approach may be more appropriate."[9]

The Secretary's comments and the Proposed Interpretive Guidance demonstrate a significant change in the FSOC's approach to addressing systemic risk by eliminating the "activities-based" preference embodied in the 2019 Interpretive Guidance and potentially facilitating a return to entity-specific designations. Speaking in support of the Proposed Interpretive Guidance, Securities and Exchange Commission Chair Gary Gensler urged the FSOC to "build upon the work of the [FSOC's] Hedge Fund Working Group" by "looking at large, interconnected, highly-levered hedge funds, the associated repo markets for financing, the prevalence of low to zero haircuts in such funding, and the extension of leverage from banks and prime brokers."[10] Although it remains unclear whether other FSOC members agree with Chair Gensler about potential risks in these areas, his comments may provide insight into potential future issues of focus for the FSOC.

PROPOSED INTERPRETIVE GUIDANCE

A. BACKGROUND

Section 113 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("*Dodd-Frank Act*") authorizes the FSOC to designate certain nonbank financial companies[11] for supervision by the Federal Reserve Board and application of prudential standards.[12] A nonbank financial company may be designated by the FSOC under either of two determination standards: (1) when "material financial distress" at the company "could pose a threat to the financial stability of the United States," or (2) when the "nature, scope, size, scale, concentration, interconnectedness, or mix of the [company's] activities" could pose the same threat.[13]

Under section 120 of the Dodd-Frank Act, the FSOC is also authorized to make recommendations to primary financial regulatory agencies regarding the application of new or heightened standards and safeguards to financial activities or practices conducted by bank holding companies or nonbank financial companies under the jurisdiction of such agencies, if the Council determines that the activity or practice could create or increase the risk of significant liquidity, credit, or other problems spreading among financial institutions and in U.S. financial markets.[14]

Following the enactment of the Dodd-Frank Act, four nonbank financial companies (American International Group, Inc., General Electric Capital Corporation, Inc., Prudential Financial, Inc., and MetLife, Inc.) were designated as systemically important. Following restructurings and, in one case, litigation, all four were de-designated by 2018. The FSOC has never exercised its section 120 recommendation authority.

The 2019 Interpretive Guidance implemented an "activities-based" approach that requires the FSOC to consider the potential financial stability risk of activities and to pursue entity-specific designations only in "rare instances."[15] There are currently no companies subject to this regulatory framework.

B. KEY PROPOSED CHANGES

The Proposed Interpretive Guidance would make three key changes to the 2019 Interpretive Guidance, as it would: (1) eliminate the commitment to prioritizing an activities-based approach over entity-specific designations; (2) remove the commitments to conduct a cost-benefit analysis and an assessment of the likelihood of a company's material financial distress prior to designating a nonbank financial company; and (3) replace the current analytic approach to evaluating nonbank financial companies under consideration for designation with the Proposed Analytic Framework.

In explaining the rationale for the proposed changes, the Proposed Interpretive Guidance states that the FSOC "seeks to establish a durable process for the Council's use of its authority to designate nonbank financial companies."[16]

1. Elimination of Prioritization of Activities-Based Approach

Most notably, the Proposed Interpretive Guidance would eliminate the prioritization of an activities-based approach over entity-specific designations, as reflected in the 2019 Interpretive Guidance. The proposed elimination of this prioritization reflects the FSOC's view that "[a]ppropriate actions to respond to a particular risk depend on the nature of the risk," and that, "where distress at one entity could threaten financial stability, entity-based regulation may be appropriate."[17] The Proposed Interpretive Guidance observes that the prioritization scheme embodied in the 2019 Interpretive Guidance is "found nowhere in the Dodd-Frank Act"[18] and argues that financial crises "have illustrated the importance of ensuring that the Council can exercise its authorities as needed."[19]

2. Removal of Cost-Benefit Analysis and Assessment of Likelihood of Material Financial Distress

The Proposed Interpretive Guidance would also remove the commitments made in the 2019 Interpretive Guidance to conduct a cost-benefit analysis and assess the likelihood of a company's material financial distress, in order to assess the extent to which a determination may promote U.S. financial stability, prior to designating the company for supervision by the Federal Reserve Board and application of prudential standards under section 113 of the Dodd-Frank Act.

a. Cost-Benefit Analysis

The Proposed Interpretive Guidance offers four reasons for removing the commitment to conduct a cost-benefit analysis prior to designation. First, it observes that a cost-benefit analysis is not required by the Dodd-Frank Act. Instead, the statute enumerates 10 factors the FSOC must consider when designating a nonbank financial company,[20] and the Proposed Interpretive Guidance argues that the costs and benefits of a designation "are not listed considerations in the statute and are not similar to any of the listed considerations."[21] Second, although the Proposed Interpretive Guidance acknowledges that Congress granted the FSOC discretion to consider other factors it "deems appropriate,"[22] the Proposed Interpretive Guidance argues that these must be "risk-related" and that the potential cost of a designation is not a risk-related factor.[23] This argument appears to be directly at odds with the *MetLife* decision, in which the court invalidated the FSOC's decision to designate MetLife, in part because FSOC "intentionally refused to consider the cost of regulation, a consideration that is essential to reasoned rulemaking."[24] Third, the Proposed Interpretive Guidance asserts that the text of section 113 of the Dodd-Frank Act "indicates that Congress itself determined that the potential costs of designation are outweighed by the benefits . . . if the company meets the statutory standard."[25] Fourth, even if the potential cost of designation were a risk-related factor, the FSOC does not believe that a cost-benefit analysis is "useful or appropriate," in part because it is "not feasible to estimate with any certainty the likelihood, magnitude, or timing of a future financial crisis."[26]

b. Assessment of Likelihood of Material Financial Distress

Similarly, the Proposed Interpretive Guidance offers three reasons for removing the commitment to assess the likelihood that a company will experience material financial distress in considering whether to designate the company under section 113 – an assessment that the *MetLife* court concluded was required under the 2012 Interpretive Guidance. First, it asserts that, under the statutory determination standard, the FSOC "presupposes a company's material financial distress, and then evaluates what consequences could follow for U.S. financial stability."[27] Second, the Proposed Interpretive Guidance argues that the designation authority is "preventative" and that "waiting until there is a reasonable likelihood of a company's failure would negate the purpose of the Council's designation authority."[28] Third, it cautions that, if designation requires an assessment of the likelihood of material financial distress, public awareness of a potential designation "could create a run on the company by its creditors and counterparties."[29]

3. Rescission of Previous Analytic Approach

Finally, the Proposed Interpretive Guidance would rescind the previous description of the FSOC's analytic approach to evaluating nonbank financial companies under consideration for designation in light of the issuance of the Proposed Analytic Framework. As part of this rescission, the FSOC is proposing a substantial reinterpretation of what constitutes a "threat to the financial stability of the United States."[30] In the absence of a statutory definition of this term, the 2019 Interpretive Guidance defined the term to mean a "threat of an impairment of financial intermediation or of financial market functioning that *would* be sufficient to inflict severe damage on the broader economy."[31] The Proposed Interpretive Guidance no longer includes a definition of this term, and argues that the prior definition is "inappropriate" and "contrasts sharply with the statutory standard under section 113 of the Dodd-Frank Act, which calls on the Council to determine whether there '*could*' be a threat to financial stability."[32] Instead, FSOC indicates it "would expect to evaluate a 'threat to the financial stability of the United States' with reference to the description of financial stability provided in the Proposed Analytic Framework,"[33] which appears to remove any requirement to assess the magnitude of the potential damage the identified threat would inflict on the economy.

C. PROCESS FOR NONBANK FINANCIAL COMPANY DESIGNATIONS

The Proposed Interpretive Guidance sets forth a two-stage process that the FSOC would follow when determining whether to designate a nonbank financial company. This process largely tracks the existing process embodied in the 2019 Interpretive Guidance, which in part is a reflection of the fact that many of the procedures governing notice, opportunities for hearings, and annual reevaluations are required by statute.[34]

1. Stage 1

During Stage 1, a nonbank financial company would be notified and subjected to a preliminary analysis based on "quantitative and qualitative information available to the Council primarily through public and regulatory sources."[35] During this stage, the FSOC would permit – but not require – the company to submit relevant information, and the FSOC would consult with the company's primary financial regulatory agency or home country supervisor. Because of the "preliminary nature" of a review in Stage 1, the FSOC expects that "not all companies reviewed in Stage 1 will proceed to Stage 2."[36] The FSOC would provide notice to any nonbank financial company selected for additional review no later than 60 days before the FSOC votes on whether to evaluate the company in Stage 2.

2. Stage 2

Stage 2 involves an in-depth evaluation of the nonbank financial company, including the assessment of additional information collected directly from the company. Before requiring the submission of reports from any nonbank financial company that is regulated by a member agency or a primary financial regulatory agency, the FSOC, acting through the Office of Financial Research ("*OFR*"), must coordinate with such agencies and rely on information available from the OFR or such agencies whenever possible. The FSOC would make staff available to meet with representatives of any company that enters Stage 2.

3. Proposed Determinations and Final Determinations

If the FSOC votes to make a proposed determination that a nonbank financial company be supervised by the Federal Reserve Board and subject to prudential standards ("*Proposed Determination*"), the company may request a nonpublic hearing to contest the Proposed Determination. After making a Proposed Determination and holding any requested written or oral hearing, the FSOC may vote to make a final determination that the nonbank financial company be supervised by the Federal Reserve Board and subject to prudential standards ("*Final Determination*").

4. Annual Reevaluations

After the FSOC makes a Final Determination regarding a nonbank financial company, the FSOC would reevaluate the Final Determination at least annually. The FSOC's reevaluation would generally assess whether any material changes since the previous reevaluation and since the Final Determination justify a rescission of the determination. If the potential risks identified by the FSOC at the time of the Final Determination have been adequately addressed, the FSOC would generally expect to rescind its determination. If a nonbank financial company contests the FSOC's determination during the annual reevaluation, the FSOC would vote on whether to rescind the determination and provide the company, its primary financial regulatory agency or home country supervisor, and the primary financial regulatory agency of its significant subsidiaries with a notice explaining the primary basis for any decision not to rescind the determination. The FSOC would provide a nonbank financial company subject to a determination an opportunity for an oral hearing once every five years at which the company can contest the determination.

PROPOSED ANALYTIC FRAMEWORK

A. OVERVIEW

In connection with the Proposed Interpretive Guidance, the FSOC issued a Proposed Analytic Framework that "describes the approach the Council expects to take in identifying, assessing, and responding to certain potential risks to U.S. financial stability."[37] Although the Proposed Analytic Framework may alter the FSOC's approach to entity-specific designations under section 113 of the Dodd-Frank Act, it does not appear to make any change to the FSOC's approach to its separate authority under section 804 of the Dodd-Frank Act to designate financial market utilities ("*FMUs*") and payment, clearing, and settlement ("*PCS*") activities as systemically important, other than potentially signaling a renewed willingness to exercise that authority as well.[38] The Proposed Analytic Framework "does not have a binding effect; does not impose duties on, or alter the rights or interests of, any person; and does not change the statutory conditions or standards for the Council's actions."[39] However, the proposal is intended to provide "new public transparency into how the Council does its work."[40]

B. IDENTIFYING, ASSESSING, AND ADDRESSING RISKS

1. Identifying Potential Risks

The Proposed Analytic Framework notes that the FSOC's monitoring for potential risks to financial stability may cover an "expansive range of asset classes, institutions, and activities," such as:

- markets for debt, loans, short-term funds, equity securities, commodities, digital assets, derivatives, and other institutional and consumer financial products and services;
- central counterparties and PCS activities;
- financial entities, including banking organizations, broker-dealers, asset managers, investment companies, insurance companies, mortgage originators and servicers, and specialty finance companies;

- new or evolving financial products and practices; and
- developments affecting the resiliency of the financial system, such as cybersecurity and climate-related financial risks.[41]

2. Assessing Potential Risks

The Proposed Analytic Framework identifies eight "vulnerabilities that most commonly contribute" to financial stability risks, as well as "sample quantitative metrics that are commonly used to measure these vulnerabilities."[42] Although the Proposed Analytic Framework emphasizes that the evaluation of any potential risk "will be highly fact-specific" and that the following list is "not exhaustive," it notes that the FSOC expects to consider:[43]

Vulnerability	Explanation	Sample Metrics
Leverage	• Can amplify risks by reducing market participants' ability to satisfy their obligations and increasing the potential for sudden liquidity strains	• Ratios of assets, risk-weighted assets, debt, derivatives liabilities or exposures, and off-balance-sheet obligations to equity
Liquidity risk and maturity mismatch	• Can subject market participants to rollover or refinancing risk • May force entities to sell assets rapidly at stressed market prices, which can contribute to broader stresses	• Ratio of short-term debt to unencumbered short-term high-quality liquid assets • Amounts of funding available to meet unexpected reductions in available short-term funding
Interconnections	• Can increase the potential negative effect of dislocations or financial distress	• Total assets, off-balance-sheet assets or liabilities, total debt, derivatives exposures, values of securities financing transactions, and the size of potential requirements to post margin or collateral • Concentration of holdings of a class of financial assets
Operational risks	• Can arise from the impairment or failure of financial market infrastructures, processes, or systems, including cybersecurity vulnerabilities	• Statistics on cybersecurity incidents or the scale of critical infrastructure
Complexity or opacity	• Can arise if financial transactions occur outside of regulated sectors or if the structure and operations of market participants cannot readily be determined • May be aggravated by legal structure of market participants and their activities, unavailability of data due to lack of regulatory or public disclosure requirements, and obstacles to the rapid and orderly resolution of market participants	• Number of jurisdictions in which activities are conducted • Number of affiliates

Vulnerability	Explanation	Sample Metrics
Inadequate risk management	• May be exacerbated by the absence of appropriate regulatory authority and requirements	• Amounts of capital and liquidity
Concentration	• May be amplified if financial exposures are highly concentrated in a small number of entities	• Market shares in segments of applicable financial markets
Destabilizing activities	• Can arise from activities that are sizeable and interconnected with the financial system, even when those activities are intentional and permitted by applicable law	• Trading practices that substantially increase volatility in one or more financial markets • Activities that involve moral hazard or conflicts of interest

The Proposed Analytic Framework notes that the identification and assessment of a potential risk to financial stability typically involve consideration of multiple quantitative metrics and qualitative factors. Although, as noted above, the Proposed Interpretive Guidance eliminates the commitment to assess the likelihood of a company's material financial distress in considering a nonbank financial company for designation, two of the "vulnerabilities" identified above (leverage and liquidity risk and maturity mismatch) were identified in the 2012 Interpretive Guidance as categories that "seek to assess the vulnerability of a nonbank financial company to financial distress" (as opposed to the potential impact of the nonbank financial company's financial distress on the broader economy), and a third (inadequate risk management) is related to the final category used in assessing vulnerability in the 2012 Interpretive Guidance, existing regulatory scrutiny.

The FSOC also identifies four non-exhaustive transmission channels that are "most likely to facilitate the transmission of the negative effects of a risk to financial stability":[44]

- ***Exposures*****:** direct and indirect exposures of creditors, counterparties, investors, and other market participants;
- ***Asset liquidation*****:** a rapid liquidation of financial assets;
- ***Critical function or service*****:** a disruption of a critical function or service that is relied upon by market participants and for which there are no ready substitutes that could provide the function or service at a similar price and quantity; and
- ***Contagion*****:** the perception of common vulnerabilities or exposures, such as business models or asset holdings that are similar or highly concentrated.

The Council solicits public comment on, among other matters, whether its descriptions of the vulnerabilities and attendant metrics are appropriate, as well as whether the identified transmission channels "capture the most likely ways in which the negative effects of a risk to financial stability could be transmitted to other firms or markets."[45]

3. Addressing Potential Risks

The Proposed Analytic Framework notes that the FSOC may take different approaches to respond to a potential risk and may use "multiple tools" to mitigate such a risk.[46] Generally, once a potential risk has been identified, the FSOC's Deputies Committee would direct one or more of the staff-level committees or working groups to consider potential policy approaches or actions the FSOC could take to assess and address it. Those committees or working groups, in turn, may consider one or more of the following responses, among others:

- ***Interagency coordination and information sharing*:** Existing regulators may have the authority to mitigate potential risks to financial stability identified by the FSOC.
- ***Recommendations to agencies or Congress*:** The FSOC may issue formal public recommendations to primary financial regulatory agencies under section 120 of the Dodd-Frank Act. In addition, in any case in which no primary regulator exists for the markets or companies conducting financial activities or practices identified by the FSOC as posing potential risks, the FSOC may report to Congress on recommendations for legislation.
- ***Nonbank financial company determinations*:** The FSOC may evaluate one or more nonbank financial companies for an entity-specific determination under section 113 of the Dodd-Frank Act.
- ***Payment, clearing, and settlement activity designations*:** The FSOC may designate certain PCS activities that it determines are, or are likely to become, systemically important under Title VIII of the Dodd-Frank Act.
- ***Financial market utility designations*:** The FSOC may designate FMUs that it determines are, or are likely to become, systemically important under Title VIII of the Dodd-Frank Act.

CONCLUSION

It remains to be seen whether the Proposed Interpretive Guidance will result in any new entity-specific SIFI designations. Moreover, there is no clear indication in the Proposed Interpretive Guidance as to what types of financial services companies may be of concern to the FSOC. Nonetheless, the proposed modification of the Proposed Interpretive Guidance would appear to increase the potential for entity-specific designations.

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ENDNOTES

1 *Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies*, *available at* https://home.treasury.gov/system/files/261/FSOC-2023-Proposed-Nonbanks-Guidance.pdf.

2 *Analytic Framework for Financial Stability Risk Identification, Assessment, and Response*, *available at* https://home.treasury.gov/system/files/261/FSOC-2023-Risk-Framework.pdf.

3 *Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies*, 84 Fed. Reg. 71,740 (Dec. 30, 2019), *available at* https://www.govinfo.gov/content/pkg/FR-2019-12-30/pdf/2019-27108.pdf. For further information, see our Client Memorandum, Financial Stability Oversight Council: FSOC Finalizes Changes to Nonbank SIFI Designation Guidance, dated January 2, 2020, https://www.sullcrom.com/files/upload/SC-Publication-FSOC-Finalizes-Nonbank-SIFI-Designation-Guidance.pdf.

4 *Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies*, 77 Fed. Reg. 21,637 (Apr. 11, 2012), *available at* https://www.govinfo.gov/content/pkg/FR-2012-04-11/pdf/2012-8627.pdf.

5 *MetLife, Inc.* v. *Fin. Stability Oversight Council*, 177 F. Supp. 3d 219 (D.D.C. 2016). For further information, see our Client Memorandum, D.C. District Court Rescinds FSOC's Designation of MetLife as Systemically Important: Decision Cites "Fundamental Violations of Established Administrative Law," Including a Failure to Consider the Costs of Regulation and Unexplained Deviations From Prior Regulatory Guidance, dated April 7, 2016, https://www.sullcrom.com/siteFiles/Publications/SC_Publication_D.C._District_Court_Rescinds_FSOCs_Designation_of_MetLife_as_Systemically_Important.pdf.

6 Remarks by Secretary of the Treasury Janet L. Yellen at Financial Stability Oversight Council Meeting (Apr. 21, 2023), *available at* https://home.treasury.gov/news/press-releases/jy1431 ("*Secretary Yellen Remarks*").

7 *Id*.

8 *Id.* (emphasis added).

9 *Id*. Secretary Yellen previously stated in congressional testimony that "with respect to asset management, rather than focus on designation of companies, I think it is important to focus on an activity" and that it is "not obvious" designation is the correct tool. *The Quarterly CARES Act Report to Congress: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 117th Cong., Mar. 24, 2021, *available at* https://www.govinfo.gov/content/pkg/CHRG-117shrg47083/pdf/CHRG-117shrg47083.pdf.

10 Remarks before the Financial Stability Oversight Council Financial Stability Risks & Guidance on Nonbank Determinations (Apr. 21, 2023), *available at* https://www.sec.gov/news/speech/gensler-remarks-fsoc-042123.

11 A nonbank financial company must be "predominantly engaged" in financial activities. 12 U.S.C. § 5311(a)(4). A company is predominantly engaged in financial activities if (1) its annual gross revenues derived from activities that are financial in nature (as defined by 12 U.S.C. § 1843(k)) represent 85 percent or more of its consolidated annual gross revenues, or (2) its consolidated assets related to activities that are financial in nature (as defined by 12 U.S.C. § 1843(k)) represent 85 percent or more of its consolidated assets.

12 The voting members of the Council are the Secretary, the Chairman of the Federal Reserve Board, the Comptroller of the Currency, the Director of the Bureau of Consumer Financial Protection, the Chairman of the Securities and Exchange Commission, the Chairperson of the Federal Deposit Insurance Corporation, the Chairperson of the Commodity Futures Trading Commission, the Director of the Federal Housing Finance Agency, the Chairman of the National Credit Union Administration Board, and an independent member with insurance expertise who is appointed by the President and confirmed by the Senate. There are also five non-voting members representing

ENDNOTES (CONTINUED)

the Federal Insurance Office, the Office of Financial Research and state banking, insurance, and securities regulators.

13 12 U.S.C. § 5323.

14 12 U.S.C. § 5330.

15 84 Fed. Reg. at 71,761.

16 Proposed Interpretive Guidance, at 5.

17 *Id*. at 12.

18 *Id*.

19 *Id*. at 13.

20 12 U.S.C. § 5323(a)(2).

21 Proposed Interpretive Guidance, at 16.

22 12 U.S.C. § 5323(a)(2)(K).

23 Proposed Interpretive Guidance, at 16.

24 177 F. Supp. 3d at 242. In reaching this decision, the court cited the Supreme Court's holding that "[c]onsideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages and disadvantages of agency decisions," *Michigan* v. *Environmental Protection Agency*, 576 U.S. 743, 753 (2015) (emphasis in original), and the Dodd-Frank Act's "command to consider all 'appropriate' risk-related factors." 177 F. Supp. 3d at 242.

25 Proposed Interpretive Guidance, at 17.

26 *Id*. The Proposed Interpretive Guidance also argues that the potential benefits of designation are "potentially enormous and, in many respects, incalculable, representing the tangible and intangible gains that come from averting a financial crisis and economic catastrophe." *Id*.

27 *Id*. at 18.

28 *Id*. at 19. In support of this argument, the Proposed Interpretive Guidance observes that a financial company can go from "seemingly healthy to in danger of imminent collapse in a matter of months, weeks, or even days," as demonstrated by several bank failures over the past 15 years. *Id*.

29 *Id*. at 20.

30 As noted above, under section 113 of the Dodd-Frank Act, the FSOC is authorized to designate a nonbank financial company for supervision by the Federal Reserve Board and application of prudential standards if the FSOC 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. *See* 12 U.S.C. 5323(a)(1). The statute does not define the term "threat to the financial stability of the United States."

31 84 Fed. Reg. at 71,763 (emphasis added). Similarly, the 2012 Interpretive Guidance defined the term to mean "impairment of financial intermediation or of financial market functioning that would be sufficiently severe to inflict significant damage on the broader economy." 77 Fed. Reg. at 21,657.

32 Proposed Interpretive Guidance, at 10 (emphasis added).

33 *Id*. The Proposed Analytic Framework defines financial stability as "the financial system being resilient to events or conditions that could impair its ability to support economic activity, such as by intermediating financial transactions, facilitating payments, allocating resources, and managing risks." Proposed Analytic Framework, at 6.

34 *See* 12 U.S.C. § 5323(d)-(e).

ENDNOTES (CONTINUED)

35 Proposed Interpretive Guidance, at 27.

36 *Id*. at 28.

37 Proposed Analytic Framework, at 2.

38 Section 804 of the Dodd-Frank Act sets forth distinct considerations for the designation of FMUs and PCS activities as systemically important. *See* 12 U.S.C. § 5463(a)(2). The Proposed Analytic Framework essentially repeats the criteria contained in the Dodd-Frank Act itself and a regulation previously adopted by the FSOC, and does not suggest any change to the approach reflected in those provisions. Notably, the statute permits the FSOC to designate FMUs and PCS activities that are already systemically important, as well as those that are "likely to become" systemically important. However, to date, the FSOC has not made a designation of any FMU that is not already systemically important.

39 Proposed Analytic Framework, at 5. The statement regarding the non-binding nature of the Proposed Analytic Framework reflects the fact that the Administrative Procedure Act, which sets forth the requirements for the issuance of legislative rules that carry the force and effect of law, exempts interpretive rules and general statements of policy. *See* 5 U.S.C. § 553(b)(A).

40 Secretary Yellen Remarks. Secretary Yellen noted that the Proposed Analytic Framework is the "first time the Council has published such a document."

41 Proposed Analytic Framework, at 8-9.

42 *Id*. at 9.

43 *Id.*

44 *Id*. at 13.

45 *Id.* at 4.

46 *Id.* at 16.

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