U.S. Chamber of Commerce

1615 H Street, NW
Washington, DC 20062-2000
uschamber.com

July 25, 2023

Financial Stability Oversight Council
Attn: Eric Froman
Office of General Counsel
U.S. Department of the Treasury
1500 Pennsylvania Ave., NW
Room 2308
Washington, DC 20220

Re: Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, Proposed Interpretive Guidance (RIN 4030-XXXX) (88 Fed. Reg. 26,234, April 28, 2023)

Re: Analytic Framework for Financial Stability Risk Identification, Assessment, and Response, Proposed Analytic Framework (RIN 4030-XXXX) (88 Fed. Reg. 26,305, April 28, 2023)

Dear Mr. Froman:

The U.S. Chamber of Commerce's ("the Chamber") Center for Capital Markets Competitiveness appreciates the opportunity to comment on the above-captioned proposals released by the Financial Stability Oversight Council ("FSOC" or "Council"). The Chamber supports FSOC's close adherence to Congress's mandate in Section 113 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").[1] Historically, the Chamber strongly supported FSOC's mission of addressing risks to U.S. financial stability through the activities-based approach formalized in the Council's 2019 Guidance.[2] That approach reached an appropriate balance between protecting U.S. financial stability and ensuring due process for nonbank financial companies.

Unfortunately, the Chamber cannot support FSOC's two interconnected proposals (the "Proposals") that reverse the progress made in the 2019 Guidance and ignore the lessons learned from the 2016 *MetLife* decision.[3] By removing constraints

[1] 12 U.S.C. § 5323.

[2] Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 84 Fed. Reg. 71,740 (Dec. 30, 2019) ("2019 Guidance").

[3] *MetLife, Inc. v. FSOC*, 177 F. Supp. 3d 219 (D.D.C. 2016).

on FSOC's approach to designation and eliminating the activities-based approach, the Proposals eliminate the predictability and transparency of the 2019 Guidance and run counter to the promotion of stable and competitive U.S. financial markets. The Proposals' failure to provide market participants with any meaningful guidance on FSOC's designation process or analytical approach to financial stability risk may dissuade financial companies from engaging in new strategies and developing innovative products—leading to sectoral uniformity and concentration risks to financial stability. As a consequence, the Proposals could inflict the very economic harm the Council is seeking to prevent.

The Chamber had serious concerns with the nonbank financial designation process used by FSOC before 2019. In 2013, the Chamber released an FSOC Reform Agenda[4] that proposed a number of transparency, due process, and data driven approaches, some of which were adopted in the 2019 guidance. We are concerned that the proposed guidance on nonbank financial company designations ("Proposed Nonbank Guidance") will create a lack of due process and procedural flaws that will harm nonbank financial firms, a key provider of capital necessary for economic growth.

In addition to establishing misguided policy, the Proposed Nonbank Guidance is unlawful because, among other reasons, FSOC proposes to ignore important considerations that Congress directed FSOC to consider in the determination process.[5] For example, FSOC fails to acknowledge its obligation to consider the costs and business-altering impact that designation entails, including Federal Reserve supervision and enhanced prudential standards.[6] Moreover, FSOC proposes to ignore a nonbank financial company's vulnerability to material financial distress in the designation process,[7] but if a nonbank is not vulnerable to material financial distress, then the company could not pose a threat to the financial stability of the United States. Likewise, the proposed analytic framework for financial stability ("Proposed Analytic

---

[4] *See* Financial Stability Oversight Council Reform Agenda found at: https://www.centerforcapitalmarkets.com/wp-content/uploads/2013/08/2013_Financial-Stability-Oversight-Council-Reform-Agenda.pdf

[5] Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, Proposed Interpretive Guidance, 88 Fed. Reg. 26,234 (Apr. 28, 2023) (to codified at 12 C.F.R. § 1310 Appendix A) ("Proposed Nonbank Guidance").

[6] FSOC may recommend and the Federal Reserve may impose risk-based capital requirements, leverage limits, liquidity requirements, resolution plan and credit exposure report requirements, concentration limits, contingent capital requirements, enhanced public disclosures, short-term debt limits, and overall risk management requirements on designated nonbanks. See 12 U.S.C. § 5325(b)(1). These enhanced prudential standards are in addition to Federal Reserve supervision and examination, which is itself costly and distracting. For a sense of what Federal Reserve supervision and examination entail, *see*, *e.g.*, the Federal Reserve's 1,623-page *Bank Holding Company Supervision Manual*, available at https://www.federalreserve.gov/publications/files/bhc.pdf.

[7] Proposed Nonbank Guidance, 88 Fed. Reg. at 26,239.

Framework") suffers from its own legal flaws and reverses the clarity provided by the 2019 Guidance.[8]

Finally, the 2019 guidance, unlike the policies which it replaced, was tested during a period of severe financial and economic stress in March and April 2020 with the government mandated economic shutdown. Nonbank financial firms were a source of strength—and primary regulators had the tools at hand to deal with the financial stresses that existed—under very abnormal circumstances. FSOC has failed to provide any data from that time to demonstrate why its policies should change.

For the foregoing reasons, we believe that FSOC should withdraw the Proposals and instead renew its commitment to the 2019 Guidance.

I. The Proposed Nonbank Guidance Is Unlawful.

Although agencies generally have discretion to change policies,[9] FSOC's proposed departure from its 2019 Guidance is unlawful for multiple reasons. *First*, as the court held in the *MetLife* decision, Section 113 requires FSOC to consider costs before designating a nonbank financial company for supervision. *Second*, the statute also requires FSOC to consider a nonbank's vulnerability to material financial distress in the designation process. *Third*, as discussed by the *MetLife* court, FSOC must consider nonbank financial companies' reliance interests before departing from the 2019 Guidance—in particular, the extent to which nonbanks structured their affairs in reliance upon the 2019 Guidance. *Fourth*, FSOC must consider alternatives before resorting to its extraordinary designation authority, including by relying on primary regulators. *Fifth*, FSOC must provide fair notice of how it plans to enforce Section 113 and which prudential standards will apply after a designation.

A. FSOC Must Consider Costs Before Designating A Nonbank For Supervision.

FSOC's proposal to ignore the costs of designating a nonbank for supervision is unlawful because the statute makes clear that the Council must consider the costs of designating a nonbank financial company for supervision.[10] By disregarding costs,

---

[8] Analytic Framework for Financial Stability Risk Identification, Assessment, and Response, Proposed Analytic Framework, 88 Fed. Reg. 26,305 (Apr. 28, 2023) ("Proposed Analytic Framework").

[9] *FCC v. Fox Television Studios, Inc.*, 556 U.S. 502, 514–15 (2009).

[10] Proposed Nonbank Guidance, 88 Fed. Reg. at 26,238.

FSOC would ignore an "important aspect of the problem" that Congress directed the Council to consider in the designation process.[11]

1. Cost Is A Relevant Factor Under Section 113.

Section 113(a)(2)(K) of Dodd-Frank provides that "the Council *shall* consider . . . any other risk-related factors that the Council deems *appropriate*" in designating a nonbank for supervision.[12] As the Supreme Court explained in *Michigan v. EPA*, the word "appropriate" is "the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors."[13] "Although this term leaves agencies with flexibility, an agency may not entirely fail to consider an important aspect of the problem when deciding whether regulation is appropriate."[14] "One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in [regulatory] benefits."[15]

"Read naturally in the present context," Congress's use of the word "appropriate" in Section 113(a)(2)(K) means FSOC must give "at least some attention to cost" in the designation process.[16] In particular, FSOC "must consider cost—including, most importantly, cost of compliance—before deciding whether regulation is appropriate."[17] The costs that FSOC must consider include "more than the expense of complying with regulations; any disadvantage could be termed a cost."[18] Yet, like in *Michigan v. EPA*, FSOC's proposed "interpretation precludes the Agency from considering *any* type of cost—including, for instance, harms that" designation might do to the stability of the financial system.[19]

---

[11] *See Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[12] 12 U.S.C. § 5323(a)(2)(K) (emphasis added).

[13] *Michigan v. EPA*, 576 U.S. 743, 752 (2015) (EPA could not ignore costs where statute directed agency to regulate if "appropriate and necessary" because that phrase implied cost-benefit analysis) (cleaned up).

[14] *Id.* (cleaned up).

[15] *Id.* (cleaned up).

[16] *Id.*

[17] *Id.* at 759.

[18] *Id.* at 752.

[19] *Id.*

Statutory "context reinforces the relevance of cost."[20] One of the "risks to the financial stability of the United States"[21] is that the Council's designation of a nonbank financial company for supervision may do "significantly more harm than good."[22] To account for this risk, FSOC must consider whether designation could "pose a threat to the financial stability of the United States."[23] For example, designating a nonbank for supervision might cause unnecessary and unwarranted panic in the financial markets.[24] Indeed, the Council acknowledges that a designation "could create a run on the company by its creditors and counterparties."[25] Accordingly, the Council must take into account the cost that a designation "could accelerate the company's demise and thereby threaten financial stability and undermine the purpose of the designation."[26]

In rescinding the Council's designation of MetLife, the U.S. District Court for the District of Columbia persuasively explained that Section 113(a)(2)(K) requires FSOC to consider the costs of designating a nonbank for supervision. As in *Michigan v. EPA*, the court explained, '"[a]ppropriate' is also the touchstone of the catch-all factor in Dodd-Frank section 113."[27] "Because FSOC refused to consider cost as part of its calculus," FSOC's designation of MetLife was arbitrary and capricious because it was "impossible to know whether its designation 'does significantly more harm than good.'"[28]

Here too in the Proposed Nonbank Guidance, FSOC's refusal "to consider the cost of regulation"—"a consideration that is essential to reasoned rulemaking"—would be contrary to Section 113 and arbitrary and capricious.[29] As Cass Sunstein, former administrator of the Office of Information and Regulatory Affairs during the Obama Administration, has explained, "[w]ithout some sense of both costs and benefits—both nonmonetized and monetized—regulators will be making a stab in the dark."[30] "[A]ny

---

[20] *Id*. at 753.

[21] 12 U.S.C. § 5322(a)(1)(A).

[22] *Michigan*, 576 U.S. at 752.

[23] 12 U.S.C. § 5323(a)(1).

[24] *See MetLife*, 177 F. Supp. 3d at 239 (arguing that it was "arbitrary and capricious to weaken the very company that was meant to be fortified by new regulation" and that FSOC should consider the extent to which a company would need to "raise prices and withdraw from certain markets, thereby reducing consumer choice and competition").

[25] Proposed Nonbank Guidance, 88 Fed. Reg. at 26,239.

[26] *Id.*

[27] *MetLife*, 177 F. Supp. 3d at 240.

[28] *Id.* at 240 (quoting *Michigan*, 576 U.S. at 752).

[29] *Id.* at 242.

[30] Cass R. Sunstein, *Cost–Benefit Analysis and the Environment*, 115 ETHICS 351, 354 (2005).

reasonable judgment will ordinarily be based on some kind of weighing of costs and benefits, not on an inquiry into benefits alone . . . . If there is not, the agency's interpretations should be declared unreasonable."[31] That principle is squarely applicable here.

2. FSOC's Reasons For Disregarding Cost Are Unpersuasive.

FSOC offers four reasons to justify its proposal to ignore costs in the designation process, but each fails to withstand scrutiny.

First, FSOC's attempt to sweep the *MetLife* decision under the rug is a questionable abrogation of the law.[32] Although *MetLife* is not controlling, the court applied controlling precedent from the Supreme Court interpreting the same word "appropriate" that appears in Section 113(a)(2). Contrary to FSOC's assertion, the *MetLife* court did not conclude that cost-benefit analysis was required solely as a result of agency "guidance in effect at that time," which FSOC now seeks to change.[33] And FSOC cannot ignore costs merely by removing the requirement for cost-benefit analysis from its own guidance—rather, its statutory mandate controls. Indeed, the *MetLife* court concluded that FSOC must consider costs because Dodd-Frank uses the word "appropriate," making "the cost of regulation a consideration that is essential to reasoned rulemaking."[34] FSOC should not casually dismiss *MetLife* in a footnote because the court straightforwardly applied *Michigan* to the same statute at issue here.

Second, FSOC's contention that cost is not a "risk-related factor" is incorrect.[35] The "risk" referred to in Section 113(a)(2)(K) is the potential "threat to the financial stability of the United States."[36] As explained, cost is a relevant factor in this context because the increased costs incurred from designation or the resulting Federal Reserve supervision could potentially exacerbate threats to "the financial stability of the United States" posed by nonbanks by actually making them "more vulnerable to financial distress."[37] FSOC incorrectly asserts that designation costs to a nonbank are not a risk-related factor "because they are incurred for the purpose of increasing the safety and

---

[31] Cass R. Sunstein, *Cost–Benefit Default Principles*, 99 MICH. L. REV. 1651, 1694 (2001).

[32] Proposed Nonbank Guidance, 88 Fed. Reg. at 26,238 n.16.

[33] *Id.*

[34] *MetLife*, 177 F. Supp. 3d at 242 ("Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions." (quoting *Michigan*, 576 U.S. at 753)).

[35] Proposed Nonbank Guidance, 88 Fed. Reg. at 26,238.

[36] 12 U.S.C. § 5323(a)(1).

[37] *Id.*; *MetLife*, 177 F. Supp. 3d. at 241.

soundness of the company."[38] Federal Reserve supervision is never costless,[39] and as recent bank failures have shown, Fed supervision can be ineffective even with respect to banks for which it was actually designed.[40] Nor are costs of designation limited to the designated company itself. They may also include broader consequences to U.S. financial stability, such as shifting activities from one regulated sector to another less-regulated or less visible sector, and reducing the availability or increasing the costs of particular financial services or products. These may lead to market disruption and increased risk to financial stability in the aggregate.

Third, FSOC's claim that weighing costs and benefits is not feasible in this context is not credible.[41] Agencies regularly analyze the costs and benefits of their decisions in a variety of different contexts. Indeed, "[a]gencies have long treated cost as a centrally relevant factor when deciding whether to regulate. Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions."[42] And for decades—across administrations of both parties—the executive branch has generally expected agencies to consider both the costs and benefits of agency action (and inaction) in the rulemaking process.[43] Neither measuring difficulties nor the magnitude of harm associated with a financial crisis suggests a cost-benefit analysis is impossible here. They suggest, rather, that FSOC may use qualitative analysis to supplement hard quantitative estimates. The fact that it may be easier or more convenient for FSOC to weigh costs and benefits at a "later" stage of the regulatory process is no excuse for failing to undertake this analysis at the stage when the agency makes "the decision to regulate."[44] FSOC also undermines its own rationale by acknowledging that the

---

[38] Proposed Nonbank Guidance, 88 Fed. Reg. at 26,238.

[39] *MetLife*, 177 F. Supp. 3d at 241 ("FSOC never responded to MetLife's allegation or its argument that imposing billions of dollars in cost could actually make MetLife more vulnerable to distress. Because FSOC refused to consider cost as part of its calculus, it is impossible to know whether its designation does significantly more harm than good." (cleaned up)).

[40] *See e.g., Review of the Federal Reserve's Supervision and Regulation of Silicon Valley Bank* (April 2023), available at https://www.federalreserve.gov/publications/review-of-the-federal-reserves-supervision-and-regulation-of-silicon-valley-bank.htm.

[41] Proposed Nonbank Guidance, 88 Fed. Reg. at 26,238.

[42] *Michigan*, 576 U.S. at 752–53.

[43] *See, e.g.*, Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981); *accord* Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993); *see generally* Paul Rose & Christopher Walker, *The Importance of Cost-Benefit Analysis in Financial Regulation* (2013), http://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/CBA-Report-3.10.13.pdf.

[44] *MetLife*, 177 F. Supp. 3d. at 241–42 (citing *Michigan*, 576 U.S. at 758).

Proposed Nonbank Guidance is subject to Executive Order 12866,[45] which directs agencies to "assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating."[46]

Fourth, Congress did not and could not have "determined that the potential costs of designation are outweighed by the benefits" in Section 113.[47] Congress delegated to FSOC the discretion to designate specific companies if the Council determines that the statutory criteria are satisfied in a particular case. Congress's delegation of this discretionary power to FSOC did not excuse the Council of its obligation to consider costs when it chooses to regulate. Before designating a company for designation, therefore, the Council must consider whether the costs of such a designation would itself pose a threat to the financial stability of the United States.

In sum, FSOC should abandon its proposal to ignore costs because Congress directed the Council to consider this important aspect of the problem in Section 113. Although FSOC may not want to spend the time or effort of identifying and then weighing the costs and benefits of designating a nonbank for supervision, the weighing process is highly important and integral to ensuring that a designation mitigates the risk to financial stability posed by a nonbank vulnerable to material financial distress while minimizing costs to both the nonbank and the financial stability of the United States.

B. FSOC Must Consider Vulnerability To Material Financial Distress Before Designating A Nonbank For Supervision.

In addition to ignoring cost, FSOC also proposes to ignore a nonbank financial company's vulnerability to material financial distress in the designation process.[48] But the Council would again be ignoring an important component in determining potential designation because the statute clearly contemplates that FSOC will analyze a nonbank financial company's vulnerability to material financial distress.

1. Vulnerability To Material Financial Distress Is A Relevant Factor.

Five key factors within Section 113 make abundantly clear that FSOC must consider vulnerability to material financial distress before designating a nonbank for supervision under this standard. By definition, a nonbank cannot pose a threat to the financial stability of the United States if it is not vulnerable to material financial distress. By presupposing the satisfaction of this statutory prerequisite to designation, FSOC

[45] Proposed Nonbank Guidance, 88 Fed. Reg. at 26,240.

[46] Exec. Order No. 12,866, 58 Fed. Reg. 51,735.

[47] Proposed Nonbank Guidance, 88 Fed. Reg. at 26,238.

[48] *Id.* at 26,239.

would be removing an important statutory constraint on its regulatory authority and acting arbitrarily and capriciously.

First, Section 113(a)(1) establishes two prerequisites for a designation. Congress authorized FSOC to designate a nonbank financial company for supervision "if the Council determines that material financial distress at the U.S. nonbank financial company . . . could pose a threat to the financial stability of the United States."[49] The text thus requires FSOC to affirmatively find: (1) that there could be "material financial distress at the U.S. nonbank financial company," (meaning that it cannot "presuppose[] a company's material financial distress"[50]); and (2) that such distress "could pose a threat to the financial stability of the United States."

Congress's use of the word "material" to modify the phrase "financial distress" in Section 113(a)(1) is key. The use of the word "material"—which means "significant" or "essential"[51]—means the Council must consider whether the company is vulnerable to "material financial distress" based on assessment of the company's particular circumstances. If the company's particular circumstances reveal the company is not vulnerable to a material level of financial distress, the company could not be designated for supervision.

Second, the statutory factors in Section 113(a)(2) confirm that vulnerability to material financial distress is among the relevant factors FSOC must consider. "In making a determination," FSOC must consider multiple factors inherently concerned with the likelihood and risk that "the company" is susceptible to material financial distress.[52] These factors include the company's leverage, balance sheet exposures, relationships, amount and nature of financial assets, and liabilities.[53] Each of these factors requires an analysis of whether something about the existing operations of "the company" makes it vulnerable to material financial distress. By directing FSOC to consider these company-specific factors, Congress required the Council to consider the likelihood that the company will suffer material financial distress.

Beyond the explicit statutory references to "the company" and the particular vulnerabilities of its internal operations, other statutory factors include language directing the analysis outward to the broader markets. For example, one factor examines "the extent and nature of the transactions and relationships of the company

---

[49] 12 U.S.C. § 5323(a)(1).

[50] Proposed Nonbank Guidance, 88 Fed. Reg. at 26,239.

[51] *Material*, Black's Law Dictionary (11th ed. 2019).

[52] 12 U.S.C. § 5323(a)(2)(A)–(C), (F), (I)–(J).

[53] *Id.* § 5323(a)(2).

with other significant nonbank financial companies and significant bank holding companies."[54] Hence, some of the statutory factors specifically reference potential impacts on third parties, while others focus on the company itself. The contrasting language among factors makes clear that Congress contemplated a consideration of both parts of the problem—i.e., whether the company is vulnerable to material financial distress and, if so, whether that distress could pose a threat to U.S. financial stability.

Many of the factors in Section 113(a)(2) would be superfluous if FSOC could designate a nonbank for supervision without considering the company's vulnerability to material financial distress.[55] FSOC's approach under the Proposed Nonbank Guidance effectively means that if a company is engaged in financial activities and is large or prominent enough to be on the Council's radar, on those bases alone it may be subjected to the economic and regulatory burdens resulting from designation since, pursuant to FSOC's view, they may always merely presuppose a company's material financial distress without the need to conduct any analysis – qualitative or quantitative. Had Congress intended for size to be the sole threshold for designation, it would not have conditioned designation on an eleven-factor analysis.[56] Indeed, the company-specific factors in Section 113(a)(2) would serve no purpose if FSOC could designate a company for supervision merely based on the company's "importance" to the financial system.[57]

Third, the catch-all phrase—"any other risk-related factors that the Council deems *appropriate*"—erases any doubt that FSOC must consider a nonbank's vulnerability to material financial distress.[58] What matters for mitigating risk is the susceptibility of the nonbank to material financial distress.[59] If the nonbank is not vulnerable to material financial distress, then the company could not pose a threat to

---

[54] *Id.* § 5323(a)(2)(C); *see also id.* § 5323(a)(2)(G) (requiring FSOC to analyze the company's "interconnectedness"); *accord* Proposed Nonbank Guidance, 77 Fed. Reg. 21,637, 21,658 (Apr. 11, 2012) (FSOC's own guidance indicating that only some of the factors "seek to assess the . . . impact of the nonbank financial company's financial distress on the broader economy") ("2012 Guidance").

[55] *See FDA v. Brown v. Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (statutes must be interpreted "as a symmetrical and coherent regulatory scheme" and "fit, if possible, all parts into an harmonious whole").

[56] *Compare* 12 U.S.C. § 5323(a)(2) (authorizing SIFI designations based on a multifactor analysis), *with id.* § 5326(a) (authorizing enhanced regulatory requirements for any "bank holding company with total consolidated assets of $250,000,000,000 or greater"); *see also* The Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174 (May 24, 2018), which raised this threshold from $50 billion to $250 billion in assets.

[57] *Id.* § 5323(a)(2)(D)–(E).

[58] *Id.*§ 5323(a)(2)(K) (emphasis added).

[59] *MetLife*, 177 F. Supp. 3d. at 241 (explaining that "risk" must "refer both to the risk of destabilizing the market and the risk of distress in the first place").

the financial stability of the United States. It would not be rational or "appropriate" to designate a nonbank financial company for supervision if it is unlikely to pose any threat to financial stability of the United States.

Fourth, statutory structure and context also confirm that Section 113 requires FSOC to consider a nonbank's vulnerability to financial distress before a designation. In Section 112, Congress established FSOC for the purpose of identifying "risks to the financial stability of the United States that *could* arise from the material financial distress [of] nonbank financial companies" and responding "to *emerging* threats to the stability of the United States.[60] Because material financial distress at nonbanks "could arise" that pose "emerging" threats to financial stability, Congress authorized FSOC to "require supervision by the Board of Governors for nonbank financial companies that *may pose risks to the financial stability of the United States in the event of their material financial distress*."[61] These provisions—all of which focus on the likelihood of "material financial distress" at a nonbank—demonstrate that Congress intended for FSOC to consider whether a nonbank is vulnerable to material financial distress before designating the company for supervision.

Finally, even if the text of Section 113 were ambiguous, "the sheer scope of" FSOC's claimed authority under Section 113 "would counsel against the Government's interpretation."[62] Courts "expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance."[63] Without a threshold vulnerability analysis, even the healthiest, most stable large American businesses could end up strapped with the burdensome designation process and its onerous regulations, unprecedented prudential standards, and enormous costs. If hypothetical financial distress of any large company with extensive financial or customer relationships can simply be assumed, and the only other qualification for designation is that the company is engaged in financial activities, Section 113 would mark a sea change in financial regulation. Congress would have spoken clearly if it had intended to delegate to FSOC the extraordinary power to designate any large nonbank for supervision at any time, and for any reason, regardless of its vulnerability to material financial distress.

---

[60] 12 U.S.C. § 5322(a)(1)(A), (C) (emphasis added).

[61] *Id.* § 5322(a)(2)(H) (emphasis added).

[62] *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021).

[63] *Id.* (quoting *Utility Air Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014)); *see also West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022).

2. FSOC's Reasons For Ignoring Vulnerability To Material Financial Distress Are Not Credible.

FSOC's reasons for disregarding a nonbank's vulnerability to material financial distress do not withstand scrutiny.

First, FSOC cannot "presuppose[] a company's material financial distress"[64] merely because it would presume the satisfaction of one of the two statutory prerequisites to designation. As explained, text, structure, and context confirm that Congress intended FSOC to first determine a likelihood of "material financial distress" at a nonbank before determining whether such distress "could pose a threat to the financial stability of the United States."[65] FSOC cannot presume "material financial distress" any more than it can presume a "threat to the financial stability of the United States." By presupposing the satisfaction of this statutory prerequisite to designation, the Council would be erasing a statutory constraint on its regulatory authority. The Supreme Court has been clear that agencies may not eliminate statutory constraints that Congress has imposed on their regulatory authority.[66]

Second, FSOC's interpretation would improperly collapse the two distinct statutory standards for designation in Section 113(a)(1).[67] The first focuses on "material financial distress at the U.S. nonbank financial company" while the second focuses on "the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the U.S. nonbank financial company."[68] If FSOC could ignore the likelihood that a nonbank will suffer material financial distress under the first standard, then the first standard would be indistinguishable from the second standard, because under both standards FSOC would be evaluating only whether the company could pose a threat to financial stability.

Third, FSOC complains that considering a nonbank's vulnerability to material financial distress would be impractical, because the statute is meant to be "preventative" and FSOC may need to move quickly to address "imminent collapse."[69]

---

[64] Proposed Nonbank Guidance, 88 Fed. Reg. at 26,239.

[65] 12 U.SC. § 5323(a)(1).

[66] *See generally W. Virginia v. EPA*, 142 S. Ct. 2587 (2022).

[67] *In re Espy*, 80 F.3d 501, 505 (D.C. Cir. 1996) (per curiam) ("[A] statute written in the disjunctive is generally construed as 'setting out separate and distinct alternatives.'").

[68] 12 U.S.C. § 5323(a)(1).

[69] Proposed Nonbank Guidance, 88 Fed. Reg. at 26,239.

This rationale would turn the statute on its head because the Council could regulate all nonbanks as banks as a prophylactic matter. In any event, Congress specifically addressed this concern about emergency risks to the financial system by authorizing FSOC, by vote of not fewer than two-thirds of the voting members then serving, to waive or modify the statute's notice and hearing procedures if "necessary or appropriate to prevent or mitigate threats posed by the nonbank financial company to the financial stability of the United States."[70] Because FSOC can act quickly in emergencies, the mere possibility of an emergency should not infect FSOC's interpretation of the statute.

Fourth, FSOC's concern that assessing "the likelihood of material financial distress at the company . . . could create a run on the company" cuts in favor of considering this factor in the designation process.[71] Improperly designating a company that is not vulnerable to material financial distress "could accelerate the company's demise and thereby threaten financial stability and undermine the purpose of the designation."[72] FSOC can avoid causing this unnecessary harm to the financial system by not designating companies for supervision that are not vulnerable to material financial distress, but the Council can avoid this harm only if it considers whether the nonbank is vulnerable to material financial distress in the first place or allow it to bypass due process under non-emergency circumstances.

C. FSOC Must Consider Reliance Interests Before Departing From Its Guidance.

Besides ignoring costs and vulnerability to material financial distress, the Council also proposes to ignore an important consideration that the Supreme Court has directed agencies to consider whenever they change policies. Although FSOC acknowledges that its Proposals depart from the 2019 Guidance,[73] FSOC fails to acknowledge or consider the extent to which nonbanks structured their affairs in reliance upon the 2019 Guidance.

In explaining this policy change, it is not enough for FSOC to acknowledge the departure. FSOC "must also be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'"[74] "In such cases it is not that further justification is demanded by the mere fact of policy change;

[70] 12 U.S.C. § 5323(f)(1).

[71] Proposed Nonbank Guidance, 88 Fed. Reg. at 26,239.

[72] *Id.*

[73] *See e.g.*, *id.* at 26,235.

[74] *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–22 (2016) (citing *Fox*, 556 U.S. at 515).

but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."[75]

The *MetLife* decision again illustrates the flaw in FSOC's Proposals. The court not only faulted FSOC for acting "contrary to its Guidance,"[76] but also criticized the Council for failing to consider MetLife's reliance interests in that guidance. According to the court, "MetLife relied on the Guidance for years, including in multiple submissions to FSOC, before finding out that FSOC had inexplicably changed its approach."[77]

FSOC should not repeat the same mistake here by ignoring the extent to which nonbank financial companies have structured their affairs in reliance upon the 2019 Guidance. Nonbank financial companies across a variety of industry sectors have on their own initiative—or in coordination with their primary regulators—made changes to enhance their resilience and resolvability. Efforts to increase resilience include raising capital and enhancing enterprise-wide risk management as part of more holistic approaches to holding company oversight of operating subsidiaries. Many nonbanks have also simplified their legal entity structure to facilitate their resolvability and participated in efforts to enhance applicable insolvency frameworks both in the United States and abroad. Eliminating any assessment of the likelihood of material financial distress makes nonbanks' efforts to increase their resilience irrelevant. Efforts to improve nonbank resolvability are designed to minimize damage to the U.S. economy.

FSOC cannot escape its obligation to consider these reliance interests by claiming that its 2019 Guidance is not binding.[78] Agencies must acknowledge and adequately explain a departure from previous guidance.[79] An agency's failure to acknowledge or explain a departure from prior guidance is arbitrary and capricious,[80]

---

[75] *Fox*, 556 U.S. at 515–16; *see also, e.g.*, *DHS. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913–15 (2020).

[76] *MetLife*, 177 F. Supp. at 239–40.

[77] *Id.* at 236 n.18 (citing *Fox*, 556 U.S. at 515 ("[W]hen its prior policy has engendered serious reliance interests that must be taken into account," an agency "must provide a more detailed justification than what would suffice for a new policy created on a blank slate.")).

[78] Proposed Nonbank Guidance, 88 Fed. Reg. at 26,239.

[79] *See Fogo De Chao (Holdings) Inc. v. DHS*, 769 F.3d 1127, 1143 (D.C. Cir. 2014) (remanding agency adjudication determination that represented "sudden[] depart[ure] from policy guidance"); *Sierra Club v. Salazar*, 177 F. Supp. 3d 512, 537 (D.D.C. 2016) (explaining that an agency's "decision to disregard its own guidance is tantamount to the inconsistent treatment of similar situations").

[80] *See, e.g.*, *MetLife*, 177 F. Supp. 3d at 239; *CSL Plasma Inc. v. CBP*, No. 21-CV-2360 (TSC), 2022 WL 4289580, at *10 (D.D.C. Sept. 16, 2022); *Mo. Dep't of Soc. Servs. v. DHS*, No. CV 20-3611 (ABJ), 2022 WL 971296, at *13–15 (D.D.C. Mar. 31, 2022).

including when an agency fails to consider reliance interests in previous guidance.[81] Accordingly, FSOC must consider the extent to which nonbank financial companies have relied on the 2019 Guidance before abandoning that guidance.

Finally, FSOC has not provided any "good reasons" for departing from the 2019 Guidance.[82] Refusing to consider relevant factors because they are inconvenient to FSOC's desire to pursue a different approach or viewed as "inappropriate hurdles" that "unduly hamper" use of the designation authority is not a rational reason for reversing course.[83] Nor do the Proposals identify any general nonbank problem that justifies making it easier for FSOC to designate nonbanks for supervision. To the contrary, the Administration continues to tout that the financial system remains strong and stable.[84] Although CFPB Director Chopra recently commented that the fact that no nonbanks are currently designated is a sign of FSOC's failure,[85] this does not mean that the standard must be lowered to sweep in more nonbanks. Rather, it is a sign of the sufficiency of the 2019 Guidance—including the progress made through the initiatives of primary regulators coupled with nonbanks' efforts to improve financial strength—not a failure of the 2019 Guidance.

D. FSOC Must Consider Alternatives To Entity-Based Designation.

Although Section 113 authorizes FSOC to designate nonbank financial companies for supervision,[86] using this extraordinary power is meant to be an exception to the general rule that nonbanks are not subject to bank-like supervision. The Administrative Procedure Act (APA) reinforces that FSOC should wield this

---

[81] *See, e.g.*, *MediNatura, Inc. v. FDA*., 998 F.3d 931 (D.C. Cir. 2021) (agency still required to consider reliance interests for guidance document); *Wages & White Lion Invs., LLC v. FDA*., 16 F.4th 1130 (5th Cir. 2021) (same)

[82] *Fox*, 556 U.S. at 515.

[83] Proposed Nonbank Guidance, 88 Fed. Reg. at 26,235.

[84] *Remarks by Heather Boushey on How President Biden's Invest in America Agenda has Laid the Foundation for Decades of Strong, Stable, and Sustained, Economic Growth*, WhiteHouse.gov Speeches and Remarks (May 31, 2023).

[85] Rohit Chopra, *Statement of CFRB Director Rohit Chopra on the Proposed Restoration of the Financial Stability Oversight Council's Authority and Regulatory Credibility*, CFRB (Apr. 21, 2023), https://www.consumerfinance.gov/about-us/newsroom/statement-of-cfpb-director-rohit-chopra-on-proposed-restoration-of-financial-stability-oversight-council-authority-regulatory-credibility/ ("The Financial Stability Oversight Council currently has zero firms on its roster of systemically important institutions under this core authority. I'm not sure there's anyone who really believes that these systemically important nonbanks have gone extinct. Put simply, market participants have believed the FSOC lacks regulatory credibility when it comes to nonbank designations. But now we are taking a step to change this.").

[86] 12 U.S.C. § 5323(a)(1).

extraordinary designation power rarely, and only after considering other alternatives, including reliance upon the nonbank financial company's primary regulators. According to the Supreme Court, "when an agency rescinds a prior policy its reasoned analysis must consider the alternatives that are within the ambit of the existing policy."[87]

Yet the Proposed Nonbank Guidance suggests that FSOC intends to wield Section 113 as a primary option without first considering alternatives to designation.[88] In particular, FSOC has demoted its prior approach to "first rely on federal and state regulators to address risks to financial stability before the Council would begin to consider a nonbank financial company for potential designation,"[89] signaling that FSOC will choose to exercise its designation authority going forward without first considering the alternatives. But the APA requires FSOC to consider alternatives before resorting to entity-based regulation. And the statute itself requires FSOC to consider how a nonbank is regulated by other regulators.[90]

The Council can best accomplish its mission to identify and respond to threats to U.S. financial stability by relying on primary regulators as a first option, including by facilitating information sharing and coordination among and with primary federal and state regulators.[91] Designating nonbank financial companies for bank-style regulation is an ineffective and burdensome exercise of governmental authority, which is why international coordinating bodies have largely moved on from nonbank designation as an effective or viable means of addressing systemic risk. Primary regulators are best suited to monitor for and mitigate potential risks associated specifically with the products and industries they regulate. Especially in light of FSOC not providing a reasonable rationale for transitioning away from the current guidance, FSOC should thus consider alternatives before using its extraordinary designation authority.

E. FSOC Must Ensure The Designation Process Affords Due Process.

The Proposed Nonbank Guidance also raises constitutional concerns because FSOC would erase its previous definition of the critical statutory term "threat to the financial stability of the United States" without providing any replacement definition.[92]

---

[87] *Regents*, 140 S. Ct. at 1913 (cleaned up).

[88] Proposed Nonbank Guidance, 88 Fed. Reg. at 26,235.

[89] *Id.*

[90] 12 U.S.C. §§ 5323(a)(2)(H), 5323(g), 5323(i).

[91] CCMC Comment Letter on FSOC 2019 Guidance (May 13, 2019) at 2 ("CCMC 2019 Comment Letter"), available at http://www.centerforcapitalmarkets.com/wp-content/uploads/2019/05/5.13.19-CCMC_Comments_NonbankSupervision_FSOC.pdf .

[92] 12 U.S.C. § 5323(a)(1).

The Council cannot, consistent with due process, leave nonbank financial companies in the dark and left guessing about the standard FSOC will apply in the designation process or the regulatory consequences of such a designation.

1. FSOC Must Give Fair Notice Of The Standards It Will Apply In The Designation Process.

"Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule."[93] As the Supreme Court has emphasized, "agencies should provide regulated parties fair warning of the conduct a regulation prohibits or requires" to avoid "the kind of unfair surprise against which" the Supreme Court has "long warned."[94] Indeed, "[r]ule of law principles require that parties have fair notice and an opportunity to conform their behavior to legal rules" because a "clear statement of the standards the agency is applying is necessary if administrative adjudication is to be consistent with the democratic process."[95]

Although FSOC previously gave fair notice that the phrase "threat to the financial stability of the United States" means "severe damage on the broader economy,"[96] FSOC proposes to abandon that definition—without offering any replacement. FSOC's failure to define this critical phrase puts every nonbank at risk of designation and makes FSOC's exercise of its nonbank designation authority opaque and inherently arbitrary and capricious. Nonbank financial companies facing designation cannot be left to guess what FSOC believes is a threat to U.S. financial stability.

FSOC's failure to provide a new interpretation of this critical phrase is also arbitrary and capricious. When changing course, FSOC "must show that there are good reasons for the new policy." [97] Besides criticizing its previous definition as "inappropriate,"[98] FSOC fails to articulate why providing no definition is an improvement and what it believes may be a better definition, nor does it provide any rationale for leaving this critical phrase undefined. FSOC's failure to define this key phrase is inherently arbitrary because the Council would deprive nonbanks of due process if it were to announce a definition for the first time during the designation process.

---

[93] *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987).

[94] *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (cleaned up).

[95] *Circus Circus Casinos, Inc. v. NRLB*, 961 F.3d 469, 476 & n.2 (D.C. Cir. 2020) (citation omitted).

[96] 2019 Guidance, 84 Fed. Reg. at 71,763; *see also* 2012 Guidance, 77 Fed. Reg. at 21,657 (defining a threat to mean "significant damage on the broader economy").

[97] *Fox*, 556 U.S. at 515.

[98] Proposed Nonbank Guidance, 88 Fed. Reg. at 26,236

To avoid these problems, FSOC should reaffirm its prior definition of this phrase. A "threat to the financial stability of the United States" must mean at least some non-trivial quantum of damage to the broader economy—otherwise, this language would be meaningless and could apply to almost any circumstance that FSOC decides to put under the microscope at any point in time. A nonbank that poses only trivial harm (or no harm) to the economy cannot in any reasonable interpretation of the term be systemically important.

In addition, FSOC should identify the specific prudential standards that will apply at the time of designation. FSOC could not, consistent with due process, designate a nonbank without first identifying the specific prudential standards that will be imposed. Section 115(b)(2) requires FSOC to consider business model differences, assets under management, and other activities for which prudential standards may not be appropriate. Generally, FSOC and subject nonbank financial companies should know what prudential requirements and other regulations will apply to nonbanks under a section 113 designation prior to any designation being made. To that end, the Federal Reserve should provide information about the prudential requirements, other regulations, and estimated costs before FSOC votes on a proposed designation, and the Council should not vote to do so unless it can demonstrate that these prudential requirements would effectively mitigate the systemic risk posed by that entity.[99]

2. FSOC Should Adopt Due Process Reforms.

If FSOC nevertheless reverts to the uncertainty that characterized its nonbank determinations process prior to the 2019 Guidance, it should make the due process reforms identified below, among others. These reforms would help protect the rights of nonbanks under the scrutiny of FSOC and enhance FSOC's governance, transparency, credibility, and accountability.[100]

---

[99] This is consistent with previous input FSOC has received. *See, e.g.*, United States Government Accountability Office, *Financial Stability: New Council and Research Office Should Strengthen the Accountability and Transparency of Their Decisions*, GAO-12-886 (2012), available at https://www.gao.gov/assets/650/648064.pdf (FSOC must develop a framework for measuring the impacts of designation. Absent that, "Congress, the affected institutions, the public, and FSOC cannot determine whether the designations and associated oversight is actually helping to improve financial stability.").

[100] For a more comprehensive discussion of these reforms, see CCMC Comment Letter to the Review of FSOC's Determination and Designation Processes Under Section 113 and section 804 of the Dodd-Frank (Aug. 15, 2017) ("CCMC Letter to Sec'y Mnuchin"), available at https://www.centerforcapitalmarkets.com/letter/comment-letter-to-the-review-of-fsocs-determination-and-designation-processes-under-section-113-and-section-804-of-the-dodd-frank/; CCMC 2019 Comment Letter at 6–14.

First, given the significance of nonbank designation and bureaucratic inertia once review commences, FSOC principals should be required to vote to commence the review of a nonbank in Stage 1, in addition to voting to advance a nonbank to Stage 2.[101] FSOC should not be permitted to rely upon the mere recommendation of staff-level committees to commence Stage 1 review.

Second, FSOC should confer with a nonbank's primary regulator before proceeding with notice to a nonbank, and then provide a nonbank with at least 90 days' notice prior to voting on whether to advance it to Stage 2. At this time, FSOC should also provide the company with the full evidentiary record to allow a company a fair opportunity to correct and/or supplement the record.[102] Sixty days' notice, as contemplated in the Proposed Nonbank Guidance,[103] is insufficient time for a company to supplement the Stage 1 record or correct any inaccuracies.[104]

Third, during Stage 1, FSOC should not be able to request a "page-limited summary" from the company of its submissions.[105] FSOC should review and address any and all information that the company chooses to submit in this Stage, rather than relying on the more superficial review that a summary would enable.

Fourth, FSOC member agency staff, in addition to FSOC staff, should identify and be available to discuss any risks allegedly posed by nonbanks during Stage 1 as well as the factual predicate for such risks.[106] Likewise, FSOC member agency staff and FSOC staff should also be available to meet with a designated company as part of the annual reevaluation process and provide feedback on changes made by its regulators or the company itself to address the risks that were the basis of the designation.[107]

Fifth, FSOC principals, individually or collectively, should be available to meet with nonbanks at every stage of the determination process.[108] Direct and ongoing dialogue between the nonbank, the nonbank's primary regulator, and the decision-making principals is essential to ensure effective communication, transparency, and mutual understanding, especially given the magnitude of what a designation would mean for a company.

---

[101] CCMC 2019 Comment Letter at 8.

[102] *Id.* at 10.

[103] Proposed Nonbank Guidance, 88 Fed. Reg. at 26,242.

[104] FSOC retains its statutory authority to pursue emergency exceptions as needed. *See* 12 U.S.C. § 5323(f)(1) and *supra* note 69 and accompanying text.

[105] *Id.*

[106] CCMC Letter to Sec'y Mnuchin at 9.

[107] *Id.* 8–9; CCMC 2019 Comment Letter at 11.

[108] CCMC Letter to Sec'y Mnuchin at 10; CCMC Comment Letter at 9–10.

Sixth, FSOC should notify a nonbank financial company as soon as practicable but no later than within one business day of the result of its vote to advance such company to Stage 2, regardless of whether the vote is to advance the company or not, to enable firms to comply with disclosure obligations under applicable securities laws and exchange requirements.

Seventh, FSOC should provide the full evidentiary record to the nonbank at least 120 days prior to making a Proposed Determination and allow the nonbank to correct any errors in the record or rebut any unsupported conclusions.[109]

Eighth, the primary financial regulatory agency of the nonbank under review should be involved early and often in FSOC's review process, rather than consulted on a mere episodic basis by FSOC staff.[110]

Ninth, FSOC should ensure appropriate confidentiality protections are in place during the process to protect the company under review and to ensure the public does not jump to incorrect or unwarranted reactions regarding the status of the company or the related industry. To that end, FSOC should pursue all legal and procedural steps to ensure that privileged, confidential and/or trade secret information shared with FSOC by the nonbank's existing primary regulators or directly by the company will be treated as confidential and not be shared with parties outside FSOC, the existing regulators, and the company. All FSOC, regulator, or company work product that incorporates such confidential information, including any responses, written explanations, or challenges to proposed or final determinations or reevaluations, should be treated as confidential.[111]

Last, FSOC should revise its approach to successor companies. FSOC should have to make an affirmative and specific determination that the successor nonbank remains a threat to U.S. financial stability, whether by virtue of its acquisition of the designated nonbank or portion thereof (and for the rationale that applied to the designated nonbank) or as a result of the successor company's pro forma profile. At a minimum, FSOC should raise the standard for automatic treatment of a successor company as a designated nonbank from those successors acquiring a mere "majority" to "substantially all" of the assets and liabilities of the designated company.[112]

---

[109] CCMC 2019 Comment Letter at 10.

[110] CCMC Letter to Sec'y Mnuchin at 10–11.

[111] CCMC 2019 Comment Letter at 7.

[112] *Id.* at 11–12.

II. The Proposed Analytic Framework Deviates From The Statute And Fails To Provide Meaningful Insight Into FSOC's Approach To Financial Stability Risk.

FSOC's efforts to "help market participants, stakeholders and other members of the public better understand how [it] expects to perform certain of its duties" through issuance of the Proposed Analytic Framework deviate from its statutory responsibilities and fail to provide meaningful insight into its approach to financial stability risk, particularly when compared to its 2019 Guidance.[113]

A. The Proposed Analytic Framework Disregards Specific And Unique Designation Standards And Factors FSOC Must Consider Under Its Designation Authorities.

Congress granted FSOC the power to designate legal entities and activities in several sections of Dodd-Frank, including Sections 113, 120, and 804. Each section contains different scopes of application, designation standards, and factors for FSOC to consider. Section 113 authorizes FSOC to designate nonbank financial companies that could pose a threat to U.S. financial stability.[114] Section 120 applies to financial activities or practices that could create or increase the risk of significant liquidity, credit, or other problems spreading among bank holding companies and nonbank financial companies, U.S. financial markets, or low-income, minority, or underserved communities.[115] And Section 804 applies to financial market utilities or payment, clearing, or settlement activities that are, or are likely to become, systemically important.[116] Sections 113 and 804 identify differing factors that FSOC must consider in its analysis.[117] Given the differing scopes of application and designation standards, it is not surprising that Congress prescribed different factors for FSOC to consider in each case.

In contrast, the Proposed Analytic Framework conflates the different statutory designation standards and factors in its attempt to create a generalized framework that

---

[113] Proposed Analytic Framework, 88 Fed. Reg. at 26,306.

[114] 12 U.S.C. § 5323(a)(1).

[115] *Id.* § 5330(a).

[116] *Id.* § 5463(a)(1).

[117] For example, Section 113 requires FSOC to consider the extent of the company's leverage and off-balance sheet exposures while Section 804 requires it to consider the aggregate value of transactions processed. 12 U.S.C. §§ 5323(a)(2), 5463(a)(2). Section 120 does not contain a list of specific factors to consider.

applies to all systemic risk analysis.[118] This raises several legal and analytical problems. First, the Proposed Analytic Framework deviates from the statute. For example, the Proposed Analytic Framework's vulnerabilities and transmission channels differ from the factors in Section 113(a)(2) that FSOC must consider in the context of a nonbank designation. Second, the creation of vulnerabilities and transmission channels not found in the statute may place inappropriate or unintentional emphasis on statutory factors. Third, the vulnerabilities conflate (1) likelihood of material financial distress or failure with (2) damages to the broader economy in the event of material financial distress. For example, the "operational risks" vulnerability goes to the likelihood of material financial distress while other vulnerabilities like "concentration" go to damages to the broader economy (or both). Similarly, some vulnerabilities (e.g., interconnections) look more like transmission channels. Finally, the creation of a "destabilizing activities" vulnerability is conclusory and not probative.

Whether FSOC's "numerous authorities" are as "broad-ranging" or "complementary" as FSOC asserts, they are certainly not co-extensive.[119] The Proposed Analytic Framework's failure to recognize and adhere to the different designation standards and statutory factors would impermissibly allow FSOC to evaluate entities by the factors meant only for regulating activities, and vice versa. FSOC makes what should be distinct statutory designation standards and factors too generic and in so doing conflates the specific standards and factors under Section 113.

B. The Proposed Analytic Framework Fails To Provide Meaningful Insight Into FSOC's Approach To Financial Stability Risk And Undoes Much-Needed Clarity Already Provided By The 2019 Guidance.

The Chamber has consistently supported FSOC's efforts to provide insight and transparency into its meetings and actions.[120] FSOC's prioritization of an activities-based approach, as reflected in its 2019 Guidance, provided the public and markets with a greater understanding into FSOC's analytic approach than had previously existed. This provided markets with a measure of certainty and predictability that enabled individual firms to make necessary business and risk management decisions. FSOC now proposes to eliminate this clarity and instead replace it with a generic and cursory "analytic" framework applicable to financial stability risk at large. In so doing,

---

[118] *See Global Tel*Link v. FCC*, 866 F.3d 397, 412 (D.C. Cir. 2017) (vacating agency action that "conflate[d] grants of authority" under different statutes).

[119] Proposed Analytic Framework, 88 Fed. Reg. at 26,306–26,307.

[120] *See, e.g.*, CCMC Letter to Sec'y Mnuchin at 2, 7–10 (encouraging "regulations to increase due process and transparency," such as that "a potential designee should be involved in the determination process at the earliest point feasible"); CCMC 2019 Comment Letter at 10 (recommending that FSOC be required to provide the full evidentiary record because "the ability to have a direct and ongoing dialogue with FSOC principals is essential to ensuring . . . transparency").

FSOC is choosing administrative expediency over substantive analytical rigor. The Proposed Analytic Framework provides neither the public nor markets with any ability to predict the outcome of FSOC's deliberations or to make informed business decisions in the interim, including voluntarily taking actions aimed at de-risking a nonbank financial company's profile or activities to minimize the likelihood of designation. It lacks any pretense of offering objective and transparent standards, whether in the form of metrics (e.g., quantitative thresholds or categories), or even of the "vulnerabilities" it might consider, noting those identified in the Proposed Analytic Framework are merely "indicative."[121] It does not recognize the significant developments that have been put into place by primary regulators having authority over nonbank financial companies. Nor does the Proposed Analytic Framework facilitate Congressional oversight of FSOC's actions; on the contrary, it seems designed to revert FSOC to the inscrutable black box of its origins.

The Proposed Analytic Framework's deficiencies are particularly notable when compared to the vast body of literature on systemic risk and financial stability.[122] Although this work remains in progress and may not be perfect or applicable in all cases, its depth and comprehensiveness stand in stark contrast and implicit rebuke to the Proposed Analytic Framework. Its failure to reference any of this work—much less emulate it in substantive depth or rigor—is problematic. Furthermore, FSOC's rejection of its current activities-based approach is inconsistent with the current direction of global research and work on systemic risk.[123] At a minimum, FSOC should amend the Proposed Analytic Framework to incorporate the research on this topic and reflect best practices around activities-based approaches.

* * *

[121] Proposed Analytic Framework, 88 Fed. Reg. at 26,307.

[122] Fin. Stability Bd., *Enhancing the Resilience of Non-Bank Financial Intermediation: Progress Report*, at 23-28 (Nov. 10, 2022), https://www.fsb.org/wp-content/uploads/P101122.pdf; Int'l Ass'n Ins. Supervisors (IAIS), *Holistic Framework for System Risk in the Insurance Sector* at 20-23 (Nov. 2019), https://www.iaisweb.org/uploads/2022/01/191114-Holistic-Framework-for-Systemic-Risk.pdf; Int'l Org. Sec. Comm'rs. (IOSCO), *Systemic Risk Identification in Securities Markets* at 12-16 (Jul. 2012), https://www.iosco.org/library/pubdocs/pdf/IOSCOPD461.pdf.

[123] *See, e.g.*, "FSB endorses the IAIS Holistic Framework and discontinues identification of Global Systemically Important Insurers (G-SIIs)," (Dec. 9, 2022), https://www.iaisweb.org/2022/12/fsb-endorses-the-iais-holistic-framework-and-discontinues-identification-of-global-systemically-important-insurers-g-siis/ (noting the "Holistic Framework provides a more effective basis for assessing and mitigating systemic risk in the insurance sector than G-SII identification" and "The Holistic Framework . . . recognises that systemic risk may arise not only from the distress or disorderly failure of an individual insurer, but also from the collective exposures and activities of insurers at a sector-wide level").

While the Chamber supports FSOC's mission of addressing risks to U.S. financial stability, the Chamber believes that the proposal is flawed, removes transparency and due process, and sets the stage for potential economic harm. Additionally, the 2019 guidance provided a means to address systemic risk during the financial stresses caused by the government-mandated shutdown in March 2020. FSOC has failed to provide any evidentiary-based facts or data to demonstrate why a system that worked in the past should be changed.

Accordingly, we respectfully request that the FSOC withdraw its proposals. We stand ready to discuss these issues with you further.

Sincerely,

Tom Quaadman
Executive Vice President
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce