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Billing Code 4810-25-P

FINANCIAL STABILITY OVERSIGHT COUNCIL

12 CFR Part 1320

RIN 4030-AA01

Authority to Designate Financial Market Utilities as Systemically Important

AGENCY: Financial Stability Oversight Council.

ACTION: Final Rule.

SUMMARY: Section 804 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “DFA”) provides the Financial Stability Oversight Council (the “Council”) the authority to designate a financial market utility (“FMU”) that the Council determines is or is likely to become systemically important because the failure of or a disruption to the functioning of the FMU could create, or increase, the risk of significant liquidity or credit problems spreading among financial institutions or markets and thereby threaten the stability of the United States financial system.

This final rule describes the criteria that will inform and the processes and procedures established under the DFA for the Council’s designation of FMUs as systemically important under the DFA.

The Council published an advance notice of proposed rulemaking regarding the designation criteria in section 804 on December 21, 2010, followed by a notice of proposed rulemaking (“NPRM”) on March 28, 2011. The Council notes that this final rule only addresses the

designation of FMUs. The Council expects to address the designation of payment, clearing, or settlement activities as systemically important in a separate rulemaking.

DATES: Effective date: [INSERT 30 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]

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SUPPLEMENTARY INFORMATION:

I. Background

Dodd-Frank Wall Street Reform and Consumer Protection Act

Title VIII of the DFA is entitled the “Payment, Clearing, and Settlement Supervision Act of 2010.”¹ FMUs form a critical part of the nation’s financial infrastructure. They exist in many markets to support and facilitate the transfer, clearing or settlement of financial transactions, and their smooth operation is integral to the soundness of the financial system and the overall economy. However, their function and interconnectedness also concentrate a considerable amount of risk in the financial system due, in large part, to the interdependencies, either directly through operational, contractual or affiliation linkages, or indirectly through

¹ 12 U.S.C. 5461 et seq.

payment, clearing, and settlement processes. In other words, problems at one FMU could trigger significant liquidity and credit disruptions at other FMUs or financial institutions.

Section 804(a)(1) of the DFA states that the Council, “on a nondelegable basis and by a vote of not fewer than 2/3 of the members then serving, including an affirmative vote by the Chairperson of the Council, shall designate those financial market utilities or payment, clearing, or settlement activities that the Council determines are, or are likely to become, systemically important.” Subject to certain exclusions, the DFA defines an FMU as “any person that manages or operates a multilateral system for the purposes of transferring, clearing, or settling payments, securities, or other financial transactions among financial institutions or between financial institutions and the person.”²

Section 111 of the DFA establishes the Council. Among the duties of the Council under section 112(a)(2) is to “identify systemically important FMUs,” as defined in the statute.³

Section 804 of the DFA requires the Council, after consultation with the Board of Governors of the Federal Reserve System (the “Board of Governors”) and the relevant federal agency that has primary jurisdiction over an FMU under federal banking, securities, or commodity futures laws (“Supervisory Agency”), to identify and designate an FMU that is, or is likely to become, systemically important if the Council determines that a failure of or disruption to an FMU could create, or increase, the risk of significant liquidity or credit problems spreading across financial institutions and markets and thereby threaten the stability of the U.S. financial system.⁴

² See 12 U.S.C. 5462(6). Section 5462(6)(B) specifically excludes a number of entities, such as designated contract markets and national securities exchanges meeting certain criteria, from the definition of an FMU.

³ See 12 U.S.C. 5322(a)(2)(J).

⁴ Section 804(a)(1) of the DFA states that the Council, “on a nondelegable basis and by a vote of not fewer than 2/3 of the members then serving, including an affirmative vote by the Chairperson of the Council, shall designate those financial market utilities or payment, clearing, or settlement activities that the Council determines are, or are likely to become, systemically important.” 12 U.S.C. 5463(a)(1). See also DFA section 803(9) (defining systemic importance). 12 U.S.C. 5462(9).

The designation of an FMU as systemically important by the Council subjects the designated FMU to the requirements of Title VIII of the DFA (“Title VIII”). For example, section 805(a) authorizes the Board of Governors, the Commodity Futures Trading Commission (“CFTC”), and the Securities and Exchange Commission (“SEC”), in consultation with the Council and one or more Supervisory Agencies and taking into consideration relevant international standards and existing prudential requirements, to prescribe risk management standards governing the operations related to the payment, clearing, and settlement activities of systemically important FMUs.⁵ The objectives and principles for the risk management standards are to promote robust risk management and safety and soundness, reduce systemic risk, and support the stability of the broader financial system.⁶ These standards may address areas, as outlined in section 805(c), such as risk management policies and procedures, margin and collateral requirements, participant or counterparty default policies and procedures, the ability to complete timely clearing and settlement of financial transactions, capital and financial resource requirements for designated FMUs, as well as other areas that are necessary to achieve these objectives and principles.⁷ Designation also subjects the FMU to additional examinations and reporting requirements, as well as potential enforcement actions. In addition, as set forth in section 806(a), the Board of Governors may authorize a Federal Reserve Bank to establish and maintain an account for a designated FMU and provide the services listed in section 11A(b) of the Federal Reserve Act to the designated FMU.⁸

Designation of Financial Market Utilities: Overview of the Proposed Rule

⁵ See 12 U.S.C. 5464(a).

⁶ See 12 U.S.C. 5464(b).

⁷ See 12 U.S.C. 5464(c).

⁸ See 12 U.S.C. 5465(a).

In March 2011, the Council issued, and requested public comment on, an NPRM that included the analytical framework that the Council would use to determine whether an FMU should be designated as systemically important in accordance with Title VIII.⁹ As noted in the NPRM, section 804(a)(2) of the DFA provides that, in determining whether an FMU should be designated as systemically important, the Council must consider:

- A. The aggregate monetary value of transactions processed by the FMU;
- B. The aggregate exposure of the FMU to its counterparties;
- C. The relationship, interdependencies, or other interactions of the FMU with other FMUs or payment, clearing or settlement activities;
- D. The effect that the failure of or a disruption to the FMU would have on critical markets, financial institutions, or the broader financial system; and
- E. Any other factors that the Council deems appropriate.¹⁰

Under the approach described in the NPRM, the Council would evaluate FMUs under each of the four specific statutory considerations, as well as any other factors the Council deems relevant, using quantitative metrics where possible and appropriate. Informed by data collected with respect to each statutory consideration, the Council would use its judgment to determine whether an FMU should be designated as systemically important and thus subject to the relevant heightened risk management standards prescribed by the Board of Governors, the SEC, or the CFTC. Any determinations of the Council would ultimately be based on an evaluation of whether the failure or disruption of the FMU could pose a threat to the financial stability of the U.S. financial system as described in DFA section 803(9).¹¹

⁹ Authority To Designate Financial Market Utilities as Systemically Important, 76 FR 17047 (March 28, 2011).

¹⁰ 12 U.S.C. 5463(a)(2).

¹¹ Authority To Designate Financial Market Utilities as Systemically Important, 76 FR at 17055.

The NPRM indicated that the Council expected to use the statutory considerations discussed above as the base line criteria for assessing an FMU's systemic importance, regardless of the type of payment, clearing or settlement activities that the FMU is engaged in. However, the NPRM also stated that the application of the statutory considerations would be adapted for the risks presented by a particular type of FMU and business model. For example, the metrics that are best suited for assessing the systemic importance of a central counterparty will likely differ from the metrics used to assess the importance of an interbank payment system. In light of such differences, the Council will apply metrics in a manner that is appropriate to a specific FMU or market segment.¹²

In addition, the NPRM sets out a two-stage process for evaluating the systemic importance of an FMU prior to a vote of proposed designation by the Council. The first stage would consist of a largely data-driven process for the Council, working with its committees, to identify a preliminary set of FMUs, whose failure or disruption could potentially threaten the stability of the U.S. financial system.¹³ In the second stage, the FMUs identified through the first stage would be subject to a more in-depth review, with a greater focus on qualitative factors, in addition to institutional and market specific considerations. If an FMU reached the second stage of the evaluation process, the Council would notify the FMU under consideration and provide the FMU with an opportunity to submit written materials to the Council in support of or in opposition to designation as outlined in proposed rule section 1320.11. In the case of a proposed designation of systemic importance, an FMU would be notified and given the opportunity to request a written or oral hearing before the Council to demonstrate that the proposed determination is not supported by substantial evidence as outlined in proposed rule section

¹² Id.

¹³ Id.

1320.12. Following this hearing, the Council would complete its considerations and carry out its final vote and notification to the FMU.¹⁴

Overview of the Public Comments

The Council received 15 comments in response to the NPRM – including submissions from industry groups, clearinghouses, retail payment systems and other financial institutions¹⁵ – addressing a wide variety of issues. Commenters submitted suggestions regarding the substantive criteria for designation, including the relevance of certain considerations to various types of FMUs operating across different markets, quantitative designation thresholds and other matters related to the description of potential metrics to be used by the Council, as outlined in the NPRM. With respect to the designation process, commenters made recommendations regarding the ability of an FMU to apply for designation or rescission, the periodic reevaluation of designated and non-designated FMUs, Council communication to FMUs, the collection of information from FMUs, deadlines for FMUs to request hearings and submit information, Council voting procedures, and the confidentiality of proceedings, notifications and information gathered by the Council. Several commenters addressed potential designations of FMUs operating “retail payment systems,” with some arguing that the final rule should categorically exclude, or contain a presumption against, the designation of retail payment systems, and others recommending designation of at least some retail payment systems. Commenters also suggested

¹⁴ Id.

¹⁵ Comments were received from: Americans for Financial Reform, the American Bankers Association, American Express, Better Markets, Robert Brasell, the Committee on Capital Markets Regulation, the Council of Institutional Investors, LCH.Clearnet Group Limited, MasterCard Worldwide, the National Automated Clearing House Association, Sun Hong Rie, The Clearing House Association L.L.C. and The Clearing House Payments Company L.L.C., The Depository Trust & Clearing Corporation, The Financial Services Roundtable, and The Options Clearing Corporation.

that, given the global nature of payment, clearing and settlement flows, the designation framework should account for international regulatory oversight and standards. Specific comments are discussed in more detail in the relevant portions of the section-by-section analysis.

II. Final Rule

Overview

After considering the comments, the Council has adopted a final rule to implement section 804 of the DFA. The final rule is substantially similar to the proposed rule, maintaining the two-stage designation process and the key considerations and the subcategories for designation. However, the application of certain subcategories and illustrative metrics have been moved from stage one to stage two and the Council has added procedural provisions affording FMUs the right to an after-the-fact hearing following the Council’s waiver or modification of a notice, hearing, or other requirement.¹⁶ A summary of the key provisions of the rule, highlighting certain portions of the designation process and analytical criteria, is provided below. This summary is followed by a section-by-section analysis of key sections of the regulatory text, relevant comment letters, and changes to the proposed rule.

¹⁶ In the NPRM, the Council laid out its analytical framework for stage one in which it proposed to begin considering each of the subcategories with corresponding illustrative metrics. Upon further evaluation, the Council has decided to begin applying certain subcategories and metrics in stage two rather than stage one to further enhance the transparency of the stage one process by relying upon readily available data that is generally easy to quantify.

Specifically, the Council will begin applying the following four subcategories in section 1320.10(d)(3)-(6) at stage two: concentration of participants, concentration by product type, the degree of tiering, and potential impact or spillover in the event of a failure or disruption.

The Council also decided to clarify several of the illustrative metrics or to begin considering such metrics at stage two. For example, certain metrics in stage one will be calculated on “average” values, a more generic term, rather than the more specific “mean” or “median” terms for value, as indicated in the NPRM. The Council also moved the consideration of “the mean and peak aggregate value of an FMU’s financial resources held to address the credit risks arising from a potential participant default (i.e., participant, clearing or margin fund)” from stage one to stage two.

The Council expects to use a two-stage process for evaluating FMUs prior to a vote of proposed designation. The first stage will consist of a largely data-driven process for the Council to identify a preliminary set of FMUs, whose failure or disruption could potentially threaten the stability of the U.S. financial system. In the second stage, the FMUs identified through the first stage of review will be subject to a more in-depth review, with a greater focus on qualitative factors, in addition to other institution and market specific considerations.

The Council's analytical framework, which was summarized in the NPRM, is outlined below. As discussed in more detail in the section-by-section analysis, metrics referenced herein are offered for purposes of illustration and their application will vary by specific market or institution. If information for a specific metric described below is not available or is not relevant to an FMU under consideration, the Council may consider an alternate or substitute metric for which information is available or which the Council considers more relevant. In appropriate cases, the Council may exclude a metric from consideration for a particular FMU. The Council may revise the metrics as new data become available and as the process for evaluating FMUs for designation evolves.

Analytical Framework: Stage One

The Council is establishing subcategories to further address the specific statutory considerations that are set forth in section 804(a)(2) of the DFA. These subcategories are substantively similar to those contained in the proposed rule. Certain subcategories and associated metrics are described below to illustrate how the considerations will be taken into account in assessing systemic importance.

Consideration (A): Aggregate monetary value of transactions processed by an FMU

- Subcategory (A)(1): Number of transactions processed, cleared or settled by the FMU

Within subcategory (A)(1), examples of the types of metrics that the Council may consider include daily average¹⁷ and historical peak gross volumes processed, cleared or settled.

- Subcategory (A)(2): Value of transactions processed, cleared or settled, by the FMU

Within subcategory (A)(2), examples of the types of metrics that the Council may consider include daily average and historical peak gross values processed, cleared or settled.

- Subcategory (A)(3): Value of other financial flows that may flow through an FMU

Within subcategory (A)(3), the Council may consider the daily average and historical peak value of variation margin, as well as the change in average daily and peak daily initial margin.

Consideration (B): Aggregate exposure of an FMU to its counterparties

- Subcategory (B)(1): Credit exposures¹⁸ to counterparties

Within subcategory (B)(1), the Council may consider the use of metrics that measure the average aggregate daily value and peak aggregate dollar value of collateral (before or after haircut) posted to the FMU; average daily and peak aggregate intraday credit provided by an FMU to participants; and the mean and peak daily value of initial margin held by an FMU.

- Subcategory (B)(2): Liquidity exposures to counterparties

¹⁷ In considering “average” data, the Council will use mean or median values, depending on which is appropriate in a particular case.

¹⁸ In the context of derivatives clearing, the term “credit exposures” refers to potential future exposures.

Within subcategory (B)(2), the Council may consider measures of the estimated peak liquidity need in the case of the default of the largest single counterparty to the FMU and the average and peak daily aggregate dollar value of pay outs by an FMU to its counterparties.

Consideration (C): Relationship, interdependencies, or other interactions of an FMU with other FMUs or payment, clearing or settlement activities

Within consideration (C), the Council may consider metrics that measure the relationships and interdependencies of an FMU, including those that measure interactions of an FMU with different participants, such as systemically important financial and/or nonfinancial companies, central banks, or other payment, clearing or settlement systems, with trading platforms (such as exchanges and alternative trading systems), and with the market environment more generally, including contractual relationships, that support the operations of an FMU.

Consideration (D): Effect that the failure of or disruption to an FMU would have on critical markets, financial institutions or the broader financial system

- Subcategory (D)(1): Role of an FMU in the market served

Within subcategory (D)(1), the Council may consider market share metrics such as an FMU's volume as a percentage of total market volume or value as a percentage of total market value.

- Subcategory (D)(2): Availability of substitutes

Within subcategory (D)(2), the Council may consider whether there exist, and if so, the number of other FMUs that may provide the same function or product, or provide an alternative payment mechanism, and how readily available a potential substitute would be for participants, considering such additional factors as operational capability and timing.

Consideration (E): Any other factors that the Council deems appropriate

Under this statutory consideration, the Council retains its ability to consider additional subcategories, metrics and qualitative factors as may be relevant and appropriate. Such additional factors may be based on the particular characteristics of an FMU being reviewed, such as the nature of the FMU’s operations, the FMU’s corporate structure or the FMU’s business model.

Analytical Framework: Stage Two

The second stage will provide the Council with the opportunity to perform a more in-depth review and analysis of specific FMUs from both a quantitative and qualitative perspective. In this stage, the Council will place a greater focus on any elements that may be particular to a specific FMU or a market. The Council will conduct a tailored analysis of each FMU under consideration to determine whether it is or is likely to become systemically important.

Relationship Between Considerations (A)-(E) and the Statutory Basis for Designation

Ultimately, the Council will use its assessment of Considerations (A) through (E), as described above, to reach a conclusion regarding whether an FMU meets the statutory basis for designation under section 804(a)(1) of the DFA, which directs the Council to designate FMUs that the Council determines are, or are likely to become, systemically important.¹⁹ “Systemically important” is defined in section 803(9) of the DFA, and in section 1320.2 of the final rule, as a “situation where the failure of or disruption to the functioning of a financial market utility ... could create, or increase, the risk of significant liquidity or credit problems spreading among financial institutions or markets and thereby threaten the stability of the financial system of the United States.”²⁰ Thus, the two critical determinations for an FMU designation are:

¹⁹ See 12 U.S.C. 5463(a)(1).

²⁰ See 12 U.S.C. 5462(9).

(1) Whether the failure of or a disruption to the functioning of the FMU now or in the future could create, or increase, the risk of significant liquidity or credit problems spreading among financial institutions or markets (the “First Determination”); and

(2) Whether the spread of such liquidity or credit problems among financial institutions or markets could threaten the stability of the financial system of the United States (the “Second Determination”).

Considerations (A) and (C) primarily relate to the First Determination. Whether the failure of or a disruption to the functioning of the FMU could create or increase the risk of significant liquidity or credit problems is a function of, among other things, the value of the transactions the FMU processes (Consideration (A)). The risk of significant liquidity or credit problems also depends on the interactions between the FMU and other FMUs or payment, clearing, or settlement (“PCS”) activities (Consideration (C)). For example, the risk of liquidity or credit problems is greater if the failure of an FMU would cause other FMUs to fail, but mitigated if other FMUs could, in a timely manner, act as substitutes for the failed FMU.

Consideration (B) relates to both the First and the Second Determinations. The aggregate exposure of an FMU to its counterparties (Consideration (B)) is positively correlated with the probability that any failure or disruption of the FMU could potentially destabilize counterparties or the financial system. Consideration (D) primarily relates to the Second Determination.

In light of the language and purpose of Title VIII, the Council notes that the judgment involved in the Second Determination is substantially informed by the First Determination. Title VIII enhances the supervision of systemically important FMUs and payment, clearing, and settlement activities so that the economy can enjoy the advantages of efficiency and risk

reduction that these institutions provide to the financial system.²¹ A failure or disruption of an FMU that could create the risk of “significant liquidity or credit problems spreading among financial institutions or markets” will, absent extraordinary circumstances, weaken the financial system’s ability to serve the economy and dramatically increase the risk of financial instability and economic downturn. The Second Determination, therefore, largely assesses whether possible disruptions are potentially severe, not necessarily in the sense that they themselves might trigger damage to the U.S. economy, but because such disruptions might reduce the ability of financial institutions or markets to perform their normal intermediation functions.

Section-by-Section Analysis

§ 1320.1 Authority and purpose.

Proposed section 1320.1(a) states that sections 111, 112, 804, 809, and 810 of the DFA provide the statutory authority for the Council to designate FMUs. Proposed section 1320.1(b) explains that the purpose of part 1320 is to set forth standards and procedures governing the Council’s designation of FMUs that the Council determines are, or are likely to become, systemically important.

The Council did not receive any comments that requested changes to this section. The Council made one technical, non-substantive change.

§ 1320.2 Definitions.

In the proposed rule, the Council defined terms that are necessary to implement the final rule. The definitions (including “financial market utility,” “Supervisory Agency,” and “systemically important and systemic importance”) use the statutory definitions in sections 2 and

²¹ See 12 U.S.C. 5461.

803 of the DFA.²² The definitions in the final rule are unchanged, except that the Council has made a technical addition to the definition of the term “Supervisory Agency” and added a definition of the term “hearing date.”

Financial Market Utility. One commenter suggested that, in evaluating systemic importance, the Council should identify the FMU functions within an organization, and separately apply the standards for systemic importance set forth in section 1320.10 of the proposed rule to individual subsidiaries performing such functions.²³ The commenter stated that the Council should not apply the standards for systemic importance to non-FMU operating subsidiaries or at the parent-company level. The Council generally agrees with the comment; specifically, where there is a parent holding company that has, for example, separately incorporated FMU subsidiaries whose operations and activities are not significantly interconnected, the Council expects to separately apply the standards for systemic importance set forth in section 1320.10 to each FMU subsidiary that potentially meets the standards of systemic importance. The Council generally does not expect to apply the standards for systemic importance to a parent holding company or subsidiaries that are not themselves FMUs. However, there may be instances of overlap between affiliates in the operation or management of FMU or PCS activities making it appropriate for the Council to evaluate whether more than one affiliate meets the standards for systemic importance, for example, if the parent holding company is actively managing the operations of a subsidiary that performs the function in question.

Hearing date. The final rule includes a new definition of the term “hearing date” to be used to establish the date by which the Council must provide an FMU written notification of the

²² 12 U.S.C. 5301 and 5462.

²³ See comment letter from The Depository Trust & Clearing Corporation (May 27, 2011) (hereinafter “DTCC letter”), p. 5

final determination of the Council after a hearing under section 1320.14 or section 1320.15 of the final rule. The definition of the term “hearing date” distinguishes between hearings conducted through the submission of written materials and hearings conducted through oral argument and oral testimony. The Council expects to develop and implement more detailed procedures governing the conduct of hearings under this part at a later date.

Payment, clearing, or settlement activity. One commenter suggested expanding the types of activities that fall within the definition of “payment, clearing, or settlement activity” to include key risk management controls exercised by clearinghouses.²⁴ The Council considered this comment and determined that the concept of risk management controls are already included in the proposed definition of payment, clearing, or settlement activity, which encompasses “the management of risks and activities associated with continuing financial transactions.”²⁵ As such, expanding the definition of payment, clearing, or settlement activities to include risk management controls exercised by clearinghouses, but not other FMUs, is unnecessary.

Supervisory Agency. One commenter noted that while the definition of the term “Supervisory Agency” in the proposed rule would extend only to designated FMUs, the context of other sections of the proposed rule requires that it also apply to undesignated FMUs that are being considered for designation.²⁶ Consistent with this comment, the commenter suggested a technical revision to apply the definition to both designated and undesignated FMUs. The final rule incorporates the suggested technical revision so that the definition of the term “Supervisory Agency” will apply to both designated and undesignated FMUs.

²⁴ See comment letter from LCH.Clearnet Group Limited (May 27, 2011) (hereinafter “LCH letter”), p. 4.

²⁵ See 12 U.S.C. 5462(7)(C)(iv).

²⁶ See comment letter from The Options Clearing Corporation (May 26, 2011) (hereinafter “OCC letter”), p. 2.

Systemically important and systemic importance. One commenter suggested that a term contained within the definitions of “systemically important” and “systemic importance” – specifically, “significant liquidity or credit problems” – should also be defined.²⁷ Specifically, the commenter suggested that the Council should take into consideration definitions under deliberation by other G-20 countries, and coordinate the Council’s efforts with those of the Committee on Payment and Settlement Systems (CPSS) and the International Organization of Securities Commissions (IOSCO) when crafting these and other relevant definitions. The Council considered this comment and determined that it is appropriate to leave unchanged the statutory definitions of systemically important and systemic importance. Doing so does not preclude the Council from taking into account definitions under consideration by, or from coordinating its efforts with, international organizations, including CPSS and IOSCO. Moreover, the Council believes that the term “significant liquidity or credit problems” does not lend itself to a specific definition in the context of this final rule because the nature of liquidity and credit problems will depend on particular facts and circumstances, and the Council will take those facts and circumstances into consideration in making designation determinations.

§ 1320.10 Factors for Consideration in Designation.

In the proposed rule, the Council listed five considerations that section 804(a)(2) of the DFA requires the Council to consider in making such determinations. Of these considerations, four were specific: 1) aggregate monetary value of transactions; 2) aggregate counterparty exposure; 3) relationships, interdependencies, or other interactions with market participants; and 4) the effect that a failure or disruption of an FMU would have on critical markets, financial institutions, or the broader financial system. The fifth consideration – any other factors that the

²⁷ See comment letter from The Financial Services Roundtable (May 27, 2011) (hereinafter “Financial Services Roundtable letter”), p. 3.

Council deems appropriate – is open-ended. For each of the four specific considerations – the proposed rule contained non-exclusive subcategories to provide greater transparency as to how the Council will apply each of the specific considerations. The proposed rule did not provide for any categorical exclusions or exemptions.

These considerations and subcategories, as well as the metrics discussed earlier, prompted a broad range of responses from commenters addressing how these considerations are formulated and the nature of proposed subcategories, including additional considerations for inclusion, and qualitative and quantitative assessments on the appropriateness of certain criteria or metrics.

While several comments requested more detailed criteria, the Council believes that the establishment and application of rigid “bright-line” standards or thresholds would unduly constrain the designation process. The Council believes that the diverse nature of businesses operated by FMUs – spanning a broad range of asset classes, counterparties and market structures – does not lend itself to a fixed formula drawn consistently from an array of pre-determined considerations. In this context, the Council believes that a reasonable degree of flexibility is appropriate to permit refinement of its approach to designations as market structure, technology and competition evolve across key markets.

Two commenters observed that the standards for determining whether an FMU is, or is likely to become, systemically important are influenced by the financial market and economic conditions that might exist at the time of failure or disruption.²⁸ In testing for systemic importance, both of these commenters recommended that the Council assume that the failure or

²⁸ See comment letter from Americans for Financial Reform (May 27, 2011) (hereinafter “Americans for Financial Reform letter”), pp. 3-4; and see comment letter from Better Markets (May 27, 2011) (hereinafter “Better Markets letter”), p.2.

disruption of an FMU occurs at a time of “extreme but plausible market conditions.” They warned against relying on purely historical data in identifying such conditions on the grounds that damage caused by a build-up of systemic risk is most likely to occur as a result of unprecedented events. The Council considered these comments and agrees that, in determining whether the failure or disruption of an FMU *could* create, or increase, the risk of significant liquidity or credit problems, it should generally consider a range of circumstances, including “extreme but plausible” events. In considering such circumstances, the Council does not anticipate limiting itself to historical data.

With respect to the aggregate monetary value of transactions processed by an FMU, one commenter urged the Council to adopt a methodology for valuing derivatives transactions that does not distort comparisons made with securities or commodity transactions and suggested that the Council analyze evaluation criteria in light of the currencies in which an FMU’s obligations are denominated.²⁹ This commenter also recommended that, in the case of an FMU that is a clearinghouse, any assessment of the FMU’s potential liquidity exposures should consider liquidity strains from: (i) the failure of a bank or dealer which is a market counterparty of the clearinghouse for the purposes of investment of margin or other collateral; (ii) a delay in, or disruption to, collateral liquidation in the event of a participant’s default; (iii) and the failure of a settlement bank. Finally, this commenter asserted that the Council should, in assessing the potential systemic importance of a clearinghouse, take into account its linkages to other clearinghouses and the regulatory oversight of an FMU’s participants or members. As a general matter, the Council agrees with these comments and expects to apply the considerations set forth in section 1320.10 in a manner that is consistent with these recommendations, as appropriate to

²⁹ LCH letter, *supra* at 5.

the circumstances of each FMU. However, as noted below, the Council does not believe that the extent of regulatory oversight of an FMU is a dispositive consideration because Congress recognized that most FMUs are already subject to regulatory oversight, but nevertheless found that enhancements to the existing regulation of systemically important FMUs are necessary to mitigate systemic risk and promote financial stability.³⁰

Quantifiable benchmarks. Two commenters recommended that the final rule contain quantifiable benchmarks to better equip an FMU to assess the likelihood of being designated.³¹ Conversely, two other commenters recognized the difficulty of establishing quantifiable benchmarks that would function as a bright-line standard for determining whether an FMU is systemically important.³² The latter two commenters noted that bright-line designation criteria could overly restrict the Council’s ability to designate systemically important FMUs that might not otherwise meet certain size or risk thresholds, with one commenter specifically noting that it will be difficult to discern bright-line criteria in advance, as there is not always a correlation between size and risk. Another commenter noted that the Council should have flexibility to respond to the evolving market landscape, maintaining the ability to respond to unforeseen risks that may be difficult to define today.³³

While clear, identifiable “triggers” could provide predictable outcomes, the application of bright-line standards is not likely to achieve the stated purposes of Title VIII given the breadth of FMUs operating across diverse and rapidly evolving marketplaces. The Council believes that any degree of certainty provided by quantifiable benchmarks is outweighed by the risk that such

³⁰ See 12 U.S.C. 5461(a)(4).

³¹ See comment letters from the National Automated Clearing House Association (May 26, 2011) (hereinafter “NACHA letter”), p. 2 and MasterCard letter, *supra*, at 2.

³² See DTCC letter, *supra*, p.2; and see comment letter from The Clearing House Association, L.L.C. and The Clearing House Payments Company L.L.C. (May 20, 2011) (hereinafter “The Clearing House letter”), p. 3.

³³ Americans for Financial Reform letter, *supra*, at 4.

benchmarks could prevent the Council from designating systemically important FMUs in as effective a manner as necessary to achieve the objectives of Title VIII.

Therefore, the Council does not believe that it can effectively fulfill its mandate to mitigate risk and promote financial stability if it were to establish in advance bright-line triggers for determining systemic importance. This conclusion is underscored by the lack of consensus among commenters on the relative merits of certain subcategories, metrics, or other considerations to inform the designation process. Given the breadth of affected markets, not all metrics can be applied consistently across firms or asset classes. The Council serves its statutory mandate in preserving the flexibility to seek out and utilize substitute subcategories and metrics when appropriate to better inform the Council's assessment of systemic importance.

At this stage, while the Council believes that it would be premature to pre-judge or otherwise narrow the identification and collection of pertinent data, the Council does not anticipate that it will employ all of the identified metrics in every determination, and expects to refine its approach, as appropriate, as its work progresses and markets evolve.³⁴ The Council intends to rely on quantitative measures as inputs to the process, particularly for making its initial assessments at stage one of the designation process. As outlined in the NPRM, these metrics do not represent quantifiable thresholds, but rather provide an illustrative list of the types of metrics that will inform the Council's work. The Council believes that, in most cases, much of this data is available to regulators, although the relevance of particular metrics will vary by institution or market segment. If data are not available or otherwise applicable, the Council will endeavor to identify appropriate substitutes. In addition, the Council will, to the extent practicable, seek to

³⁴ In utilizing a more flexible approach, one commenter urged the Council to consider the potential for creating inconsistent standards that may lead to unintended competitive advantages. See DTCC letter, supra, p. 4.

avoid unnecessary and unintended anti-competitive effects from its selection of appropriate metrics.

Retail payment systems. Several commenters made suggestions regarding the Council's consideration of FMUs operating retail payment systems, which one commenter defined as including check, Automated Clearing House ("ACH"), and debit and credit card networks.³⁵ Specifically, a number of these commenters stated that retail payment systems are not systemically important and should not be designated as such for a variety of reasons, including the fact that they process low aggregate value transactions with broad availability of substitutes. These commenters urged the Council to reconsider its position against including a categorical exclusion of retail payment systems from consideration.³⁶ Two commenters acknowledged the Council's proposed rationale for not categorically excluding retail payment systems, but suggested that the final rule contain a rebuttable presumption that retail payment systems are not systemically important.³⁷ Some commenters suggested that in the absence of a categorical exclusion, the Council consider the extent of existing regulatory oversight over retail payment systems, the different structures of retail payment systems, and finality in settlement.³⁸ One of these commenters suggested that the Council broadly interpret the "availability of substitutes" subcategory contained in section 1320.10(d)(2) of the proposed rule to include any payment method that satisfies the same payment need.³⁹ Conversely, one commenter urged the Council to, at a minimum, designate large credit card systems, on the basis that not doing so would put the Council in a position where it would not be fulfilling its responsibilities under the DFA.⁴⁰

³⁵ See comment letter from the American Bankers Association (May 27, 2011) (hereinafter "ABA letter"), p. 4.

³⁶ See e.g., MasterCard letter, supra, at 2 and AMEX letter, supra, at 2.

³⁷ MasterCard letter, supra, at 2, and NACHA letter, supra, at 3.

³⁸ AMEX letter, supra, at 2-5, and NACHA letter, supra, at 3.

³⁹ See e.g., NACHA letter, supra at 4.

⁴⁰ Americans for Financial Reform letter, supra, at 3.

The Council recognizes that the definition of an FMU covers a large number of systems and a larger number of system operators. Within payment systems, the Council expects to focus on FMUs that operate large-value systems and not on FMUs that operate low-value systems for which there appear to be readily available and timely alternative payment mechanisms. However, the Council has decided against including in the final rule any categorical exclusion for FMUs operating retail payment or other systems, both because there are not clear distinctions between various types of systems, and because such an exclusion would impair the Council's ability to respond appropriately to new information, changed circumstances, and future developments. The Council has also decided against including in the final rule a rebuttable presumption that retail payment systems are not systemically important. The Council believes that such a presumption is unnecessary because the initial task of determining whether any FMU is systemically important already rests with the Council.⁴¹

The Council also decided not to add considerations more narrowly tailored to the characteristics of retail payment systems, because the Council does not believe additional considerations are necessary or appropriate at this time. For example, as discussed above, the Council does not believe that the extent of regulatory oversight is an appropriate consideration.⁴² Lastly, under section 1320.10(d)(2), the Council will consider with respect to retail payment systems, the availability of substitute mechanisms to make low-value payments.

Subcategories. In the NPRM, the Council requested comment on whether the subcategories in the proposed rule for each specific consideration were clear, sufficiently detailed, and appropriate. To the extent applicable, the Council also sought feedback on the

⁴¹ See 12 U.S.C. 5463(c)(2)(C), which provides that an FMU may request a hearing before the Council to demonstrate that the Council's proposed determination is not supported by substantial evidence.

⁴² See 12 U.S.C. 5461.

merits of potential additional subcategories, as well as the elimination or modification of the subcategories.

The Council received several comments on the proposed subcategories. One commenter suggested that the Council consider a common methodology for determining the value of derivatives transactions across various asset classes and currencies; an FMU's potential liquidity exposure in the event of a participant default; counterparty credit exposure to the FMU; and the nature of regulatory oversight and intermarket linkages of a particular FMU.⁴³ Another commenter asserted that corporate governance arrangements and risk management oversight practices should be considered by the Council.⁴⁴

The Council has considered these recommendations for designation determinations and has adopted the proposed subcategories in the final rule, with one technical change in section 1320.10(c) regarding interactions with participants to make clear that the Council should consider interactions between participants of the same type of FMU or PCS activity.

Importantly, these subcategories are neither exclusive nor rigid, and are provided as illustrative examples of potential criteria to improve transparency to market participants regarding factors that may be considered in the Council's determinations. Nonetheless, the comments offered on the subcategories will inform the Council's analysis. Furthermore, the Council may consider additional subcategories or find certain subcategories inapplicable to specific cases.

§ 1320.11 Stage Two Consultation with Financial Market Utility.

In general. In the NPRM, the Council outlined the two-stage process that the Council, working with its committees, will use to designate FMUs. The NPRM described the stage one

⁴³ LCH letter, *supra*, at 5.

⁴⁴ See comment letter from the Council of Institutional Investors (May 13, 2011) (hereinafter "Council letter"), p. 1.

assessment process and explained that those FMUs that are determined to warrant further assessment will advance to stage two (such advancement does not require a two-thirds vote of Council members then serving).⁴⁵ The NPRM explained that FMUs that advance to stage two will receive written notification from the Council that they are under consideration for designation, and that each such FMU may voluntarily submit written materials to the Council in support of, or in opposition to, designation by the Council within such time as the Council determines appropriate. The Council stated that the stage two consultation process would help the Council make better informed decisions in determining whether to propose or not propose the designation of an FMU. The Council also noted that the stage two consultation process would benefit an FMU by, for example, enabling it to demonstrate that it is not systemically important.

§ 1320.11(a) Content of consultation notices. Two commenters suggested that the Council's notices should specify why the Council is considering the FMU for potential designation so that the FMU can prepare an appropriate response.⁴⁶ One commenter suggested that the Council provide the FMU with all applicable information the Council relied on in making the determination to advance an FMU to stage two.⁴⁷ The Council agrees that some degree of specificity is appropriate in all circumstances, and additional clarification may be appropriate under certain circumstances, such as when the Council believes it will help an FMU tailor its response. Accordingly, under section 1320.12(a) of the final rule, the Council's notice of proposed determination to designate an FMU as systemically important will contain proposed findings of fact supporting the Council's proposed determination. Further, the Council expects

⁴⁵ Section 804 of the DFA requires a vote of no fewer than two-thirds of the members of the Council then serving, including the affirmative vote of the Chairperson of the Council, before the Council may either designate an FMU or rescind the designation of an FMU. 12 U.S.C. 5463. The stage 1 and stage 2 processes, including the section 1320.11 consultation process, precede any Council proposed or final determination to designate an FMU.

⁴⁶ See e.g., AMEX letter, supra, at 5-6.

⁴⁷ Financial Services Roundtable letter, supra, at 2.

that additional clarity, for example, may be appropriate where an FMU operates more than one system and the Council is focusing on only one particular system for designation. Under those circumstances, the Council expects that its notice will identify the system the Council is reviewing when considering the FMU for designation.

The Council has decided not to include in the rule a standard or requirement to provide FMUs with the stage one information that informed its decision to advance an FMU to stage two. The Council anticipates relying upon publicly available information and data from the appropriate Supervisory Agencies during stage one. Accordingly, information obtained from one or more federal agencies with jurisdiction over an FMU could in some instances contain confidential supervisory information not appropriate for disclosure. Because an FMU under consideration will have an opportunity to understand the information considered by the Council to be most relevant if the Council proposes to designate the FMU, the Council believes its decision not to include in the rule a standard or requirement regarding providing stage one information to an FMU to be appropriate.

Confidentiality of notices. One commenter suggested that the final rule should clarify that the Council will keep confidential a notice or information request to an FMU regarding its potential designation.⁴⁸ Another commenter suggested that the Council implement procedures that provide market participants the opportunity to offer input on the possible designation of an FMU.⁴⁹ The Council considered these two comments and determined that it will not publicize the notices or information requests⁵⁰ submitted to FMUs. The Council understands that

⁴⁸ AMEX letter, *supra*, at 5.

⁴⁹ DTCC letter, *supra*, at 6.

⁵⁰ Council information requests to FMUs are covered by section 1320.20 of the proposed rule, which provides that the Council's notice must describe the basis for the Council's belief that the FMU is, or is likely to become, systemic important.

maintaining the confidentiality of the notices and information requests is important to prevent potentially destabilizing market speculation that could occur if the Council were to make such notices public. This approach also is consistent with the DFA, which provides that any materials prepared by the Council regarding its assessment of the systemic importance of FMUs shall be exempt from disclosure pursuant to the Freedom of Information Act.⁵¹ Finally, the Council will in its annual report to Congress disclose publicly its final designation determinations and the basis for those determinations as required by Section 112 of the DFA.⁵²

§ 1320.11(b) Timeframe to respond to notices. In the NPRM, the Council requested comment on the merits of establishing a set time period for FMUs to submit written materials to the Council or whether flexibility in the time permitted for FMUs to submit information is appropriate. One commenter stated that FMUs should have at least 60 days to provide information to the Council after receiving a consultative notice and that the final rule should contain a mechanism by which an FMU can request an extension.⁵³ Another commenter suggested that, in the absence of an emergency, FMUs should be given 90 days to respond to Council notices or requests.⁵⁴ The Council considered these comments and determined that a set 60-day or 90-day response time is too inflexible and, in most cases, too long, particularly in light of the fact that any FMU that the Council may later propose to designate will have a second opportunity to submit written materials to the Council under section 1320.12 of the final rule. However, the Council believes that there may be exceptional circumstances where a 60-day, 90-

⁵¹ 5 U.S.C. 552. See 12 U.S.C. 5468(g). At the same time, the Council recognizes that the FMU itself (as opposed to the Council or a Supervisory Agency) may be required to disclose notices or information requests to the extent required by applicable law, particularly if the FMU is a public company required to comply with federal securities laws.

⁵² 12 U.S.C. 5322(a)(2)(N)(iv).

⁵³ Financial Services Roundtable letter, supra, at 2.

⁵⁴ AMEX letter, supra, at 5.

day, or even longer response time may be appropriate. As a result, the Council believes that it is appropriate to preserve administrative flexibility to tailor a response time to the particular facts and circumstances for each FMU, so as to avoid pro forma delay in inappropriate circumstances.

Therefore, the final rule is substantively similar to the proposed rule, except that the Council revised section 1320.11(b)(3) to require the Council to consider only those written materials that are “timely” submitted by the FMU.

§ 1320.12 Advance notice of proposed determination

The proposed rule outlined the process by which the Council will provide an FMU with advance notice and an opportunity for a hearing to contest the Council’s proposed designation of an FMU as systemically important or a proposed rescission of a prior designation. One commenter noted that a two-thirds vote of the Council is necessary for a proposed designation and suggested that section 1320.12 directly state the two-thirds Council vote standard.⁵⁵ The Council agrees with the suggestion, and has revised section 1320.12(a) of the final rule to state that a proposed determination of designation or rescission shall be made by a vote of the Council under section 1320.13(c).

The Council has also made several non-substantive changes to section 1320.12 to provide greater clarity.⁵⁶

§ 1320.13 Council Determination Regarding Systemic Importance

⁵⁵ Financial Services Roundtable letter, supra, at 2.

⁵⁶ For example, changes to § 1320.12 clarify that before the Council makes a final determination to rescind a designated FMU’s designation of systemic importance, the Council must provide the designated FMU with advance notice of the proposed rescission, including the right to request a written or oral hearing to challenge the proposed rescission.

The proposed rule set out the requirement for the Council to designate an FMU and rescind the designation of an FMU depending on whether the FMU is, or is likely to become, systemically important. The proposed rule provided that any proposed or final determination by the Council is non-delegable and requires at least a two-thirds vote of the voting members then serving, including the affirmative vote of the Chairperson of the Council. These requirements track the language in section 804(a)(1) of the DFA.⁵⁷

In the NPRM, the Council proposed to reassess designated FMUs at least annually, as well as conduct stage one reviews of FMUs that appear to be, or that appear likely to become, systemically important. One commenter recommended adding a provision allowing an FMU to apply to be designated as systemically important as well as to apply to have such designation rescinded.⁵⁸ Another commenter suggested that the final rule provide for periodic reexamination and reevaluation of FMU designations.⁵⁹ The Council agrees that a periodic review of each designated FMU should help to maintain the integrity of the designation process and minimize the risk of unnecessary regulatory burdens on a designated FMU, particularly in light of the fact that an FMU's role in the financial system will not be static. Similarly, the Council believes that a periodic review of any FMUs that are potentially systemically important, but that have not been designated as such, is important to evaluate any new developments in the roles these FMUs have in the financial system. As a result, the Council anticipates conducting reviews of both designated FMUs and potentially systemically important FMUs on a periodic basis.

However, the Council believes that it is important to retain flexibility in the timing for periodic reviews in order to take into account evolving market conditions. Accordingly, the

⁵⁷ See 12 U.S.C. 5463(a)(1).

⁵⁸ See LCH letter, *supra*, at 7.

⁵⁹ See DTCC letter, *supra*, at 4.

Council is not including a provision regarding periodic reviews in the final rule. In addition, taking into consideration the anticipated periodic reviews, the Council does not believe that it is necessary or appropriate to include provisions in the final rule for an “application process” that an FMU could use to apply for designation or to seek rescission of a designation.

§ 1320.13(a) Likely to become systemically important. One commenter suggested that when a designation is based on an assessment that an FMU is likely to become systemically important, as opposed to an FMU already being systemically important, the Council should make this differentiation clear.⁶⁰ The Council considered this comment and expects that it will state in both its proposed determination letter, under section 1320.12, and its final determination letter, under section 1320.15, whether the proposed and final determinations are based on whether the FMU is systemically important or is likely to become systemically important.

The Council also recognizes that for newly formed or start-up FMUs, complete information regarding each of the four specific considerations may not be available or cover a sufficient historical period. In such cases, the Council will need to consider whether such an FMU “is likely to become systematically important.” In doing so, the Council will take into consideration available information regarding the four specific considerations, including estimates and projections of volume and value of cleared or settled transactions. In addition, the Council will consider the importance to the financial system and financial institutions of the market(s) and products to be supported by the FMU, the availability of substitutes for the FMU, the type and nature of expected participants and risks to be borne by the FMU. In designating a newly formed FMU that is likely to become systemically important, the Council also recognizes that the FMU may not in fact ultimately achieve over time a level and scope of activity that

⁶⁰ LCH letter, supra, at 7.

would pose systemic risk to the U.S. financial system. As a general matter, the Council expects to evaluate annually whether any previous designations should be rescinded. Where a newly formed FMU does not achieve a level and scope of activity that would pose systemic risk to the U.S. financial system, the Council would then consider rescinding the FMU designation under section 1320.13(b).

§ 1320.13(c) Council membership at time of designation determinations. One commenter suggested that the Council make no proposed or final determinations regarding designations of FMUs until all voting and non-voting members of the Council are in place.⁶¹ The Council determined that this suggestion conflicts with language in the DFA specifying that designations are to be made “by a vote of not fewer than 2/3 of members then serving. . . .”⁶² As a result, the Council decided to retain the language of the proposed rule. The Council has also made several non-substantive changes to provide greater clarity with regard to proposed and final determinations.

§ 1320.14 Emergency Exception

The proposed rule authorized the Council to waive or modify any or all of the notice, hearing, and other requirements of sections 1320.11 and 1320.12 with respect to an FMU if (1) the Council determined that the waiver or modification is necessary to prevent or mitigate an immediate threat to the financial system posed by the FMU and (2) the Council provides notice of the waiver or modification to the applicable FMU , as soon as practicable, but not later than 24 hours after the waiver or modification. Invoking the emergency exception would require the affirmative vote of at least two-thirds of the Council members then serving, including the affirmative vote of the Chairperson of the Council. The Council requested comment on whether

⁶¹ Financial Services Roundtable letter, supra, at 2.

⁶² 12 U.S.C. 5463(a)(1) (emphasis added).

it should provide a designated FMU an opportunity for a hearing to contest the Council's determination to waive the notification and hearing requirements and the extent to which the opportunity for a hearing should mirror section 113(f)(4) and (5) of the DFA.

One commenter suggested that, when the Council invokes the emergency exception, the Council should disclose the basis for its decision and give the FMU the option of an after-the-fact hearing to contest such decision.⁶³ The Council agrees with the comment and has revised section 1320.14 accordingly. The procedures governing the conduct of an after-the-fact hearing are substantively similar to those contained in section 1320.12 of the final rule, except that any waiver or modification under the emergency exception will take effect immediately.

§ 1320.15 Notification of Final Determination Regarding Systemic Importance

The proposed rule set the deadline for the Council to notify an FMU of the Council's final determination after providing the FMU notice of the proposed determination and an opportunity for a hearing. The proposed rule substantially mirrored the requirements contained in the DFA. The Council requested comment on whether it should provide findings of fact in its final determination notification to an FMU that did not timely request a hearing. One commenter suggested that the Council's final determination notification to an FMU that did not timely request a hearing should include the Council's factual findings.⁶⁴ The Council has decided not to include findings of fact in the "notification of final determination if no hearing" because the section substantively mirrors the DFA.⁶⁵ The Council revised section 1320.15 of the final rule to clarify the date by which the Council must provide to an FMU written notification of the final determination of the Council after a hearing. Specifically, the Council must provide written

⁶³ LCH letter, *supra*, at 8.

⁶⁴ LCH letter, *supra*, at 8.

⁶⁵ *See* 12 U.S.C. 5463(d)(2).

notification within 60 calendar days of the “hearing date.” The definition of the term “hearing date” distinguishes between hearings conducted through the submission of written materials and hearings conducted through oral argument and oral testimony.

§ 1320.16 Extension of Time Period

The proposed rule authorized the Council to extend the time periods by which an FMU may request a hearing and submit written materials to contest the Council’s proposed determination, the 24 hour time period for the Council to notify an FMU of an emergency designation, and the time period for the Council to notify an FMU of its final determination. One commenter suggested that FMUs should have no longer than 90 days to request a hearing and submit written materials to contest a proposed determination; that the Council should not extend the 24-hour time period for the Council to notify an FMU of an emergency designation; and that the Council should notify an FMU of its final determination within 90 days.⁶⁶ The Council considered the suggestions and decided to adopt section 1320.16 substantially as proposed, because it substantively mirrors the DFA and provides the Council with flexibility to grant itself and FMUs extensions of time as necessary or appropriate.⁶⁷ The final rule contains one change in that it clarifies that the Council may extend “any” time period established in sections 1320.12, 1320.14, or 1320.15.

§ 1320.20 Council Information Collection and Coordination

The proposed rule authorized the Council to require an FMU to submit information that the Council may require for the sole purpose of assessing whether the FMU is systemically

⁶⁶ LCH letter, *supra*, at 8.

⁶⁷ *See* 12 U.S.C. 5363(e).

important. However, before the Council may impose an information collection burden on an FMU, the Council must have reasonable cause to believe that the FMU meets the standards for systemic importance. The Council must also coordinate with the FMU's Supervisory Agency to determine if the requested information is available from or may be obtained by the Supervisory Agency. If the Supervisory Agency is unable to provide the Council with the requested information in less than 15 calendar days after the date the material is requested, the Council may then request the information directly from the FMU. In requesting information from an FMU, the Council must provide a written explanation of the basis for the Council's reasonable cause determination. The Council requested comment on the utility of providing an FMU with a written explanation of the basis for its belief that the FMU is systemically important.

Several commenters generally supported the proposed approach. For example, one commenter agreed that, before requiring an FMU to provide information for purposes of assessing systemic significance, the Council should determine that it has reasonable cause to believe that the FMU meets the standards for systemic importance and that such information cannot be timely obtained from the FMU's Supervisory Agency.⁶⁸ Another commenter agreed that the Council should provide an FMU with a written explanation of the basis for the Council's belief that the FMU is systemically important before requiring an FMU to provide information to the Council.⁶⁹

Several commenters, on the other hand, suggested revisions. For example, one commenter stated that FMUs should be able to bypass information submission requirements by consenting to designation.⁷⁰ Another commenter suggested that the Council redraft the

⁶⁸ Financial Services Roundtable letter, supra, at 4.

⁶⁹ LCH letter, supra, at 9.

⁷⁰ OCC letter, supra, at 2.

regulatory text to make clear that the Council will not collect information directly from FMUs during stage one.⁷¹ This commenter also suggested that the Council take into account the expense of the FMU data collection process when it makes requests for information from retail FMUs.⁷²

The Council considered these comments and has determined to adopt section 1320.20 substantially as proposed. The Council will not allow an FMU to bypass information submission requirements by consenting to designation. The Council has a responsibility to determine whether an FMU meets the standards for systemic importance. With respect to the suggestion that the Council restrict itself from collecting information directly from FMUs during stage one and that the Council take into account the expenses involved in data collection, the Council expects, as a general matter, not to collect any information from FMUs during stage one; rather, the Council expects that, in most instances, it will obtain the required information during stage one from publicly available sources and an FMU's Supervisory Agency. Nevertheless, the final rule limits the Council's ability to require FMUs to submit information by providing that the Council can request information only if it has reasonable cause to believe the FMU is, or is likely to become, systemically important and after coordinating with the FMU's Supervisory Agency. Accordingly, the Council has not adopted additional restrictions on the methods or timing of collecting information from FMUs in the final rule because the Council believes that these restrictions appropriately balance the needs of the Council to timely obtain sufficient information about FMUs with the costs associated with collecting such information. Once the Council has completed at least one full cycle of designations and reevaluations of designated FMUs, the Council will reexamine whether any changes to its analytical framework are warranted,

⁷¹ ABA letter, supra, at 4.

⁷² ABA letter, supra, at 3.

including whether any changes to the information-collection provisions of the rule may be appropriate.

Moreover, the final rule makes clarifying changes to one of the prerequisites for the Council to collect information from an FMU. The proposed rule required the Council to determine that it has reasonable cause to believe that an FMU meets the standards for systemic importance. The final rule provides that the Council must determine that it has reasonable cause to believe that the FMU is, or is likely to become, systemically important. The Council made this change to conform this information collection prerequisite to the standard in section 1320.10 by which the Council will determine whether to make a proposed or final determination.

III. Administrative Law Matters

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 final rule would apply only to FMUs whose failure could pose a threat to the stability of the U.S. financial system. Size is an important factor, although not the exclusive factor, in assessing whether an FMU's failure could pose a threat to the stability of the U.S. financial system. However, the Council does not expect the rule to directly affect a substantial number of small entities. Accordingly, a final regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) is not required.

Paperwork Reduction Act

The collection of information contained in this final rule has been reviewed and approved by the Office of Management and Budget (OMB) in accordance with the requirements of the

Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1505-. An agency may not conduct or sponsor, and an organization is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB.

The collection of information that is contained in this final rulemaking is found in sections section 1320.11, section 1320.12, section 1320.14, and section 1320.20. The collection of information in section 1320.11 affords financial market utilities that are under consideration for designation, or rescission of designation, an opportunity to submit written materials to the Council in support of, or in opposition to, designation or rescission of designation. The collection of information in section 1320.12 is required by section 804(c)(2)(C) of the DFA and affords financial market utilities an opportunity to contest a proposed determination of the Council by requesting a hearing and submitting written materials (or, at the sole discretion of the Council, oral testimony and oral argument). The collection of information in section 1320.14 affords financial market utilities an opportunity to contest the Council's waiver or modification of the notice, hearing, or other requirements contained in section 1320.11 and section 1320.12 by requesting a hearing and submitting written materials (or, at the sole discretion of the Council, oral testimony and oral argument). The collection of information in section 1320.20 is authorized by section 809 of the DFA and will be used by the Council to determine whether to designate or rescind the designation of an FMU. The collection of information under section 1320.20 is mandatory. The likely respondents are businesses or other for-profit and not-for-profit organizations.

The estimated total annual reporting burden associated with the collection of information in this final rule is 500 hours.

Executive Order 12866

Executive Orders 13563 and 12866 direct 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.

IV. Text of Final Rule

List of Subjects in 12 CFR Part 1320

Administrative practice and procedure, Banks, banking, Commodity futures, Electronic funds transfers, Financial market utilities, Securities.

Financial Stability Oversight Council

Authority and Issuance:

For the reasons set forth in the preamble, the Financial Stability Oversight Council adds a new part 1320 to 12 CFR chapter XIII, to read as follows:

PART 1320 – DESIGNATION OF FINANCIAL MARKET UTILITIES

Sec.

Subpart A - General

1320.1 Authority and purpose.

1320.2 Definitions.

Subpart B – Consultations, determinations and hearings

1320.10 Factors for consideration in designations.

1320.11 Consultation with financial market utility.

1320.12 Advance notice of proposed determination

1320.13 Council determination regarding systemic importance.

1320.14 Emergency exception.

1320.15 Notification of final determination regarding systemic importance.

1320.16 Extension of time periods.

Subpart C – Information Collection

1320.20 Council information collection and coordination.

Authority: 12 U.S.C. 5321; 12 U.S.C. 5322; 12 U.S.C. 5463; 12 U.S.C. 5468; 12 U.S.C. 5469

Subpart A - General

§ 1320.1 Authority and purpose.

(a) Authority. This part is issued by the Financial Stability Oversight Council under sections 111, 112, 804, 809, and 810 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) (12 U.S.C. 5321, 5322, 5463, 5468, and 5469).

(b) Purpose. The purpose of this part is to set forth the standards and procedures governing the Council’s designation of a financial market utility that the Council determines is, or is likely to become, systemically important.

§ 1320.2 Definitions.

The terms used in this regulation have the following meanings:

Appropriate Federal banking agency. The term “appropriate Federal banking agency” has the same meaning as in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), as amended.

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

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

Designated financial market utility. The term “designated financial market utility” means a financial market utility that the Council has designated as systemically important under § 1320.13.

Designated clearing entity. The term “designated clearing entity” means a designated financial market utility that is a derivatives clearing organization registered under section 5b of the Commodity Exchange Act (7 U.S.C. 7a-1) or a clearing agency registered with the Securities and Exchange Commission under section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78q-1).

Financial institution. The term “financial institution”—

(1) Means—

(i) A depository institution as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813);

(ii) A branch or agency of a foreign bank, as defined in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101);

(iii) An organization operating under section 25 or 25A of the Federal Reserve Act (12 U.S.C. 601-604a and 611 through 631);

(iv) A credit union, as defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752);

(v) A broker or dealer, as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c);

(vi) An investment company, as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a-3);

(vii) An insurance company, as defined in section 2 of the Investment Company Act of 1940 (15 U.S.C. 80a-2);

(viii) An investment adviser, as defined in section 202 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2);

(ix) A futures commission merchant, commodity trading advisor, or commodity pool operator, as defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a); and

(x) Any company engaged in activities that are financial in nature or incidental to a financial activity, as described in section 4 of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)).

(2) Does not include designated contract markets, registered futures associations, swap data repositories, and swap execution facilities registered under the Commodity Exchange Act (7 U.S.C. 1 et seq.), or national securities exchanges, national securities associations, alternative trading systems, securities information processors solely with respect to the activities of the entity as a securities information processor, security-based swap data repositories, and swap execution facilities registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), or designated clearing entities, provided that the exclusions in this paragraph apply only with respect to the activities that require the entity to be so registered.

Financial market utility. The term “financial market utility”—

(1) Means any person that manages or operates a multilateral system for the purpose of transferring, clearing, or settling payments, securities, or other financial transactions among financial institutions or between financial institutions and the person; and

(2) Does not include—

(i) Designated contract markets, registered futures associations, swap data repositories, and swap execution facilities registered under the Commodity Exchange Act (7 U.S.C. 1 et seq.), or national securities exchanges, national securities associations, alternative trading systems, security-based swap data repositories, and swap data execution facilities registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), solely by reason of their providing facilities for comparison of data respecting the terms of settlement of securities or futures transactions effected on such exchange or by means of any electronic system operated or controlled by such entities, provided that the exclusions in this clause apply only with respect to the activities that require the entity to be so registered; and

(ii) Any broker, dealer, transfer agent, or investment company, or any futures commission merchant, introducing broker, commodity trading advisor, or commodity pool operator, solely by reason of functions performed by such institution as part of brokerage, dealing, transfer agency, or investment company activities, or solely by reason of acting on behalf of a financial market utility or a participant therein in connection with the furnishing by the financial market utility of services to its participants or the use of services of the financial market utility by its participants, provided that services performed by such institution do not constitute critical risk management or processing functions of the financial market utility.

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

(1) The date on which the Council receives all of the written materials timely submitted by the financial market utility for a hearing that is conducted without oral testimony; or

(2) The final date on which the Council convenes for the financial market utility to present oral testimony.

Payment, clearing, or settlement activity.

(1) The term “payment, clearing, or settlement activity” means an activity carried out by 1 or more financial institutions to facilitate the completion of financial transactions, but shall not include any offer or sale of a security under the Securities Act of 1933 (15 U.S.C. 77a et seq.), or any quotation, order entry, negotiation, or other pre-trade activity or execution activity.

(2) For purposes of paragraph (1) of this section, the term “financial transaction” includes--

- (i) Funds transfers;
- (ii) Securities contracts;
- (iii) Contracts of sale of a commodity for future delivery;
- (iv) Forward contracts;
- (v) Repurchase agreements;
- (vi) Swaps;
- (vii) Security-based swaps;
- (viii) Swap agreements;
- (ix) Security-based swap agreements;
- (x) Foreign exchange contracts;
- (xi) Financial derivatives contracts; and
- (xii) Any similar transaction that the Council determines to be a financial transaction

for purposes of this part.

(3) When conducted with respect to a financial transaction, payment, clearing, and settlement activities may include—

(i) The calculation and communication of unsettled financial transactions between counterparties;

(ii) The netting of transactions;

(iii) Provision and maintenance of trade, contract, or instrument information;

(iv) The management of risks and activities associated with continuing financial transactions;

(v) Transmittal and storage of payment instructions;

(vi) The movement of funds;

(vii) The final settlement of financial transactions; and

(viii) Other similar functions that the Council may determine.

(4) Payment, clearing, and settlement activities shall not include public reporting of swap transactions under section 727 or 763(i) of the Dodd-Frank Act.

Supervisory Agency. (1) The term “Supervisory Agency” means the Federal agency that—

(i) Has primary jurisdiction over a designated financial market utility under Federal banking, securities, or commodity futures laws as follows—

(A) The Securities and Exchange Commission, with respect to a designated financial market utility that is a clearing agency registered with the Securities and Exchange Commission;

(B) The Commodity Futures Trading Commission, with respect to a designated financial market utility that is a derivatives clearing organization registered with the Commodity Futures Trading Commission;

(C) The appropriate Federal banking agency, with respect to a designated financial market utility that is an institution described in section 3(q) of the Federal Deposit Insurance Act;

(D) The Board of Governors, with respect to a designated financial market utility that is otherwise not subject to the jurisdiction of any agency listed in clauses (i), (ii), and (iii); or

(ii) Would have primary jurisdiction over a financial market utility if the financial market utility were a designated financial market utility under paragraph (1) of this section.

(2) If a financial market utility is subject to the jurisdictional supervision of more than one agency listed in paragraph (1) of this section, then such agencies should agree on one agency to act as the Supervisory Agency, and if such agencies cannot agree on which agency has primary jurisdiction, the Council shall decide which is the Supervisory Agency for purposes of this part.

Systemically important and systemic importance. The terms “systemically important” and “systemic importance” mean a situation where the failure of or a disruption to the functioning of a financial market utility could create, or increase, the risk of significant liquidity or credit problems spreading among financial institutions or markets and thereby threaten the stability of the financial system of the United States.

Subpart B – Consultations, Determinations and Hearings

§ 1320.10 Factors for consideration in designations.

In making any proposed or final determination with respect to whether a financial market utility is, or is likely to become, systemically important under this part, the Council shall take into consideration:

(a) The aggregate monetary value of transactions processed by the financial market utility, including without limitation—

- (1) The number of transactions processed, cleared or settled;
- (2) The value of transactions processed, cleared or settled; and
- (3) The value of other financial flows.

(b) The aggregate exposure of the financial market utility to its counterparties, including without limitation—

- (1) Credit exposures, which includes but is not limited to potential future exposures; and
- (2) Liquidity exposures.

(c) The relationship, interdependencies, or other interactions of the financial market utility with other financial market utilities or payment, clearing, or settlement activities, including without limitation interactions with different types of participants in those utilities or activities.

(d) The effect that the failure of or a disruption to the financial market utility would have on critical markets, financial institutions, or the broader financial system, including without limitation —

- (1) Role of the financial market utility in the market served;
- (2) Availability of substitutes;
- (3) Concentration of participants;
- (4) Concentration by product type;

- (5) Degree of tiering; and
- (6) Potential impact or spillover in the event of a failure or disruption.
- (e) Any other factors that the Council deems appropriate.

§ 1320.11 Consultation with financial market utility.

Before providing a financial market utility notice of a proposed determination under § 1320.12, the Council shall provide the financial market utility with—

- (a) Written notice that the Council is considering whether to make a proposed determination with respect to the financial market utility under § 1320.13; and
- (b) An opportunity to submit written materials to the Council, within such time as the Council determines to be appropriate, concerning—
 - (1) Whether the financial market utility is systemically important taking into consideration the factors set out in § 1320.10; and
 - (2) Proposed changes by the financial market utility that could—
 - (i) Reduce or increase the inherent systemic risk the financial market utility poses and the need for designation under § 1320.13; or
 - (ii) Reduce or increase the appropriateness of rescission under § 1320.13.
 - (3) The Council shall consider any written materials timely submitted by the financial market utility under this section before making a proposed determination under section 1320.13.

§ 1320.12 Advance notice of proposed determination.

(a) Notice of proposed determination and opportunity for hearing. Before making any final determination on designation or rescission under § 1320.13, the Council shall propose a determination and provide the financial market utility with advance notice of the proposed

determination, and proposed findings of fact supporting that determination. A proposed determination shall be made by a vote of the Council in the manner described in § 1320.13(c).

(b) Request for hearing. Within 30 calendar days from the date of any provision of notice of the proposed determination of the Council, the financial market utility may request, in writing, an opportunity for a written or oral hearing before the Council to demonstrate that the proposed designation or rescission of designation is not supported by substantial evidence.

(c) Written submissions. Upon receipt of a timely request, the Council shall fix a time, not more than 30 calendar days after receipt of the request, unless extended by the Council at the request of the financial market utility, and place at which the financial market utility may appear, personally or through counsel, to submit written materials, or, at the sole discretion of the Council, oral testimony and oral argument.

§ 1320.13 Council determination regarding systemic importance.

(a) Designation determination. The Council shall designate a financial market utility if the Council determines that the financial market utility is, or is likely to become, systemically important.

(b) Rescission determination. The Council shall rescind a designation of systemic importance for a designated financial market utility if the Council determines that the financial market utility no longer meets the standards for systemic importance.

(c) Vote required. Any determination under paragraph (a) or (b) of this section and any proposed determination under § 1320.12 shall—

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

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

(d) Consultations. Before making any determination under paragraph (a) or (b) of this section or any proposed determination under § 1320.12, the Council shall consult with the relevant Supervisory Agency and the Board of Governors.

§ 1320.14 Emergency exception.

(a) Emergency exception. Notwithstanding §§ 1320.11 and 1320.12, the Council may waive or modify any or all of the notice, hearing, and other requirements of §§ 1320.11 and 1320.12 with respect to a financial market utility if—

(1) The Council determines that the waiver or modification is necessary to prevent or mitigate an immediate threat to the financial system posed by the financial market utility; and

(2) The Council provides notice of the waiver or modification, and an explanation of the basis for the waiver or modification, to the financial market utility concerned, as soon as practicable, but not later than 24 hours after the waiver or modification.

(b) Vote required. Any determination by the Council under paragraph (a) to waive or modify any of the requirements of §§ 1320.11 and 1320.12 shall—

(1) Be made by the Council; and

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

(c) Request for hearing. Within 10 calendar days from the date of any provision of notice of waiver or modification of the Council, the financial market utility may request, in writing, an opportunity for a written or oral hearing before the Council to demonstrate that the basis for the waiver or modification is not supported by substantial evidence.

(d) Written submissions. Upon receipt of a timely request, the Council shall fix a time, not more than 30 calendar days after receipt of the request, and place at which the financial market utility may appear, personally or through counsel, to submit written materials, or, at the sole discretion of the Counsel, oral testimony and oral argument.

(e) Notification of hearing determination. If a financial market utility makes a timely request for a hearing under paragraph (c) of this section, the Council shall, not later than 30 calendar days after the hearing date, notify the financial market utility of the determination of the Council, which shall include a statement of the basis for the determination of the Council.

§ 1320.15 Notification of final determination regarding systemic importance.

(a) Notification of final determination after a hearing. (1) Within 60 calendar days of the hearing date, the Council shall provide to the financial market utility written notification of the final determination of the Council under § 1320.13, which shall include findings of fact upon which the determination of the Council is based.

(b) Notification of final determination if no hearing. If the Council does not receive a timely request for a hearing under § 1320.12, the Council shall provide the financial market utility written notification of the final determination of the Council under § 1320.13 not later than 30 calendar days after the expiration of the date by which a financial market utility could have requested a hearing.

§ 1320.16 Extension of time periods.

The Council may extend any time period established in §§ 1320.12, 1320.14, or 1320.15 as the Council determines to be necessary or appropriate.

Subpart C – Information Collection

§ 1320.20 Council information collection and coordination.

(a) Information collection to assess systemic importance. The Council may require any financial market utility to submit such information to the Council as the Council may require for the sole purpose of assessing whether the financial market utility is systemically important.

(b) Prerequisites to information collection. Before requiring any financial market utility to submit information to the Council under paragraph (a) of this section, the Council shall—

(1) Determine that it has reasonable cause to believe that the financial market utility is, or is likely to become, systemically important, considering the standards set out in § 1320.10; or

(2) Determine that it has reasonable cause to believe that the designated financial market utility is no longer, or is no longer likely to become, systemically important, considering the standards set out in § 1320.10; and

(3) Coordinate with the Supervisory Agency for the financial market utility to determine if the information is available from, or may be obtained by, the Supervisory Agency in the form, format, or detail required by the Council.

(c) Timing of response from the appropriate Supervisory Agency. If the information, reports, records, or data requested by the Council under paragraph (b)(3) of this section are not provided in full by the Supervisory Agency in less than 15 calendar days after the date on which the material is requested, the Council may request the information directly from the financial market utility with notice to the Supervisory Agency.

(d) Notice to financial market utility of information collection requirement. In requiring a financial market utility to submit information to the Council, the Council shall provide to the financial market utility the following—

(1) Written notice that the Council is considering whether to make a proposed determination under § 1320.12; and

(2) A description of the basis for the Council's belief under paragraphs (b)(1) or (b)(2) of this section.

Dated: __, 2011_____

Alastair Fitzpayne
Deputy Chief of Staff and Executive Secretary,
Department of the Treasury