

enhanced by the disclosure to a significant extent.

(3) To determine whether the requester has satisfied the requirements of paragraph (f)(1)(ii)(B) of this section, the Council shall consider the following factors:

(i) The Council shall consider any commercial interest of the requester (with reference to the definition of “commercial use” in § 1301.12(c)(2)(i)), or of any person on whose behalf the requester may be acting, that would be furthered by the requested disclosure. Requesters shall be given an opportunity in the administrative process to provide explanatory information regarding this consideration.

(ii) A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. The Council ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return shall not be presumed to primarily serve the public interest.

(4) Where only some of the records to be released satisfy the requirements for a waiver or reduction of fees, a waiver or reduction shall be granted for those records.

(5) *Determinations of requests to reduce or waive fees.* The Council shall decide whether to grant or deny a request to reduce or waive fees prior to processing a request and within twenty (20) calendar days of its receipt of the request. The Council shall notify the requester of the determination in writing.

(6) *Effect of denying requests to reduce or waive fees.* If the Council denies a request to reduce or waive fees, then the Council shall advise the requester, in the denial notification letter, that the requester may incur fees if the Council proceeds to process the request. The notification letter shall also advise the requester that the Council will not proceed to process the request further unless the requester, in writing, directs the Council to do so and either agrees to pay any fees that may apply to processing the request or specifies an upper limit (of not less than \$25) that the requester is willing to pay to process the request. If the Council does not receive this written direction and agreement/specification within thirty (30) days of the date of the denial

notification letter, then the Council shall deem the request to be withdrawn.

(7) *Appeals of denials of requests to reduce or waive fees.* If the Council denies a request to reduce or waive fees, then the requester shall have the right to submit an appeal of the denial determination in accordance with § 1301.11. The Council shall communicate this appeal right as part of its written notification to the requester denying the fee reduction or waiver request. The requester shall clearly mark its appeal request and any envelope that encloses it with the words “Appeal for Fee Reduction/Waiver.”

(g) *Advance notice and prepayment of fees.* (1) When the Council estimates the fees for processing a request will exceed the limit set by the requester, and that amount is less than \$250, the requester shall be notified of the estimated costs. The requester must provide an agreement to pay the estimated costs; however, the requester shall also be given an opportunity to reformulate the request in an attempt to reduce fees.

(2) If the requester has failed to state a limit and the costs are estimated to exceed \$250.00, the requester shall be notified of the estimated costs and must pre-pay such amount prior to the processing of the request, or provide satisfactory assurance of full payment if the requester has a history of prompt payment of FOIA fees. The requester shall also be given an opportunity to reformulate the request in such a way as to constitute a request for responsive records at a reduced fee.

(3) The Council reserves the right to request prepayment after a request is processed and before documents are released.

(4) If a requester has previously failed to pay a fee within thirty (30) calendar days of the date of the billing, the requester shall be required to pay the full amount owed plus any applicable interest, and to make an advance payment of the full amount of the estimated fee before the Council begins to process a new request or the pending request.

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

(h) *Form of payment.* Payment may be made by check or money order payable to Financial Research Fund.

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

(j) *Aggregating requests.* Where the Council reasonably believes that a requester or a group of requesters acting together is attempting to divide a request into a series of requests for the purpose of avoiding fees, the Council may aggregate those requests and charge accordingly. The Council may presume that multiple requests of this type made within a thirty (30) calendar day period have been made in order to avoid fees. Where requests are separated by a longer period, the Council will aggregate them only where there exists a solid basis for determining that aggregation is warranted under all the circumstances involved. Multiple requests involving unrelated matters will not be aggregated.

Dated: March 18, 2011.

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

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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: Notice of proposed rulemaking.

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 (an “FMU”) the Council determines is or is likely to become systemically important—that is, the failure of or a disruption to the functioning of which 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 notice of proposed rulemaking (NPR) 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, on December 21, 2010, published an advance notice of proposed rulemaking regarding the designation criteria in section 804.

DATES: Comments must be received on or before May 27, 2011.

ADDRESSES: Interested persons are invited to submit comments regarding this notice of proposed rulemaking according to the instructions below. All submissions must refer to the document title. The Council encourages the early submission of comments.

Electronic submission of Comments. Interested persons may submit comments electronically through the Federal eRulemaking Portal at <http://www.regulations.gov>. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt, and enables the Council to make them available to the public. Comments submitted electronically through the <http://www.regulations.gov> Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Mail: Send comments to Financial Stability Oversight Council, *Attn:* Lance Auer, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

Note: To receive consideration as public comments, comments must be submitted through the method specified. Again, all submissions must refer to the title of the notice.

Public Inspection of Public Comments. All properly submitted comments will be available for inspection and downloading at <http://www.regulations.gov>.

Additional Instructions. In general comments received, including attachments and other supporting materials, are part of the public record and are available to the public. Do not submit any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

FOR FURTHER INFORMATION CONTACT: Lance Auer, Deputy Assistant Secretary (Financial Institutions), Treasury, at (202) 622-1262, Kirsten J. Harlow, Senior Policy Advisor, Treasury, at (202) 622-2612, or Steven D. Laughton, Senior Counsel, Office of the General Counsel, Treasury, at (202) 622-8413. All responses to this Notice should be

submitted via <http://www.regulations.gov> to ensure consideration.

SUPPLEMENTARY INFORMATION:

I. Background

The DFA generally 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 that person. Section 803(6)(B) of the DFA specifically excludes a number of entities, such as designated contract markets and national securities exchanges meeting certain criteria, from the definition of an FMU. FMUs form a critical part of the nation's financial infrastructure and their smooth functioning is integral to the soundness of the financial system and the overall economy. The importance of these utility-like arrangements has been highlighted by the recent period of market stress. FMUs exist in many financial markets to support and facilitate the transferring, clearing or settlement of financial transactions. Their function, however, as well as their interconnectedness also concentrates a significant amount of risk in the market. The payment and settlement processes of these systems are highly interdependent, either directly through operational, contractual or affiliation linkages, or indirectly through liquidity flows or common participants. Problems at one system could spill over to other systems or financial institutions in the form of liquidity and credit disruptions.

Section 111 of the DFA established the Council. Among the purposes of the Council under section 112 is to "(J) identify systemically important FMUs * * * (as that term is defined in title VIII)." Section 804 of the DFA gives the Council the authority 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. Any designation of an FMU requires a two-thirds vote of serving members (including an affirmative vote by the Chairperson), after consultation with the Federal Reserve Board of Governors (the "Board of Governors") and the relevant federal agency that has primary jurisdiction over a designated FMU under Federal

banking, securities, or commodity futures laws ("Supervisory Agency").

The designation of an FMU as systemically important by the Council then subjects the designated FMU to the requirements of Title VIII. In particular, section 805(a) authorizes the Board of Governors, the CFTC, and the SEC, in consultation with the Council and one or more Supervisory Agencies, to prescribe risk management standards governing the operations related to the payment, clearing, and settlement activities of systemically important FMUs. The objective and principles for the risk management standards prescribed under section 805(a) shall be to promote robust risk management and safety and soundness, reduce systemic risk, and support the stability of the broader financial system. 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 and other areas that are necessary to achieve these objectives and principles. 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. Designation further subjects the designated FMU to additional examinations, enforcement actions and reporting requirements.

On December 21, 2010, the Council published an advance notice of proposed rulemaking (an "ANPR") with 10 questions to invite public comment on the statutory criteria, as laid out in section 804(a)(2), and the analytical framework that should be applied by the Council in designating FMUs under the DFA. This comment period closed on January 20, 2011. This NPR describes the criteria that will inform, and the processes and procedures established under the DFA for, the Council's designation of FMUs under the DFA. This NPR does not address the designation criteria and analytical framework for payment, clearing, or settlement activities carried out by financial institutions, as defined in section 803(7) of the DFA, which the Council is considering separately.

II. Public Responses to ANPR

The Council received 12 comments in response to the ANPR from industry groups, advocacy and public interest

groups, individual FMUs and financial institutions.¹ These comments addressed the Council's specific questions, as well as a range of other issues. Commenters generally encouraged the development of metrics and an analytical framework as laid out under section 804(a)(2) emphasizing the need for the Council to apply consistent standards that incorporate both qualitative and quantitative factors across all FMUs under consideration for designation. Some commenters provided specific feedback on particular metrics and considerations that should be used in the designation process, while many also commented more broadly on the analytical framework that should be applied by the Council. In addition, a few commenters asked for the Council to apply a transparent and clear communication strategy surrounding all designation decisions. The questions asked by the Council in the ANPR are provided below, along with an overview of the comments received in response to each question.

1. What quantitative and qualitative information should the Council use to measure the factors it is required to consider in Section 804(a)(2) when making determinations under Section 804 of the DFA? How should quantitative and qualitative considerations be incorporated into the determination process?

The majority of comments stressed the need to apply consistent standards that incorporate both qualitative and quantitative factors that are not overly mechanical across all FMUs.² Most commenters stated that while there could be no "one-size-fits-all" approach, all criteria should be used to measure each FMU under consideration, with the relative importance of each criterion varying depending upon the FMU under consideration. Considerations such as the differences in the type of market served by the FMU, the nature and size of the counterparties, and the complexity and liquidity of products accepted should be taken into account. Furthermore, one commenter in particular cautioned the Council to

ensure that FMUs that serve the same market are provided identical treatment, so as not to affect competition.³ One commenter, however, emphasized the need for the flexible application of each criterion within the framework due to the different types and concentrations of risk, different market structures, different governance and risk management standards across FMUs, and differences in the potential impact of an FMU's disruption on markets, households, and the financial system.⁴

In addition, there was widespread consensus on the primary factors that should be used for consideration by the Council to assist in the assessment of systemic importance. Notably, these factors included: The level of interdependence of an FMU and its participants, the characteristics of the participants in an FMU, the type of market served by the FMU, the availability of substitute services, whether the FMU operates under finality of settlement, the risk management framework, including capital, margin and liquidity practices and financial resources available to the FMU, governance arrangements, and the extent of existing regulatory oversight. Some commenters also proposed that the Council use a matrix of criteria that incorporates actual historic measures as a way to interpret metrics based on relative thresholds. Please see the discussion of public responses to question (5b) of the ANPR below for a more comprehensive discussion of these factors.

A few commenters also noted that the process used for designation should be transparent to the public, or at least to the FMUs being considered. Many noted the importance for the Council to consider ongoing work and developments in the adoption of international standards in the area of payments, clearing and settlement organizations to ensure that a uniform and consistent cross-border approach is established that incorporates existing best practices and core principles.

2. Can the considerations listed in section 804(a)(2) be broken down into easily measured factors that the Council should use to determine whether financial market utilities are systemically important? Are there certain levels of quantitative measures (e.g., for value and exposure) or qualitative characteristics (e.g., registered clearing agencies versus exempt clearing agencies) that should

trigger a review for systemic importance by the Council?

There was significant consensus among commenters expressing support for the statutory considerations listed to measure an FMU, with many noting that metrics should be relatively easy to develop for these considerations.⁵ However, as mentioned in the discussion of public response to question (1) of the ANPR above, most commenters emphasized the importance for the Council to consider these factors in conjunction with qualitative measures and professional judgments.

3. Which of the considerations listed in section 804(a)(2) are most important for the Council to consider? Should the application of the considerations differ depending on the type of FMU, and if so how?

Most commenters believed that all the considerations listed in the statute were equally important for the Council to consider. Some commenters placed particular emphasis on systemic importance, size, interconnectedness, the availability of substitutes, and concentration, as well as the need to balance quantitative metrics with qualitative judgments for a more accurate assessment.

4. How should the Council measure and assess the aggregate monetary value of transactions processed by financial market utilities?

One commenter specifically suggested that absolute terms of value be considered relative to factors such as an FMU's market share, size, importance of the market served, and the number of households affected. An FMU, for example, may process a high absolute value of transactions but may not be systemically important if there are other FMUs that could readily provide an alternative in the event of a disruption, or if the market it serves were not systemically important. The idea that readily available substitutes for the services of an FMU would reduce its systemic importance was a common theme among the majority of commenters, although the operational practicality of switching to a substitute would have to be considered. This commenter also suggested that the value and volume of transactions be considered in light of the FMU's potential performance during actual or projected times of stress.⁶

One commenter argued that, while the absolute number of contracts and aggregate notional value of contracts cleared over a period of time are useful indicators for the measuring of value, it

¹ Comments were received from: American Bankers Association, Better Markets, The Clearing House, Debevoise & Plimpton, The Depository Trust & Clearing Corporation, The Financial Services Roundtable, International Swaps and Derivatives Association, LCH, Clearnet Group Limited, NACHA—The Electronic Payments Association, The Pew Charitable Trusts, TIAA—CREF, and Visa. Comments are available at <http://www.regulations.gov>.

² See, e.g. comment letter from International Swaps and Derivatives Association, Inc. (Jan. 20, 2011) (hereinafter the "ISDA letter"), pp. 2–3, and comment letter from Depository Trust & Clearing Corporation (Jan. 20, 2011) (hereinafter the "DTCC letter"), pp. 2–4.

³ See the DTCC letter, p. 3.

⁴ See comment letter from TIAA—CREF (Jan. 20, 2011) (hereinafter the "TIAA—CREF letter"), p. 9.

⁵ See, e.g. the ISDA letter, p. 4.

⁶ See the TIAA—CREF letter, p. 8.

is important to consider average and peak daily levels of open interest to have a more comprehensive analysis. Furthermore, the commenter suggested the importance of also considering risk and liquidity in conjunction with any measures of value. To do so, risk should be measured using the average and peak daily levels of posted margin as well as the day-over-day change in margin levels using gross margin calls. For liquidity, the commenter suggested measuring the size and historic volatility of bid/ask spreads, the number of members that actively trade the contracts cleared, and the diversity of member trading volumes.⁷

a. For each type of financial market utility (*e.g.*, central counterparty, funds transfer system), what is the best approach for measuring value (*e.g.*, notional values, margin flows, net versus gross values)?

As noted, most commenters stated that regardless of the type of FMU, the same criteria and metrics should be applied to each FMU under consideration for designation.

One commenter indicated that for central counterparties (“CCPs”), daily variation margin flow—the changes in values of securities and derivatives contracts that are cleared—and initial margin requirements, should be the primary quantitative references used. In addition, the commenter suggested that the assessment also separately examine the value of securities and commodities that are delivered between a CCP and its members upon maturity of contracts. This commenter also noted that there are two different conventions used by CCPs to process changes in mark-to-market values. Revaluations of derivatives positions tend to result in daily payments and collection of cash, while mark-to-market changes in cash markets affect collateral requirements but not cash obligations. To make assessments of transactional values, both conventions must be covered. The commenter also noted that for both types of conventions used by CCPs to process changes in mark-to-market values, it is important to consider how netting impacts such values.⁸

To assess the systemic importance of the aggregate monetary value of transactions, one commenter suggested looking at the size of an FMU at both the aggregate and transaction level.⁹ Another commenter maintained that the aggregate monetary value of transactions

between an FMU and its members is a rough measure of the exposure of the rest of the financial system to an FMU. This commenter lays out a framework, as outlined in response to question (9) of the ANPR that considers credit, liquidity, portfolio and fire-sale exposures, as well as the value of positions held in a depository, the value of credit lines available to the FMU, and the gross flow between an FMU and its members.¹⁰

b. What time horizon/statistic should be used when assessing value (*e.g.*, daily, monthly or annual averages; daily, monthly, or annual peaks?). Should the Council consider historical values, projected future values, or both?

There was some difference in opinion expressed by commenters in response to this question with regard to the time horizons that should be used to assess value. One commenter believed that the most significant consideration is an FMU’s performance during times of actual or projected market stress, arguing that no single time horizon would effectively capture this performance in all cases. The number of measures should be looked at together with one another and in conjunction with periodic stress tests that are tailored in volume and time horizon to be situation specific and contain qualitative factors. The commenter argued that a measure such as an annual peak will only show an FMU’s ability to handle that volume at a given moment, but not whether it would be adequate to handle this same volume under different market conditions or whether it could absorb additional transactions if needed.¹¹

In contrast, a different commenter argued that annual peaks, calculated on the basis of a rolling 365 days rather than on the previous calendar year, would be the most appropriate and conservative estimates that would ensure that periods of stress are captured.¹² Another commenter also argued that annual historical values were the most verifiable and readily available form of information and should be used when assessing value. The commenter argued that the time horizon need not be shorter to better capture the importance of an FMU to the financial system, noting that this level of importance is unlikely to

change from month to month or quarter to quarter.¹³

One commenter argued that consideration should be given to both the maximum daily value of transactions processed within a given timeframe (at least one year) and, in the case of CCPs, this measure should be stress-tested using the same scenarios as required by supervisors to measure the adequacy of the FMU’s default backing and liquidity resources. This would mean that if a CCP’s financial resource requirement is greater than a specified value, then it should be designated. The commenter also argued that the Council should also consider whether the FMU processes a significant share of transactions of a specific type and the extent to which the FMU’s major participants are domiciled, or have parent companies that are domiciled, in the U.S.¹⁴

c. Should different measures be applied to different types of financial market utilities based on their activities, products, or markets?

As already mentioned, the majority of commenters argued that the same framework of criteria should be applied equally to each FMU under consideration.¹⁵ However, it was also widely emphasized that the Council must employ flexibility and qualitative judgment in its application of the criteria to evaluate each FMU under consideration in light of differences in the activities, products and markets served by FMUs.

d. What is the best approach for measuring potential aggregate monetary values for start-up financial market utilities?

One commenter argued that in light of the lack of data that would be available in the case of a start-up and the lack of reliable estimates of projected volumes, the Council would have to give greater weight to other qualitative factors, such as the sophistication of risk management techniques in the market.¹⁶ Another commenter said that credible forecasts would be possible and should be considered by supervisors in addition to factors such as stress scenarios and the potential markets to be served.¹⁷

e. Should certain payment systems that transfer relatively low aggregate values be considered by the Council for designation as systemically important given that the system’s failure or

⁷ See comment letter from Better Markets (Jan. 20, 2011) (hereinafter the “Better Markets letter”), p. 7.

⁸ See comment letter from LCH.Clearnet (Jan. 20, 2011) (hereinafter the “LCH.Clearnet letter”), p. 4.

⁹ See the TIAA-CREF letter, p. 8.

¹⁰ See comment letter from The Pew Charitable Trust (Jan. 19, 2011) (hereinafter the “Pew letter”), p. 8.

¹¹ See the TIAA-CREF letter, pp. 8–9.

¹² See the Pew letter, p. 10.

¹³ See comment letter from The Financial Services Roundtable (Jan 20, 2011) (hereinafter the “Financial Services Roundtable letter”), p. 3.

¹⁴ See the LCH.Clearnet letter, p. 5.

¹⁵ See, *e.g.* the TIAA-CREF letter, p. 9.

¹⁶ See the TIAA-CREF letter, p. 9.

¹⁷ See the LCH.Clearnet letter, pp. 5–6.

disruption could still cause widespread disruption, especially if there is no ready alternative means of making payments? For example, the failure or disruption of a system used extensively to make payments could leave a significant portion of the general public with unexpected overdrafts and/or lack of liquid funds. If so, what factors should the Council consider in making a determination of systemic importance for such systems?

Many commenters urged the Council to consider only the largest interbank payment systems for designation, arguing that smaller retail systems do not fit the definition of “systemically important.”¹⁸ There was significant consensus among commenters in the reasons provided for this argument, namely that: (i) Retail systems operate relatively low-aggregate monetary value systems that do not settle transactions for important financial markets or other payment systems; (ii) there are reliable and timely substitutes for retail payments; (iii) retail systems do not operate real-time final settlement systems, meaning that the liquidity would not be guaranteed to be available immediately for pending outgoing payments; and (iv) retail systems are already under strong regulatory oversight and designations would result in unnecessary costs and regulatory burdens.¹⁹ Also of note, one commenter mentioned that the ability of depository institutions to permit overdrafts to cover retail payments strongly mitigates the potential for a disruption to a low-value system to have a systemic impact that could threaten the stability of the U.S. financial system.²⁰

While largely mentioning similar reasoning for why low-value systems would likely not qualify for designation, two commenters argued that such systems should first be evaluated to determine if a disruption to them would have a significant impact on a substantial market or a large number of households, or if there were no readily-available substitutes.²¹

5. How should the Council measure and assess the aggregate exposure of financial market utilities engaged in

payment, clearing, or settlement activities to its counterparties?

a. How should the Council identify the extent to which financial market utilities bear and create risk exposures for themselves and their participants?

b. What measures of exposure should be considered (e.g., liquidity exposures, current and potential future counterparty credit exposures, operational risk, and the degree of concentration of exposures across participants)?

There was significant consensus among commenters on the types of factors that should be used by the Council. These include: (i) The liquidity, complexity and volatility of the asset classes/market served by the FMU; (ii) whether the FMU has the potential to create significant liquidity disruptions or dislocations in the event of a failure; (iii) whether the FMU has the potential to create large credit or liquidity exposures relative to participants’ financial capacity; (iv) whether the FMU covers a high proportion of large-value transactions; (v) if, and, if so, how many, large financial institutions and/or other FMUs rely on the FMU for its own operations; (vi) whether there are reliable and timely substitutes with other FMUs;²² (vii) whether the FMU offers finality in settlement, arguing that participants rely on real-time finality to settle positions elsewhere such that a disruption in such a system is more likely to have an effect on a participant’s counterparties than in a system without immediate settlement finality;²³ (viii) how the ownership and governance arrangements affect the incentives and risk-tolerance of an FMU;²⁴ and (ix) whether the FMU is already subject to an existing regulatory regime, arguing that an FMU already under supervision would be less likely to require further designation and that therefore a systemically important designation under Title VIII would result in unnecessary costs and regulatory burdens, as well as the establishment of duplicate regimes of oversight.²⁵ While some commenters did not specify which types of existing oversight were adequate to avoid designation, several commenters specifically indicated that institutions that are already subject to comprehensive Federal Reserve oversight, have access to central bank liquidity, and/or are already subject to

designation under Title I of the DFA, should not be designated.²⁶

A majority of commenters also suggested that if standards and policy in risk management, governance, capital, margin, and liquidity were strong and well-managed, this would reduce the need for designation. Several commenters emphasized the importance of considering the governance and ownership arrangements of FMUs, noting the importance of aligning the interests of an FMU so that it engages in prudent behavior. For those FMUs that have achieved this balance such that a significant portion of equity capital is at risk, they argue that the FMU would pose a lesser degree of systemic risk. These commenters suggest that the inherent risk alone that an FMU may concentrate or be exposed to should not be considered in isolation. Rather, they argue that the adoption of strong risk mitigating practices could greatly reduce systemic risk, and therefore the need for designation.

c. For each type of financial market utility (e.g., central counterparty, funds transfer system), what is the best approach for measuring current credit exposure or, where relevant, potential future exposures? For liquidity (funding), how might the Council assess the potential liquidity risks that a financial market utility may bear or liquidity risks it may impose on the broader financial system should it fail to settle as expected?

When assessing credit risk, most commenters emphasized the importance of looking at both the quality of the counterparties and the products served by the FMU. When assessing liquidity risk, many commenters emphasized the importance of considering the concentration of the FMU in the market and the capacity/substitutability available among other FMUs. Several commenters also suggested that the Council make use of existing risk assessment tools such as approaches outlined under Basel and in the CPSS/IOSCO Recommendations for CCPs as a foundation to build on.²⁷ In addition, many emphasized the importance of using stress tests as a useful way to measure liquidity risk, as well as reverse stress tests to help identify issues of macro prudential concern.

²⁶ See, e.g., the comment letter from Debevoise & Plimpton (Jan. 20, 2011) (hereinafter “the Debevoise letter”), pp. 2–5.

²⁷ See, e.g., ISDA letter, p. 5; CPSS–IOSCO, “Recommendations for Central Counterparties” (November 2004); “Guidance on the Application of the 2004 CPSS–IOSCO Recommendations for Central Counterparties to OTC Derivatives CCPs—Consultative Report” (May 2010).

¹⁸ See, e.g., comment letter from The Clearing House (Jan. 20, 2011) (hereinafter “Clearing House letter”), pp. 1–2 and comment letter from NACHA—The Electronic Payments Association (Jan. 18, 2011) (hereinafter the “NACHA letter”), pp. 3–4.

¹⁹ See, e.g., comment letter from the American Bankers Association (Jan. 20, 2010) (hereinafter “ABA letter”), pp. 3–5, comment letter VISA (Jan. 20, 2011) (hereinafter the “VISA letter”), pp. 3–6, and the Financial Services Roundtable Letter, p. 4.

²⁰ See the NACHA letter, p. 4.

²¹ See the TIAA–CREF letter, p. 9 and the Pew letter, p. 10.

²² See, e.g. the VISA letter, pp. 8–9.

²³ See, e.g. the VISA letter, p. 8.

²⁴ See, e.g., the ISDA letter, p. 3.

²⁵ See, e.g. the ABA letter, p. 2, 5.

One commenter argued that the sources of liquidity for an FMU, which are highly related to the underlying credit of members, should be ignored or severely discounted in any analysis. The commenter argued that during a time of stress, sources of liquidity are unreliable because members will be unlikely to respond to an FMU's call for additional support during a severe market event and major default of another member. Similarly, the commenter argued that lines of credit and liquidity will not likely be available in a major default scenario.²⁸

6. How should the Council identify, measure, and assess the effects of relationships, interdependencies, and other interactions of financial market utilities listed as considerations in section 804(a)(2)?

a. What role should models of interdependencies (e.g., correlations; stress tests) play in the Council's determinations?

Many commenters discussed the importance of using stress tests and correlations in any model to measure levels of interdependence, although there was some variation in the appropriate assumptions and time horizons that should be used. One commenter, for example, emphasized the need for the stress scenarios to use both historical worst-case scenarios as well as future potential events in order to apply more extreme cases of market illiquidity.²⁹ In addition, some argued that correlations both between counterparties and industry sectors and between financial markets and instruments should be incorporated and appropriately stress-tested.³⁰

b. What role should the nature of participants or counterparties play in the Council's determinations (e.g. common participants across utilities, systemic importance of participants)?

The majority of commenters emphasized the importance of examining the nature of participants and counterparties to an FMU, particularly as a means of measuring interdependence and concentration. This should include considerations such as the type and number of counterparties, particularly if they are significant financial firms or FMUs, as well as the nature of relationships these counterparties have to each other and other FMUs.

c. Should the Council consider the legal, corporate, or contractual relationships of financial market utilities in assessing relationships,

interdependencies, and other interactions (e.g., common holding company, joint ventures, cross-margining agreements, and service provider relationships)?

One commenter emphasized the importance for FMUs to operate under a well-established and enforceable legal framework. In particular, the commenter emphasized the importance of assessing the legal risks arising from cross-border relationships, governance and corporate structures and any affiliates or holding companies that are under the same control as the FMU and thus depend on the same creditors. Furthermore, the commenter noted that the Council should consider any cross-margining and/or outsourcing and servicing relationships that an FMU may have.³¹ Please see the discussion of public responses provided to question (7) of the ANPR for more detailed information.

Another commenter emphasized this point as well, noting the importance for the Council to consider legal, corporate, or contractual relationships of FMUs. This commenter emphasized the importance of paying attention to cases where the same legal entity is acting in multiple capacities, for example if a legal entity acts both as a market operator and a CCP, and also as a participant in a money or tri-party market. Furthermore, this commenter argued that the Council should carefully consider cases in which the holding company of an FMU has significant exposure to foreign markets.³²

d. Should the Council consider whether there are readily available substitutes for the payment, clearing, and settlement services of financial market utilities?

The importance of readily available substitutes for an FMU was a theme common among all commenters, who argued that the availability of a readily-available alternative would significantly reduce the systemic threat an FMU posed to the financial system, thereby reducing the need for designation by the Council.

7. How should the Council assess whether failures or disruptions to a financial market utility could potentially threaten the financial system of the United States?

a. What measures, information and thresholds should be used in assessing the effect of a financial market utility failure or disruption on critical markets and financial institutions? For example, how might the Council assess potential credit and liquidity effects and

spillovers from a financial market utility disruption?

The vast majority of commenters emphasized the importance of considering the level of interconnectedness of participants—both directly and indirectly—of an FMU as well as between FMUs. These relationships would help inform the Council on the potential effect on all relevant market participants in the event that an FMU is unable to function. While some explicitly believed that this should be limited to a more permanent long-term loss of function, noting that temporary disruptions such as operational failures should not be considered, one commenter believed that any potential disruption should be examined to understand the dependencies of participants on the FMU and the resulting impact on the economy as a whole.

Furthermore, nearly all commenters noted the importance of considering the type of counterparties to an FMU, and whether they themselves are systemically important, as well as the concentration of the market and the availability of substitutes. Other factors mentioned widely by commenters, as elaborated on in question (5b) were the capital and liquidity cushions of an FMU, its governance structure, whether or not it offered finality of settlement, and the nature, in terms of size, depth and volatility, of the market that it serves.

As mentioned in question (6a) as well, many suggested the importance of using stress tests and a variety of extreme but plausible assumptions in order to assess the effects from any disruption.

b. What factors should the Council consider when determining whether markets served by financial market utilities are critical? What qualitative or quantitative characteristics might lead the Council to scope in or out particular markets?

Many commenters emphasized the importance of considering the size, depth and volatility of a particular market in order to determine its systemic importance. Furthermore, many argue that the Council should also consider the type and number of participants to the market—for example, if they themselves are systemically important, this will increase the likelihood that the market itself is critical—as well as what percentage of a market may be used by a large percentage of U.S. households.

One commenter argued that all types of disruptions—both temporary and permanent—must be examined by the Council. In addition, the commenter suggested considering whether the

²⁸ See the Better Markets letter, pp. 7–8.

²⁹ See the Better Markets letter, p. 8.

³⁰ See, e.g., the LCH.Clearnet letter, p. 7.

³¹ See the TIAA-CREF letter, p. 11.

³² See the LCH.Clearnet letter, p. 7.

failure or suspension of a market for a significant period of time interrupts the supply of vital foodstuffs or energy, halts commercial activity, or prevents financial institutions from managing their own risks.³³

8. Title VIII of the DFA contains distinct provisions with respect to financial market utilities and financial institutions engaged in payment, clearing and settlement activities. What factors should the Council consider in distinguishing between a systemically important financial market utility and a financial institution that is very substantially engaged in a systemically important payment, clearing, or settlement activity?

Most commenters urged the Council to ensure that any designations did not lead to duplicative oversight regimes.³⁴ Furthermore, it was noted that if an institution were designated under Title I, it should not also be subject to designation under Title VIII. One commenter believes that the same qualitative and quantitative criteria and metrics should be applied in all cases, including if the potential designee is a financial institution.³⁵

A different commenter stated that the distinction is a critical issue for market participants but that it requires clarification by the Council in order to allow stakeholders the ability to provide a substantive answer.³⁶

9. What other types of information would be effective in helping the Council determine systemic importance? What additional factors does your organization consider when assessing exposure to, or the interconnectedness of, financial market utilities?

In addition to the set of common factors elaborated on in question (5b), one commenter also suggested that the Council consider an FMU's opacity/complexity/disclosure, leverage, rate of change of activity, role in monetary and/or fiscal policy, segregation of client margin, business conduct rules, execution requirements, and methodology of margin calculation.³⁷

One commenter developed a framework for consideration by the Council. This framework attempts to measure three broad components in order to value systemic significance: fragility of the FMU, exposure of its financial firm members to its failure, and fragility of the members. The

framework involves seven steps: (1) Developing a set of "heightened reporting firms;" (2) identifying factors—such as leverage, liquidity, concentration, risk management, complexity, and credit exposure—that can affect systemic significance, defining measures for each factor and dividing them into factors that affect fragility of the FMU and factors that affect exposure of firms to FMUs; (3) estimating the fragility of each heightened reporting firm that is a member of each FMU; (4) estimating the exposure of members to each FMU and for each FMU candidate; (5) creating a single measure of the system's vulnerability by adding up the measures of exposures of all heightened reporting member firms to the candidate FMU, weighted by their fragility estimates; (6) estimating systemic importance of an FMU using several statistical factors; and (7) applying a universal threshold to each FMU to ultimately determine designation.³⁸

Lastly, one commenter noted that a supervisory gap existed in the oversight of internet-based payment systems, including P2P payment systems, and asked for the Council to consider the appropriate actions to take to close this loophole.³⁹

10. What role should international considerations play in designating financial market utilities?

In response to this question, many commenters emphasized the importance of adopting international standards and best practices, such as the CPSS Core Principles⁴⁰ and the work of the Financial Stability Board⁴¹ to promote common standards and cross-border cooperation. Particularly in light of the interconnectedness of global markets, commenters emphasized that adherence to internationally agreed upon standards would help ensure consistency in practice across FMUs globally.⁴²

One commenter argued that the global nature of markets serviced by FMUs as well as the interconnectedness of the global financial system as a whole means that there should be no differences in criteria employed when considering the designation of FMUs that may have substantial foreign activities. As a result, the commenter argued that U.S. supervisors have a justification and need for concomitant supervisory access to any foreign FMU deemed systemically important.⁴³

One commenter urged the Council to be conservative when applying Title VIII to non-U.S. entities because Title VIII does not expressly provide for extra-territorial application. To the extent that the Council does apply Title VIII to non-U.S. entities, this commenter urged the Council to ensure that any determination maintains a level playing field for domestic and foreign FMUs with a comparable regulatory regime. Furthermore, the commenter noted that participation in government support programs should not be a factor in identifying whether an FMU is systemically important.⁴⁴

III. Overview of Proposed Rule

Proposed part 1320 of Title 12 ("Rule 1320") lays out the framework that the Council proposes to use to determine whether an FMU should be designated as systemically important. The proposed rule incorporates and augments the requirements set forth in the DFA with respect to the determination of whether to designate an FMU as systemically important. The Council requests comment on all aspects of the proposed rule, but in particular, comments in response to the specific questions raised below. The Council is providing a sixty (60) day comment period for this proposed rule.

A. Considerations for Determination

Section 804 of the DFA provides the Council with the authority to designate those FMUs the Council determines are systemically important—that is, the failure of or a disruption to the functioning of which 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 U.S. financial system. Section 803(6)(A) of the DFA generally 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 that person. Under section 804(a)(2) of the DFA, in making a determination on whether the 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

⁴⁴ See the Financial Services Roundtable letter, pp. 5–6.

³³ See the LCH.Clearnet letter, p. 8.

³⁴ See, e.g. the Debevoise letter, p. 2.

³⁵ See the LCH.Clearnet letter, p. 8.

³⁶ See the Financial Services Roundtable letter, p. 5.

³⁷ See the ISDA letter, pp. 5–7.

³⁸ See the Pew letter, pp. 3–7.

³⁹ See the Clearing House letter, p. 10.

⁴⁰ See CPSS "Core Principles for Systemically Important Payment Systems" (Jan. 2001).

⁴¹ See, e.g. <http://www.financialstabilityboard.org>.

⁴² See, e.g., the ISDA letter, pp. 6–7.

⁴³ See the LCH.Clearnet letter, p. 9.

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.

As discussed in Part II, there were several themes in the ANPR commentary regarding how the Council should apply the statutory considerations to the designation process.

One broad theme from the commenters is that the analytical framework for evaluating an FMU should be applied consistently across all FMUs and that the process used for designation be transparent to the public, or at least to the FMUs under consideration. The Council agrees with the broad theme raised by commenters that it is important to have a consistent framework and transparent process for all FMUs under consideration. However, not all criteria will be relevant to each FMU under consideration. The Council believes it would be appropriate to adopt a flexible approach to the analysis of metrics applicable to each FMU under consideration. Thus, the framework itself should accommodate the range of payment, clearing, and settlement activities that FMUs may engage in and allow the application of relevant criteria to each FMU under consideration, with the relative importance of the criteria applied to be informed by the specific circumstances of the FMU's role in the financial system and the Title VIII definition of "financial market utility." Several commenters also supported the need to weigh qualitative considerations in addition to quantitative factors.

The Council shares the concerns of commenters and proposes to develop a systematic and robust process that is consistent with the intent of the DFA. Such an analytical framework would be based on the four specific considerations for systemic importance set forth in section 804(a)(2) of the DFA. This framework would apply consistent criteria to FMUs under consideration, recognizing differences across FMUs, including differences in risk management structures and in the potential impact of an FMU's disruption on markets, households, and the financial system. In addition, the Council shares the view of the commenters that both quantitative and qualitative judgments be applied to this process. The Council provides further information with regard to this analytical framework and related process in sections III.B and III.C below.

The Council is equally interested in maintaining a transparent process, which is in keeping with one of the broader goals of the DFA. In particular, there is a provision in the proposed rule for notification of each FMU prior to a vote on a proposed designation, providing the FMU an opportunity to present the Council with arguments and information supporting or opposing its designation. In providing for an appropriately transparent process to the public, the Council will need to take into account that much of the information gathered and decisions made will be sensitive and likely require confidential handling so as not to reveal proprietary information or affect competition. Nonetheless, the Council will establish as transparent a process as is appropriate.

With respect to the criteria for designation, there was broad consensus in the comments on the factors that the Council should incorporate into the analytical framework. The most common suggestions included: an examination of the type of market served by the FMU, the potential for large credit or liquidity dislocations in the event of a disruption, the proportion of large-value transactions that the FMU serves, the nature of counterparties to the FMU, the availability of substitutes for participants in the event of an FMU disruption, and whether the FMU offers finality in settlement.

The Council agrees with commenters that many of these factors could offer considerable insight into the designation process and will consider incorporating them into the analytical framework that is developed. As noted, further insight into the types of factors that may be incorporated into the Council's analysis is further detailed in section III.B.

Many commenters also urged the Council to only consider the largest interbank payment systems for designation, arguing that smaller retail systems do not fit the definition of systemically important. Many of the commenters argued that retail systems settle relatively low-aggregate monetary value, that there are reliable and timely substitutes for retail payments, and that such systems do not operate with finality in settlement and are already under strong regulatory oversight.

While the Council recognizes that the definition of an FMU covers a wide variety of systems, including low-value and large-value payment systems, it acknowledges that the factors raised by several commenters concerning retail payment systems are important considerations. In considering the systemic importance of various FMUs,

the Council will take these factors into consideration as well as other relevant characteristics. The Council has decided not to include any categorical exclusion for retail payment or other systems in the proposed regulations because it believes that such exclusions would impair the Council's ability to effectively respond to changing market conditions and industry developments.

Several commenters specifically indicated that institutions that are already subject to comprehensive Federal Reserve oversight, have access to central bank accounts and liquidity, or are already subject to designation under Title I should not be designated. Some also argued that FMUs that are already subject to prudential oversight, have strong risk management frameworks, governance standards, and sufficient financial resources in place have developed controls that would reduce the need for designation since the risk of a systemic disruption would be considerably lower.

The Council recognizes the importance of oversight and of FMU's maintaining strong controls to mitigate the risk of failure. However, the purpose of Title VIII is to consider designating certain FMUs as systemically important because while FMUs that conduct or support multilateral payment, clearing, or settlement activities may reduce risks for their participants, such utilities may also concentrate and create new risks. Recognizing this, Title VIII instructs the Council to designate as systemically important any FMU whose failure or disruption 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 U.S. Thus, the Council is instructed to designate FMUs based on the effect that a disruption or failure of the FMU would have on the stability of the U.S. financial system. The likelihood of that precipitating event—that is to say, the likelihood, in light of any risk mitigating practices that may be in place, that an FMU *would* experience a disruption or failure is *not* one of the statutory considerations.

There were several other suggestions raised in the comment letters in which there was no consensus. In particular, there were a number of different suggestions provided in response to ANPR question 4 on how the Council should measure and assess the aggregate monetary value of transactions processed by an FMU. Commenters suggested a variety of approaches for measuring value (notional values, margin flows, net versus gross values, etc.) and defining time horizons and

statistics (annual, peak, etc.). There was further divergence in thought with regard to ANPR question 6 on the type of model that should be used to measure interdependencies, (e.g., correlations, stress tests). The Council appreciates the range of suggestions provided by the commenters. The analytical framework and associated subcategories and metrics reflect the Council's efforts to incorporate commenters' suggestions, which are further outlined in section III.B.

Lastly, in response to ANPR question 10, many commenters took the opportunity to stress the importance of applying consistent standards across borders, specifically advocating the use of international core principles and best practices to ensure consistency and a level playing field. One commenter cautioned the Council to be conservative in applying Title VIII to non-U.S. entities. The Council requests further comment on the role international considerations should play in this rule making, in particular on the application of the proposed analytical framework and the subcategories contained in the proposed section 1320.10 given cross-border payment, clearing and settlement flows, and cross-border participation in FMUs.

B. Statutory and Analytical Framework for Designations

The proposed rule incorporates each of the statutory factors that must be considered into the analytical framework to determine whether an FMU should be designated. In developing the proposed rule, the Council has also taken into consideration the comments received on the ANPR. If adopted into a final rule, this framework would be used by the Council to meet its statutory obligations of assessing the threat the failure or disruption of an FMU may pose to the stability of the U.S. financial system. In addition, the Council would consider any other risk-related factors that the Council deems appropriate, under section 804(a)(2)(E).

The Council would evaluate FMUs under each of the four statutory considerations as laid out in section 804(a)(2) of the DFA, in addition to any additional factors it deems appropriate, using quantitative metrics where possible. The Council expects to use its judgment, informed by data on the four considerations, to determine whether an FMU should be designated as systemically important and thus subject to heightened risk management standards prescribed by the Board of Governors, the SEC, or the CFTC, in consultation with the Council and

relevant Supervisory Agencies. These standards will take into consideration relevant international standards and existing prudential requirements governing the operations related to the payment, clearing and settlement activities of designated FMUs.

Any determinations of the Council made under the proposed rule using the analytical framework would be based on 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).

Under the proposal, the Council expects to use the four statutory considerations as a base for the framework for assessing the systemic importance of FMUs, regardless of the type of payment, clearing and/or settlement activities that they are engaged in. However, the application of this framework would be adapted for the risks presented by a particular type of FMU and business model. For example, the metrics that are best suited to measure the four categories of systemic importance will likely vary across FMUs. The Council will review these metrics on a periodic basis and revise them as appropriate.

In addition, the process that the Council will use to evaluate potential FMUs for designation under an analytical framework is outlined in more detail under section III.C. Briefly, the Council is considering using a two stage process for evaluating FMUs prior to a vote of proposed designation by the Council. The first stage will consist of a largely data-driven process for the Council, working with its committees⁴⁵ 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 initial review will be subject to a more in-depth review, with a greater focus on qualitative factors, in addition to FMU and market specific considerations.

Proposed Analytical Framework

To provide further transparency into the analytical framework that the Council is considering, set forth below is additional information regarding the types of metrics that may be considered by the Council.

Stage One

As described above, the Council is proposing subcategories to further build out the four specific statutory

⁴⁵ See "Financial Stability Oversight Council Committee Structure" (Nov. 23, 2010 Council Meeting Document), available at <http://www.treasury.gov/initiatives/Pages/FSOC-index.aspx>.

considerations that are set forth in DFA section 804(a)(2). Some of these subcategories and associated metrics are described below to provide illustrative examples of how the factors will be considered in assessing systemic importance.

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

- Number of transactions processed, cleared or settled by the FMU

Within this subcategory, examples of the types of metrics that the Council may consider include the mean and median daily gross and net volumes processed, cleared or settled; the historical peak daily gross and net volumes processed; and the volumes processed, cleared or settled as a percentage of the total market volume; and for derivatives central counterparties, the median and peak daily changes in open interest.

- Value of transactions processed, cleared or settled, by the FMU

For this second subcategory, examples of the types of metrics that the Council may consider include the mean and median daily gross and net values processed, cleared or settled; the historical peak daily gross and net values processed, cleared or settled; and the values processed, cleared or settled as a percentage of the total market value.

- Value of other financial flows that may flow through an FMU

For this third subcategory, the Council may consider the mean and median daily value of variation margin; the peak daily value and change of variation margin; and the peak daily value of funding flows.

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

- Credit exposures⁴⁶ to counterparties

Within this first subcategory, the Council may consider the use of metrics that measure the mean daily and historical peak aggregate intraday credit provided to participants; the mean and peak daily changes in the value of variation margin collected by an FMU; the mean and peak daily value of initial margin held by an FMU; and 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).

- Liquidity exposures to counterparties

Under the second subcategory, the Council may consider measures of the

⁴⁶ In the context of derivatives clearing, the term "credit exposures" refers to potential future exposures.

estimated peak liquidity need in the case of the default of the largest single participant to the FMU, the mean and peak aggregate dollar value of pay outs by an FMU to participants; and the mean and peak value of financial resources available to the FMU, broken out by liquidity and quality.

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

Within this category, 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

- Role of an FMU in the market served

The Council may consider metrics such as the type of market(s) served by an FMU and the FMU's role in primary and secondary markets.

- Availability of substitutes

Under the second subcategory, the Council may consider the number of other FMUs that may serve the same function and/or product and how readily available a potential substitute would be for participants, considering such additional factors as operational capability and timing.

- Concentration of participants

Under the third subcategory, the Council may consider metrics that look at concentrations of the single largest participant, the top five participants and the top ten participants, as a percentage of the value and volume of activity by all participants.

- Concentration by product type

Under this subcategory, the Council may consider information regarding the degree to which the FMU is a major or sole processor for a particular financial contract or instrument.

- Degree of tiering

Under this subcategory, the Council may consider information regarding the number of an FMU's indirect participants, as well as the concentration of such indirect clearing through an FMU's direct participants.

- Potential impact/spillover in the event of a failure or disruption.

Lastly, under this sixth subcategory, some examples of the types of metrics that the Council may consider include the number and type of systemically important financial and non-financial institutions participating in the activities of the FMU; and the daily gross value of repurchase agreements (both securities-driven and cash-driven), as well as other instruments that are cleared or settled by an FMU.

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 based on the particular characteristics of an individual FMU being reviewed, including for example the nature of its operations, corporate structure and business model, and to add any relevant subcategories and metrics to the proposed 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 can consider any elements that may be particular to a specific FMU, a type of FMU or market. Each FMU under consideration will undergo a tailored analysis of the potential impact that a failure of or a disruption to the function of the FMU has on the stability of the U.S. financial system, such as the creation of, or increase to, the risk of significant liquidity or credit problems spreading among financial institutions or markets.

Review of Prior Considerations and Designations

The Council expects to begin assessing the systemic importance of FMUs under the proposed analytical framework shortly after adopting a final rule. Subsequently, on at least an annual basis, the Council will continue to evaluate whether there are other FMUs that require designation, and whether previous designations of systemically important FMUs should be rescinded.

C. Evaluation Process for Designations

Overview of Process

The proposed rule implements provisions of Title VIII of the DFA that outline the process that the Council, working with its committees, will carry out in making designations. As noted, the Council is considering using a two

stage process for evaluating FMUs prior to a presentation to the Council of an initial assessment of the FMU for a formal vote of proposed designation by the Council. If an FMU reaches the second stage of this evaluation process, the Council will 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, as it deems relevant, designation by the Council as outlined in proposed section 1320.11. In the case of an affirmative formal vote of the proposed designation by two-thirds of the Council, including the Chairperson, an FMU will be notified and given the opportunity to request a written or oral hearing before the Council to demonstrate that the proposed designation or rescission is not supported by substantial evidence as outlined in proposed section 1320.12. Following this, the Council will complete its considerations and carry out its final vote and notification to the FMU. Below is a more detailed stage-by-stage discussion of the proposed process.

Stage One Process: Identification of FMUs for Further Evaluation

The first stage will be largely data-driven to identify a preliminary set of FMUs, whose failure or disruption could potentially threaten the stability of the financial system of the United States, and which therefore should be subject to a more thorough review under the second stage. This first stage will be informed by both publicly available information and information that is available to a Federal agency with jurisdiction over the FMU. The assessments in stage one will result in materials that provide an overview of the FMUs for further review and consideration. This first-stage identification of potentially systemically important FMUs will be performed at least annually. A reassessment of already designated FMUs will also occur at least annually.

Stage Two Process: In-Depth Evaluation of FMUs under Consideration

The second stage will involve a more in-depth review and analysis, from both a quantitative and qualitative perspective, of the FMUs determined to merit further assessment based on the first-stage review. This stage involves consideration of additional elements that may be particular to a specific FMU or type of FMU and assembly of a detailed assessment of the FMU and in-depth analysis for consideration by the Council in connection with the Council's determination whether to

make a formal vote of proposed designation. The Council will provide an FMU with the opportunity to submit a written statement in support of or opposition to, as it deems relevant, designation by the Council as provided in proposed section 1320.11. Any statement submitted by an FMU will be included in information provided to the Council for its consideration in connection with the Council's formal vote of proposed designation. The Council is proposing to provide this opportunity as part of the two-stage evaluative process, in addition to the statutory requirement affording an FMU notification and opportunity for hearing before the Council's final vote on whether to designate an FMU as systemically important.

In addition, the Council has the opportunity under stage two to request further information from an FMU (as per section 809(a)(1) of the DFA), if the information needed is not available publicly or from a federal agency with jurisdiction over the FMU. The FMU will be notified that this information is being collected to help evaluate whether it should be designated by the Council, based on the Council's determination that there is reasonable cause to believe the FMU meets the regulatory criteria for designation.

IV. Explanation and Proposed Rules

The Council is providing a sixty (60) day comment period for this proposed rule.

A. Authority and Purpose

Proposed section 1320.1(a) clarifies that sections 111, 112, 804, 809, and 810 of the DFA provide the statutory authority for the Council to promulgate this part. Proposed section 1320.1(b) explains that the principal purpose of the part 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.

B. Definitions

Proposed section 1320.2 contains definitions that are necessary to implement the proposed rules. The proposed definitions (including "financial market utility," "Supervisory Agency," and "systemically important") are taken from the statutory language in sections 2 and 803 of the DFA. The Council is soliciting comment on all aspects of the proposed definitions. In particular, the Council requests comment on whether additional definitions are needed to implement the proposed rules.

C. Considerations for Designating FMUs

Proposed section 1320.10 lists five factors for the Council to consider in making a determination on whether to designate or rescind the designation of an FMU. The five factors are derived from section 804(a)(2) of the DFA. Of the five factors, four are specific and the fifth—any other factors that the Council deems appropriate—is open-ended. For purposes of providing greater transparency as to how the Council will apply each of the specific factors, the Council proposes to include subcategories in the proposed rule. These subcategories are not exclusive, and the Council may take additional items into consideration under each statutory factor when appropriate, in the Council's experience and judgment in light of the particular circumstances of any FMU, but the Council believes including illustrative subcategories will give the public a better understanding of the designation process.

With regard to the first factor covering the aggregate monetary value of transactions processed by an FMU, the Council proposes to consider the number of transactions processed, the value of transactions cleared, settled, and processed, and the value of other financial flows.⁴⁷ The Council believes that information derived from this subcategory will inform an evaluation of the extent of an FMU's operations.

For the second factor covering the aggregate exposure of the FMU to its counterparties, the Council proposes to consider credit exposures⁴⁸ and liquidity exposures. The Council believes that these two subcategories will assist in formulating an assessment of an FMU's exposures to its counterparties.

For the third factor covering the relationship, interdependencies, or other interactions of an FMU with other FMUs or payment, clearing, or settlement activities, the proposed rule focuses on understanding the FMU's interactions by types of participants. The Council believes that this subcategory will help provide a foundation for an evaluation of the extent to which an FMU is interconnected with other FMUs, the payment, clearing, or settlement activities of financial institutions or the financial markets as a whole.

For the fourth factor covering the effect that the failure of or a disruption

to an FMU would have on critical markets, financial institutions, or the broader financial system, the proposed rule lists subcategories focused on the roles of the FMU in the market served, the availability of substitutes, the concentration of participants and product types, the degree of tiering, and the potential impact or spillover in the event of a failure or disruption. The Council believes that these six subcategories will assist the Council's evaluation of the effect of the failure of or a disruption to an FMU on critical markets, financial institutions, and the broader financial system.

The Council requests comment on whether the subcategories in each specific factor are clear, sufficiently detailed, and appropriate. In particular, the Council requests comment on whether the Council should add subcategories, and whether the Council should eliminate or modify any of the proposed subcategories.

D. Consultation With Financial Market Utility

Proposed section 1320.11 provides that before providing an FMU with notice of a proposed determination under section 1320.12, the Council will provide an FMU with written notice that the Council is reviewing the FMU under this part and allow the FMU to submit written materials to the Council in support of or in opposition to, as the FMU deems relevant, designation by the Council. Written materials may also include any actions the FMU proposes to take to reduce or increase its systemic risk. The proposed rule does not fix the time frame for an FMU to submit written materials, but rather leaves it up to the Council to decide such timing on a case-by-case basis. The Council believes such flexibility is appropriate to provide FMUs appropriate time to gather and submit information. The Council believes that affording FMUs that progress to Stage 2 of the review process an opportunity to voluntarily submit information to the Council will be mutually beneficial. Specifically, the Council believes an FMU will benefit by having an opportunity to provide the Council with information and analysis that the FMU deems relevant on whether to make a proposed determination. The Council believes that any written materials provided by an FMU will allow it to make a more informed decision regarding a proposed determination. However, the Council notes that the submission of any written materials by an FMU under this proposed section 1320.11 is strictly voluntary. The Council requests comment on the utility of the proposed

⁴⁷ Examples of the value other financial flows may include analysis of the gains, losses or collateral related to other transactions.

⁴⁸ In the context of derivatives clearing, the term "credit exposures" refers to potential future exposures as opposed to actual credit extended.

voluntary collection of information. In particular, the Council requests comment on whether the Council should establish 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.

E. Advance Notice of Proposed Determination

Proposed section 1320.12 sets out 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 determination. As set forth in section 804(c)(2) of the DFA, the Council will provide an FMU with advance written notice of its proposed determination. The FMU will generally have thirty (30) calendar days to request a hearing before the Council to demonstrate that the Council's proposed determination is not supported by substantial evidence. Upon receipt of a timely request for a hearing, the Council will fix a time for the hearing, which in most instances will be through the submission of written materials to the Council, not more than thirty (30) calendar days after receipt of the request for a hearing. The Council requests comment on whether the proposed process is sufficiently detailed and clear.

F. Council Determination Regarding Systemic Importance

Proposed section 1320.13 sets out the requirement for the Council to designate an FMU and rescind the designation of a designated FMU depending on whether the standards for systemic importance are met. Proposed section 1320.13 makes clear that any Council proposed or final determination 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. The proposed rule also requires the Council to consult with the relevant Supervisory Agency and the Federal Reserve Board before making any proposed or final determination. These requirements are taken from the statutory language in section 804(a), (b), and (c)(1) of the DFA. The Council requests comment on whether the proposed process is sufficiently detailed and clear.

G. Emergency Exception

Proposed section 1320.14 sets out an emergency exception that allows the Council to waive or modify the notice, consultation and hearing requirements set forth in the proposed rules and designate an FMU as systemically important. The Council may invoke this

exception only where the Council makes a determination that an emergency designation is necessary to prevent or mitigate an immediate threat to the financial system posed by the FMU. The exercise of this emergency exception requires at least a two-thirds vote of the voting members of the Council then serving, including the affirmative vote of the Chairperson of the Council. In addition, the Council must provide notice of its use of the emergency exception to the FMU no later than 24 hours after such exception is invoked. The emergency exception is based on statutory language in section 804(c)(3) of the DFA. The Council requests comment on whether the proposed emergency exception is sufficiently detailed and clear. In particular, the Council requests comment on whether 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.

H. Notification of Final Determination

In accordance with section 804(d) of the DFA, proposed section 1320.15 sets out the deadline for the Council to notify an FMU of the Council's final determination after providing an FMU notice of the proposed determination and an opportunity for a hearing. If the FMU has timely requested a hearing, the Council must notify the FMU in writing of its final determination within 60 calendar days of the hearing, which must also include the Council's findings of fact upon which the Council's determination is based. If an FMU does not timely request a hearing, the Council will notify the FMU in writing of its final determination within 30 calendar days after the expiration of the date by which the FMU could have requested a hearing. The Council requests comment on whether the notification process is sufficiently detailed and clear. In particular, the Council requests comment on whether the notification to an FMU that did not timely request a hearing should also include the Council's findings of fact.

I. Extension of Time Periods

As set forth in section 804(e) of the DFA, proposed section 1320.16 authorizes 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. The Council requests comment on whether the extension of time periods process is sufficiently detailed and clear.

J. Council Information Collection and Coordination

Proposed section 1320.20 authorizes the Council to require any FMU to submit information that the Council may require for the sole purpose of assessing whether the FMU is systemically 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 believes that providing a written explanation to the FMU will help reduce or mitigate an FMU's paperwork burden by providing specific context to the Council's request. This information collection and coordination authority is substantially derived from the statutory language in section 809 of the DFA. The Council requests comment on whether the information collection and consultation process is sufficiently detailed and clear. In particular, the Council requests comment on the utility of the Council providing an FMU with a written explanation of the basis for its belief that the FMU is systemically important.

V. Regulatory Flexibility Act

It is hereby certified that this rule will not have a significant economic impact on a substantial number of small entities. The 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. The Council does not expect the rule to directly affect a substantial number of small entities. Accordingly, a regulatory flexibility analysis under the Regulatory

Flexibility Act (5 U.S.C. 601, *et seq.*) is not required.

VI. Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Financial Stability Oversight Council, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to Kirsten J. Harlow, Department of the Treasury, Washington, DC 20220. Comments on the collection of information must be received by May 27, 2011. Comments are specifically requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Council, including:

Whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

The collection of information in these proposed regulations are found in § 1320.11, § 1320.12, and § 1320.20.

Estimated total annual reporting burden: 500 hours.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

VII. Executive Order 12866

Executive Orders 13563 and 12866 direct agencies to assess all 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.

List of Subjects in 12 CFR Part 1310

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 proposes to add a new part 1320 to 12 CFR chapter XIII, as proposed to be established at 76 FR 4562, January 26, 2011, 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.

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 principal 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.

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), 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. The term “Supervisory Agency”—

(1) Means the Federal agency that has primary jurisdiction over a designated financial market utility under Federal banking, securities, or commodity futures laws as follows—

(i) 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.

(ii) 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.

(iii) 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.

(iv) 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).

(2) If a designated financial market utility is subject to the jurisdictional supervision of more than one agency listed in paragraph (1), 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 by types of participants.

(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 section 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

(ii) Reduce or increase the need for designation under § 1320.13; or

(iii) Reduce or increase the appropriateness of rescission under § 1320.13.

(3) The Council shall consider any written materials 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 under

§ 1320.13, the Council shall provide the financial market utility with advance notice of the proposed determination of the Council, and proposed findings of fact supporting that determination.

(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 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 or 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 proposed or final determination under paragraph (a) or (b) of this section shall—

(1) Be made by the Council and may 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, 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 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;

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

§ 1320.15 Notification of final determination.

(a) *Notification of final determination after a hearing.* (1) Within 60 calendar days of any hearing under § 1320.12, 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 the time periods 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 meets the standards for systemic importance in § 1320.10; or

(2) Determine that that it has reasonable cause to believe that the designated financial market utility no longer meets the standards for systemic importance 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 § 1320.13; and

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

Dated: March 18, 2011.

Alastair Fitzpayne,

*Deputy Chief of Staff and Executive Secretary,
Department of the Treasury.*

[FR Doc. 2011-7003 Filed 3-25-11; 8:45 am]

BILLING CODE 4810-25-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. NM451; Notice No. 25-11-10-SC]

Special Conditions: Bombardier Model BD-700-1A10 and BD-700-1A11 Airplanes, Head-Up Display (HUD) With Video Synthetic Vision System (SVS)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed special conditions.

SUMMARY: This action proposes special conditions for Bombardier Model BD-700-1A10 and BD-700-1A11 airplanes. These airplanes, as modified by Bombardier Inc., will have a novel or unusual design features associated with

a SVS that displays video imagery on the HUD. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: We must receive your comments by April 18, 2011.

ADDRESSES: You must mail two copies of your comments to: Federal Aviation Administration, Transport Airplane Directorate, Attn: Rules Docket (ANM-113), Docket No. NM451, 1601 Lind Avenue, SW., Renton, Washington 98057-3356. You may deliver two copies to the Transport Airplane Directorate at the above address. You must mark your comments: Docket No. NM451 You can inspect comments in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Dale Dunford, FAA, ANM-111, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue, SW., Renton, Washington 98057-3356; telephone (425) 227-2239 facsimile (425) 227-1100.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning these special conditions. You can inspect the docket before and after the comment closing date. If you wish to review the docket in person, go to the address in the **ADDRESSES** section of this preamble between 7:30 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

We will consider all comments we receive on or before the closing date for comments. We will consider comments filed late if it is possible to do so without incurring expense or delay. We may change these special conditions based on the comments we receive.

If you want us to acknowledge receipt of your comments on this proposal, include with your comments a self-addressed, stamped postcard on which

you have written the docket number. We will stamp the date on the postcard and mail it back to you.

Background

On January 26, 2007, Transport Canada Civil Aviation (TCCA), on behalf of Bombardier Inc., located in Montreal, Canada, applied to the New York Aircraft Certification Office (NYACO) for FAA approval of a type-design change on the Bombardier Model BD-700-1A10 and BD-700-1A11 airplanes. Per Type Certificate Data Sheet (TCDS) T00003NY, those aircraft models are known under the marketing designation of Global Express and Global 5000, respectively. The change is to introduce the Rockwell-Collins avionics suite to replace the existing Honeywell Primus 2000EP avionics suite. It includes the installation of a SVS that displays video imagery.

Video display on the HUD constitutes new and novel technology for which the FAA has no certification criteria. Title 14, Code of Federal Regulations (14 CFR) 25.773 does not permit visual distortions and reflections that could interfere with the pilot's normal duties and was not written in anticipation of such technology. Other applications for certification of such technology are anticipated in the near future and magnify the need to establish FAA safety standards that can be applied consistently for all such approvals. Special conditions are therefore proposed as prescribed under the provisions of § 21.16.

Type Certification Basis

Under the provisions of 14 CFR 21.101, Bombardier Inc. must show that the Bombardier Model BD-700-1A10 and BD-700-1A11 airplanes, as changed, continue to meet the applicable provisions of the regulations incorporated by reference in T00003NY or the applicable regulations in effect on the date of application for the change. The regulations incorporated by reference in the type certificate are commonly referred to as the "original type certification basis." The regulations incorporated by reference in T00003NY are as follows:

Based on the application date, January 26, 2007, under the provisions of § 21.101, the applicable type-certification standards for the modification to the Bombardier Model BD-700-1A10 and BD-700-1A11 airplanes are as follows: