July 27, 2023

Financial Stability Oversight Council
Attn: Eric Froman
1500 Pennsylvania Avenue NW
Room 2308
Washington, DC 20220

Re: Authority To Require Supervision and Regulation of Certain Nonbank Financial Companies, RIN 4030–[XXXX], 88 FR 26234 (Apr. 28, 2023)

Dear Mr. Froman:

Better Markets[1] appreciates the opportunity to comment on the above-captioned Proposed Rule ("Proposal") issued by the Financial Stability Oversight Council ("FSOC" or "Stability Council").[2]

The Proposal, if adopted, would **replace** interpretive guidance issued in 2019 that severely and inappropriately restricted the Stability Council's ability to carry out its mission. Specifically, the Proposal seeks to establish a durable process for the FSOC to use its authority to designate nonbank financial companies that have the potential to threaten financial stability. In other words, the FSOC will re-establish its vital role in protecting the financial system and the American people, a mission that Congress recognized was critically important in the aftermath of the 2008 financial crisis and remains vital today as we face the continuing stress of the COVID-19 pandemic, rapid growth and turmoil in the crypto sector, and new threats that were brought to light in the March 2023 banking crisis.[3]

---

1 Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans' jobs, savings, retirements, and more.

2 Authority To Require Supervision and Regulation of Certain Nonbank Financial Companies, RIN 4030–[XXXX], 88 FR 26234 (Apr. 28, 2023), https://www.govinfo.gov/content/pkg/FR-2023-04-28/pdf/2023-08964.pdf.

3 *See, e.g.*, Better Markets CEO Dennis Kelleher co-authored an article highlighting the need for nonbank regulation and supervision in light of recent market events. Dennis Kelleher, *FTX crash shows cryptocurrency market needs bank-like regulation*, CNBC (Dec. 5, 2022), https://www.cnbc.com/2022/12/05/op-ed-ftx-crash-shows-cryptocurrency-market-needs-bank-like-regulation.html.

2000 Pennsylvania Avenue NW | Suite 4008 | Washington, D.C. 20006 | (202) 618-6464 | BetterMarkets.org

Given that the FSOC has been inexcusably AWOL for years, we applaud the Stability Council for announcing a comprehensive framework to respond to the full range of risks that can threaten our country with financial catastrophe and recommend its adoption as soon as possible.[4]

BACKGROUND

By any measure, the 2008 financial crisis ("2008 Crash") was the worst financial crisis since the Great Crash of 1929, nearly causing a modern-day Great Depression. Unprecedented, massive, and extremely costly government intervention was all that prevented an even more dire outcome. Nevertheless, the costs of the crash, both human and economic were severe. Approximately 20 percent of working Americans lost their job during the crash and remained unemployed for an average of seven months, preventing them from providing for their families, saving money for the future, and repaying debt. At the same time, 15 million homeowners were forced into foreclosure and lost their homes as a result. Entire cities, and a generation of American families and small businesses, faced financial and emotional pain that may never be healed.[5]

But not all parts of the economy suffered during the 2008 Crash. Some of the country's largest banks became bigger, more complex, and more interconnected with other parts of the financial system. Nonbank financial firms — companies that provide financial services of some kind, such as insurance or mortgages — were growing, too. Many Wall Street bankers were also collecting large bonuses, as a reward for facilitating this growth. For example, the "originate-to-distribute" model for mortgage lending focused bankers' attention on making loans and combining these loans into securities to share risk with others in the financial market, while collecting their bonuses. To make matters worse, many of these mortgages were held by families who were the victims of fraud and lender deception. Countless borrowers did not understand the structure of their loans and the implications of interest rate changes on their monthly payments. To make matters worse, home values were declining which meant that many borrowers were underwater on their loans — owing more on the mortgage than the value of the property itself. Many people became unemployed because of the national recession, which further challenged their financial security.

The devastation caused by the 2008 Crash serves as a stark reminder of what is at stake in the current FSOC Proposal. Traditional banks are held accountable to a range of rules and regulations that are enforced by a cadre of regulatory agencies, while nonbanks that provide bank-like products and importantly, present many of the same risks as banks, often escape with little to no supervision, regulation, or oversight of any kind. With the passage of the Dodd-Frank

---

[4] Better Markets has supported the Proposed change to the interpretive guidance since its announcement. *See* Press Release, Better Markets, *Financial Stability Oversight Council (FSOC) Takes Important Steps To Reverse Dangerous Trump Deregulation And Prevent Financial Crises* (Apr. 21, 2023), https://bettermarkets.org/newsroom/financial-stability-oversight-council-fsoc-takes-important-steps-to-reverse-dangerous-trump-deregulation-and-prevent-financial-crises/.

[5] *See* Better Markets, *The Cost of the Crisis* (July 2015), https://www.bettermarkets.org/sites/default/files/Better%20Markets%20-%20Cost%20of%20the%20Crisis_1.pdf.

Wall Street Reform and Protection Act ("Dodd-Frank Act"),[6] our elected officials in the Legislative and Executive branches created an interagency task force — the FSOC — made up of representatives from federal and state agencies with the responsibility for identifying nonbank entities and "designating" them as systemically important financial institutions ("SIFIs"). Nonbank financial firms designated as SIFIs were made subject to Federal Reserve supervision, intended to recognize and deter high-risk or unlawful behavior that puts American consumers and businesses at risk.

Michael Barr, now the Vice Chair for Supervision at the Federal Reserve, adeptly summarized the FSOC's creation and importance in his 2017 testimony to the House Financial Services Committee:

> One of the major problems in the lead up to the financial crisis was that there was not a single, uniform system of supervision and capital rules for major financial institutions. The federal financial regulatory system that existed prior to the Dodd-Frank Act largely developed in the context of the banking system of the 1930s. Major financial firms were regulated according to their formal labels — as banks, thrifts, investment banks, insurance companies, and the like — rather than according to what they actually did. An entity that called itself a "bank," for example, faced tougher regulation, more stringent capital requirements, and more robust supervision than one that called itself an "investment bank." Risk migrated to the less well-regulated parts of the system, and leverage grew to dangerous levels.[7]

By statute, the FSOC was given the authority to respond to potential threats to U.S. Financial Stability in several ways, including:

- i. collecting information from regulators
- ii. requesting data and analyses from the Office of Financial Research
- iii. monitoring the financial services marketplace and financial regulatory developments
- iv. facilitating information sharing and coordination among regulators
- iv. recommending to the Stability Council member agencies general supervisory priorities and principles
- v. identifying regulatory gaps
- vi. making recommendations to the Board of Governors of the Federal Reserve System ("Federal Reserve") or other primary financial regulatory agencies

---

6 Public Law No. 111-203, 124 Stat. 1376 (July 21, 2010) ("Dodd-Frank Act").

7 *See* Testimony, *Testimony of Michael S. Barr The Roy F. and Jean Humphrey Proffitt Professor of Law University of Michigan Law School Before the United States House Committee on Financial Services: Hearing on the Financial Choice Act of 2017* (Apr. 26, 2017), https://financialservices.house.gov/uploadedfiles/hhrg-115-ba00-wstate-mbarr-20170426.pdf.

viii. designating certain entities or payment, clearing, and settlement activities for additional regulation

However, changes[8] made to the interpretive guidance, particularly under the Trump administration in 2019, made it much more difficult, time consuming, and in some cases functionally impossible for the FSOC to make SIFI designations.[9] The current proposal will restore the FSOC's powers, ensure it is consistent with the statute, and enable the Stability Council to restart their important work.

---

[8] The timeline of the legislation governing the FSOC is as follows:

- April 11, 2012, the Stability Council issued a final rule at 12 CFR 1310.1–23 (the "2012 Rule") setting forth certain procedures related to designations under section 113 of the Dodd-Frank Act.
  - February 4, 2015, the Stability Council adopted supplemental procedures (the "2015 Supplemental Procedures") to the 2012 Rule and Guidance.
  - March 13, 2019, the Stability Council amended the 2012 Rule by adding a new provision at 12 CFR 1310.3.
- December 30, 2019, the Stability Council replaced the 2012 Interpretive Guidance with revised interpretive guidance (the "2019 Interpretive Guidance").
  - In connection with the adoption of the 2019 Interpretive Guidance, the Stability Council rescinded the 2015 Supplemental Procedures.
- The Stability Council is proposing this interpretive guidance (the "Proposed Guidance") to revise and update the 2019 Interpretive Guidance.

[9] Better Markets has commented on several FSOC proposals leading up to the current Proposal. *See* Better Markets, Comment Letter, *Proposed Rule and Proposed Interpretive Guidance on Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies* (Dec. 19, 2011), https://bettermarkets.com/sites/default/files/documents/CL%20FSOC%20SIFIs%2012-19-11.pdf; Better Markets, Comment Letter, *Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies* (May 24, 2019), https://www.bettermarkets.org/sites/default/files/CL_FSOC_Designation_Guidance%205-24-19.pdf; Better Markets, Comment Letter, *Proposed Rule on Asset Management Products and Activities* (Mar. 25, 2015), https://bettermarkets.com/sites/default/files/documents/FSOC%20-%20CL%20-%20Asset%20Management%20Products%20and%20Activities%203-25-2015.pdf; Better Markets, Comment Letter, *Proposed Recommendations Regarding Money Market Mutual Fund Reform* (Feb. 15, 2013), https://bettermarkets.com/sites/default/files/documents/FSOC-%20CL-%20MMF%20Recommendations-%202-15-13.pdf; Better Markets, Comment Letter, *Advance Notice of Proposed Rulemaking on Authority to Designate Financial Market Utilities as Systemically Important* (May 27, 2011), https://bettermarkets.com/sites/default/files/documents/FSOC-%20Comment%20Letter-%20NPR-%20FMUs%20as%20Systemically%20Important-%205-27-11.pdf; Better Markets, Comment Letter, *Advanced Notice of Proposed Rulemaking Authority to Designate Financial Market Utilities as Systemically Important* (Jan. 20, 2011), https://bettermarkets.com/sites/default/files/documents/FSOC-%20Comment%20Letter-%20ANPR-%20FMUs%20as%20Systemically%20Important.pdf; Better Markets, Comment Letter, *Public Input for the Study Regarding the Implementation of the Prohibitions on Proprietary Trading and Certain Relationships With Hedge Funds and Private Equity Funds* (Nov. 5, 2010), https://bettermarkets.com/sites/default/files/documents/FSOC%20Comment%20Letter-%20Volcker%2011-5-10.pdf.

SUMMARY OF THE PROPOSAL

The Proposal contains **three key components** which materially strengthen the FSOC and correct the dangerous inadequacies that exist in the current guidance that governs its work:

(1) **Elimination of the requirement for FSOC to wait for Federal or State regulators to act** before the Stability Council can act to consider a nonbank designation,

(2) **Separation of the procedures related to nonbank financial company designations** (described in this Proposal) **from the proposed analytic framework** (which is addressed in a companion Proposal[10]), and

(3) **Removal of the requirement to conduct cost-benefit analysis and an assessment of the likelihood of a firm's material financial distress** prior to making a determination.

SUMMARY OF COMMENTS

The FSOC's Proposal is a crucial step in restoring the Stability Council's ability to meet its statutory mandate. It appropriately recognizes that we must learn from historical experiences of stress in the financial markets and have a functional mechanism to identify risk of systemic disruption stemming from problems at nonbank financial companies and act to minimize that risk for the public good. The American people deserve a functioning FSOC that is accountable for identifying, analyzing, and acting upon nonbank entities that present heightened risk to financial stability.[11]

The Proposal contains a number of valuable components that, if implemented as described, should help to limit so-called "surprises" about sources of systemic risk in the financial markets:

- First, separating the FSOC's analytic framework from the authority to make SIFI designations allows for greater transparency and clarity around the FSOC's responsibilities.
- Second, using the entity-based approach in tandem with the activities-based approach should lead to greater flexibility in the identification of entities and activities that present risk and require action by the FSOC.

---

[10] Analytic Framework for Financial Stability Risk Identification, Assessment, and Response, 88 FR 26305 (Apr. 28, 2023), https://www.govinfo.gov/content/pkg/FR-2023-04-28/pdf/2023-08969.pdf.

[11] Better Markets CEO Dennis Kelleher testified before the Senate Committee on Banking, Housing, and Urban Affairs on Mar. 27, 2015, at a hearing entitled, "FSOC Accountability: Nonbank Designation." *See* Better Markets, Opening Statement (Mar. 27, 2015), https://bettermarkets.org/impact/dennis-kellehers-testimony-senate-banking-committee-0/. *See* Better Markets, Written Testimony (Mar. 25, 2015), https://bettermarkets.org/wp-content/uploads/2021/07/Dennis-Kelleher-Testimony-3-25-15_0.pdf.

- Third, eliminating the requirement for cost-benefit analysis brings the rule in line with Congressional intent in the Dodd-Frank Act and removes an unnecessary and dangerous burden to properly protecting the American people.[12]
- Fourth, modifying the interpretation of "threat to the financial stability of the United States" to mean the potential for a systemic threat instead of waiting for an already empirically-proven threat is consistent with the statute and aligns with the FSOC's critical mission.
- Fifth, continuing to make SIFI designations public knowledge will further support transparency of information related to risks affecting the financial system.

Over the years, the FSOC has proven that it is deliberate, thoughtful, and careful with decisions to designate SIFIs, often to a fault. Recognizing this, we urge the Stability Council to reconsider the degree to which targeted company input is accepted during the designation process. As described in the Proposal, there is a two-stage process for considering designations. Stage 1 is a broad review of risks in the financial system and companies that are vulnerable. Stage 2 is a deeper review of entity- or activity-specific information. The current Proposal says that companies will be able to submit information for the FSOC to consider during both stages. We recommend that this be revised such that company input is only accepting during Stage 2. There will theoretically be many entities considered during Stage 1. Appropriately, not all these entities will advance to Stage 2 for deeper investigation. Inviting input from all entities during Stage 1 would waste public time and resources, cause unnecessary delays, and interfere with the FSOC's important work of identifying actual potential threats. The FSOC should reconsider this aspect of the evaluation process.

While these changes are necessary and overdue, the FSOC must also commit to carry out its responsibilities fully and decisively. Since the FSOC was created in 2011, only four companies have been designated as SIFIs, and all four have since been de-designated.[13] This track record is unacceptable. Since 2020, the Federal Reserve has instituted several new and revolutionary programs[14] to prop up systemically significant nonbank entities and activities in the financial markets but today there is not a single nonbank financial firm in the U.S. that is designated as systemically. This is a shocking testament to the failure of the FSOC. Unquestionably, many nonbank financial firms, which have repeatedly received extraordinary support from federal

[12] *See, e.g.*, Better Markets, *The Ongoing Use and Abuse of Cost-Benefit Analysis in Financial Regulation* (Mar. 23, 2023), https://bettermarkets.org/wp-content/uploads/2023/03/BetterMarkets_Report_Cost_Benefit_Analysis_03-2023.pdf.

[13] Dennis Kelleher, *Financial Reform Is Working, But Deregulation That Incentivizes One-Way Bets Is Sowing the Seeds of Another Catastrophic Financial Crash*, GEO. WASH. BUS. & FIN. L. REV. (Apr. 10, 2018), https://gwbflr.org/financial-reform-is-working-but-deregulation-that-incentivizes-one-way-bets-is-sowing-the-seeds-of-another-catastrophic-financial-crash-2/#_ftnref1.

[14] During the COVID-19 pandemic, the Federal Reserve instituted a variety of emergency lending programs that offered targeted support to many nonbank sectors, including money market mutual funds, the commercial paper market, securities markets, and broker-dealers. Eric Milstein & David Wessel, *What did the Fed do in response to the COVID-19 crisis?*, BROOKINGS INSTITUTE (Dec. 17, 2021), https://www.brookings.edu/research/fed-response-to-covid19/.

regulators during times of stress, have the potential to threaten financial stability today. The FSOC must be accountable to the American people by acting quickly and decisively to **make the designations that were envisioned in the Dodd-Frank Act** and **institute appropriate regulation and supervisory actions to prevent further financial disruption**.

COMMENTS

I. SEPARATION OF THE STABILITY COUNCIL'S ANALYTIC APPROACH FROM RESPONSIBILITY FOR DESIGNATING NONBANK ENTITIES ADDS TRANSPARENCY AND ACCOUNTABILITY, AND MUST BE IMPLEMENTED WITH RIGOR TO BE EFFECTIVE.

Section 113 of the Dodd-Frank Act authorizes the Stability Council to determine entities that present risk to financial stability. This Proposal, as described, "establishes a durable process for the Stability Council's use of its authority to designate nonbank financial companies." It does not discuss the analytic framework. The vulnerabilities, metrics, and transmission channels that the FSOC will use in its work to make designations are described separately. This establishes a more durable process for the future by separating the "what the FSOC does" from "how they do it." It also allows for more surgical and focused adjustments in the future if they are needed. In theory, this separation of the process and the analytic factors could be an enormously powerful tool to facilitate the Stability Council's work as mandated by the statute.

The 2012 and 2019 Interpretive Guidance discussed both procedural and analytic factors related to the Stability Council's work in the assessment of systemically important entities. The current Proposal will streamline and focus future discussions. For instance, if changes are needed to analytic factors in the future, these can be discussed without re-examining the rules governing the Stability Council's responsibility for and implementation of designations.

II. EMBRACING THE "ENTITY-BASED" APPROACH AND REMOVING THE REQUIREMENT TO USE AN "ACTIVITIES-BASED" APPROACH IS A VALUABLE CHANGE AND IS CONSISTENT WITH CONGRESSIONAL INTENT IN THE STATUTE.

The Dodd-Frank Act clearly intended for the Stability Council to use an entity-based perspective when making its determinations. While activities-based analysis has been proven to effectively complement entity-based determinations, it was never intended to, nor should it be relied upon to, supersede or replace entity-based determinations. There may well be activities that make an entity more likely to pose systemic risks, but it is the entity that could fail, and which must be subject to regulation and oversight to protect the financial system and ultimately the American people.

The FSOC's entity designation authority in Section 113 is the most comprehensive and

detailed set of provisions that Congress incorporated into the Dodd-Frank Act. This was no accident; this was thoughtful, intentional, and purposeful in recognition of the many un- and underregulated systemically significant nonbanks that threatened the stability of the U.S. throughout the global financial crisis from 2007-2009. The mandate was to enable the Stability Council to identify and manage risks to the stability of the financial system from nonbanks. The entity designation is the leading substantive provision in the subchapter of Title 12 governing the FSOC, following the basic sections that establish the Stability Council and define its general powers and duties.

Appropriately, this Proposal corrects the 2019 Interpretive guidance which inappropriately prioritized an "activities-based" approach and the Proposal strikes a balance between risks that are generated from both entities and activities. In some cases, as the Proposal notes, "distress at one entity could threaten financial stability." American International Group (AIG) is the prime example of such risk.[15] AIG was the world's largest insurance company in 2008. Although AIG had a high credit rating, in September 2008 it surprised the markets and financial regulators with its complex, high-risk derivatives activities that it could not manage effectively. The company was deeply connected to many parts of the financial system and did not have sufficient reserves to protect it from potential losses or failure. The result was a historic bailout in which the U.S. government eventually paid $185 billion to protect the broader financial market from AIG's failure. An "entity-based" determination process is required to protect the U.S. economy and U.S. taxpayers from surprises like AIG. The process must allow for the identification of entities that present risks like AIG did in enough time to act appropriately — to limit risky activity or sufficiently insulate the rest of the financial market and taxpayers from it — before a "surprise" occurs.[16]

The Proposal also notes that:

> [T]he Council will continue to monitor for activities that pose risks to financial stability and work with regulators to respond to those risks. . . . [V]ulnerabilities originating from activities that are widely conduced in a particular sector or market may be well-suited for activity-based or industry-wide regulation.[17]

Understanding risky activities provides an important foundation for the Stability Council's work, but ultimately it is entities themselves, not activities, which force the government's hand with costly taxpayer-funded bailouts. Therefore, the combination of these approaches, without prioritization or restriction, should enable the Stability Council to most effectively carry out its work consistent with its statutory mandate.

---

[15] *Id.*

[16] *See generally*, *supra* note 11.

[17] Authority To Require Supervision and Regulation of Certain Nonbank Financial Companies, *supra* note 2, at 26237.

III. <u>ELIMINATING THE REQUIREMENT FOR COST-BENEFIT ANALYSIS ALLOWS THE STABILITY COUNCIL TO MEET ITS STATUTORY PURPOSE AND AVOIDS COSTLY DELAYS IN THE DESIGNATION PROCESS.</u>

Whether or not an agency must conduct cost-benefit or economic impact analysis, and the exact nature of that analysis, is determined by Congress. Furthermore, the Supreme Court declared that the need for cost-benefit analysis is not to be inferred without a clear indication from Congress.[18] The Proposal clearly and appropriately states that the Dodd-Frank Act does not require cost-benefit analysis prior to the designation of a nonbank financial company under Section 113.[19]

The Proposal also notes that while the Dodd-Frank Act does include factors that should be considered in the designation process, the costs and benefits are not listed and are not similar to any of the listed considerations. Broad guidance is given that directs factors that are considered as part of the designation process to be risk related. The costs to entities and their shareholders that are associated with a designation is not a risk-related factor. In addition to being inconsistent with the intent of the statute, the Stability Council goes on to explain that prescribing the use of cost-benefit analysis as part of a Section 113 determination is not useful or appropriate because it is not meaningful. The costs related to a potential failure of a nonbank financial company depends on a number of complex and variable factors including the state of the economy and financial system at the time of a failure. The costs also depend on the financial regulatory regime at the time in which oversight of an entity is required, which could vary substantially over time. Similarly, the benefits could be exceptionally large but are also undefined because they depend on the "tangible and intangible gains that come from averting a financial crisis and economic catastrophe."

In short, not only is the requirement for cost-benefit analysis not useful and counter to what Congress intended, it creates unnecessary hurdles and delays in the designation process — which is likely exactly why the industry and its advocates argue on its behalf — and wastes public resources in the process.

---

18 *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510-512 & n. 30 (1981) ("Congress uses specific language when intending that an agency engage in cost-benefit analysis."); *see also Inv. Co. Inst. v. Commodity Futures Trading Comm'n*, 720 F. 3d 370, 379 (D.C. Cir. 2013) ("Where Congress has required 'rigorous, quantitative economic analysis,' it has made that requirement clear in the agency's statute, but it imposed no such requirement here."); *Nat'l Ass'n of Mfrs. v Sec. & Exch. Comm'n.*, 748 F. 3d 359, 369 (D.C. Cir. 2014).

19 *See* Better Markets *The Ongoing Use and Abuse of Cost-Benefit Analysis in Financial Regulation* (Mar. 23, 2023), https://bettermarkets.org/wp-content/uploads/2023/03/BetterMarkets_Report_Cost_Benefit_Analysis_03-2023.pdf.

IV. RESPONDING TO THE POTENTIAL FOR MATERIAL FINANCIAL DISTRESS OF RISK TO FINANCIAL STABILITY IS CRITICAL TO SUPPORT THE FINANCIAL SYSTEM AS A WHOLE; WAITING TO ACT UNTIL THERE IS REASONABLE LIKELIHOOD OF AN ENTITY'S FAILURE IS NOT CONSISTENT WITH THE STATUTE OR NECESSARY OR EFFECTIVE.

The Dodd-Frank Act directed the Stability Council in Section 113 to identify situations in which "material financial distress" at a nonbank financial company "***could*** pose a threat to the financial stability of the United States." (Emphasis added.)

The Proposal explains that Section 112 of the Dodd-Frank Act describes the Stability Council's duty to designate nonbank financial companies that could threaten U.S. financial stability "in the event of their material financial distress or failure." A designation decision should not be based on the Stability Council's estimation of the likelihood of such distress or failure. Instead, the Stability Council should presuppose the entity's material financial distress and evaluate the consequences. In other words, the Stability Council is not, and should never be, required to analyze or identify the actual existence of distress at the entity before it takes further action.[20]

As has been proven throughout history, a financial entity can transition from appearing healthy and strong to unstable and on the brink of collapse very quickly. The Proposal correctly cites the example of Lehman Brothers which reported strong shareholder equity, a measure of solvency, at the end of August 2008. In early September, there were widespread doubts about Lehman Brothers' solvency, and on September 14, 2008, Lehman Brothers declared bankruptcy. More recent examples from March 2023 illustrate the speed at which entities such as Silicon Valley Bank and Signature Bank can become insolvent and threaten financial stability. In all these cases, waiting until there was unambiguous evidence of weakness at the entity would not have been sufficient to protect the country as required by the Dodd-Frank Act.

V. WHILE POTENTIALLY COSTLY TO THE ENTITY ITSELF, PUBLIC IDENTIFICATION OF ENTITIES THAT ARE DESIGNATED BY THE STABILITY COUNCIL IS IMPERATIVE TO MEET THE GOALS OF TRANSPARENCY AND ACCOUNTABILITY.

The Proposal outlines the Stability Council's approach to the handling of public identification during the designation process. During Stages 1 and 2, the Stability Council is considering a range of information from both public and nonpublic sources. Unless the entity in question chooses to publicly disclose its participation in the designation process, the identity of

[20] The 2012 Interpretive Guidance did not include consideration of the likelihood of a nonbank financial company's material financial distress. The 2019 Interpretive Guidance altered the Stability Council's approach. The Proposed Guidance would conform to the Stability Council's original understanding that this factor should not be taken into account as is consistent with the statute. *See* Authority To Require Supervision and Regulation of Certain Nonbank Financial Companies, 88 FR 26234, 26239 n.21 (Apr. 28, 2023), https://www.govinfo.gov/content/pkg/FR-2023-04-28/pdf/2023-08964.pdf.

entities remains confidential. However, once a designation is finalized, the Stability Council would release entity names to the public.

Release of this information could have negative short-term financial and operational consequences for the entity, but these concerns should not outweigh the need for transparency for the American people. After all, in the event of a failure precipitating a bailout, it is the American people who ultimately pay the price, so information about the risks is warranted. Furthermore, it is reasonable to expect that an entity that engages in the type of systemically significant behavior that results in a designation should also be responsible for creating a framework and system to manage and protect itself, thereby mitigating any potential downsides.

VI. STREAMLINE THE DESIGNATION PROCESS BY RELYING ON THE STABILITY COUNCIL'S ANALYSIS IN STAGE 1 AND INVITING ENTITY INPUT ONLY IN STAGE 2.

The Proposal describes a thorough approach to considering entities for designation. This process includes Stage 1, which relies on a wide range of public and regulatory information. The entity is also invited to provide input during Stage 1. A nondelegable vote, based on the results of the Stage 1 evaluation, determines whether the entity moves on to Stage 2 for a more in-depth assessment. Stage 2 involves further analysis of information from a variety of sources and allows for more input from the entity.

The Stability Council has proven over years of history that it is careful, thoughtful, and prudent — indeed, overly so in our opinion — by only designating four companies in its nearly 13-year existence and in de-designating all four. Given the wide range of input available during Stage 1 and the imperative for timely action, we urge the Stability Council to limit the entity input only to Stage 2 of the designation process. Not only will this limit the costs incurred during the Stability Council's assessment of information received, but it will also respect and value the entity's resources and time. Since it is envisioned that only a subset of entities considered during Stage 1 will advance to Stage 2, an entity spending time and resources to submit information during Stage 1 could be a waste of resources.

CONCLUSION

We hope these comments are helpful as the Stability Council finalizes the Proposal.

Sincerely,

Dennis Kelleher
Co-founder, President and CEO

Better Markets, Inc.
2000 Pennsylvania Avenue, NW
Suite 4008
Washington, DC 20006
(202) 618-6464
dkelleher@bettermarkets.org
http://www.bettermarkets.org