IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

METLIFE, INC., Plaintiff, v. FINANCIAL STABILITY OVERSIGHT COUNCIL, Defendant.	Civil Action No. 15-cv-45 (RMC)

BRIEF OF BETTER MARKETS, INC. AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT FINANCIAL STABILITY OVERSIGHT COUNCIL

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INTRODUCTION

The 2008 financial crisis was the worst financial disaster since the Great Crash of 1929, and it produced the worst economy our nation has seen since the Great Depression of the 1930s. It nearly collapsed our financial system, destroying millions of jobs, triggering a tidal wave of home foreclosures, and wiping out the savings of countless American households. The costs have been staggering: tens of trillions of dollars in lost GDP and inestimable human suffering, much of which continues to this day. The resolution of this case will profoundly affect the ability of our government to prevent another financial crisis of similar or even greater magnitude.

America's elected officials in the Legislative and Executive Branches responded to these historic events by enacting a comprehensive set of reforms in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law No. 111-203, 124 Stat. 1376 (July 21, 2010) ("Dodd-Frank Act"). At the very heart of these changes in our regulatory system was the creation of the Financial Stability Oversight Council ("FSOC"), an agency that is unique in the history of financial regulation in design and importance. Comprised of representatives from virtually every financial regulatory authority in the federal government, as well as a broad spectrum of state representatives, its core mission is to monitor all sectors of the financial markets, identify risks to the financial stability of the United States wherever they may arise, and respond with a series of measures to mitigate those threats.

Congress equipped FSOC with the tools necessary to carry out these difficult but critical tasks, including broad authority to collect information, extensive technical expertise, and wide discretion to designate systemically significant nonbank financial companies for prudential supervision by the Board of Governors of the Federal Reserve ("Federal Reserve"). This designation authority has a uniquely important role in helping to prevent another financial crash and economic crisis. Systemic risks arising from nonbank financial institutions were at the core

of the 2008 crisis, as illustrated by the collapse of American International Group ("AIG"), Bear Stearns, Lehman Brothers, the Reserve Primary money market fund, and others. Making sure that such nonbank financial institutions are subject to appropriate oversight is essential to protecting the American people, and that is one of FSOC's most important missions.

Notwithstanding its vital function and broad authority, FSOC has proceeded cautiously and deliberatively since its creation in 2010, exercising its designation authority only four times in five years. In this case, FSOC acted only after amassing and analyzing a vast amount of information, giving MetLife extensive opportunities over 17 months to present its views, and concluding almost unanimously that "material financial distress at MetLife could pose a threat to U.S. financial stability." *Basis for the Financial Stability Oversight Council's Final Determination Regarding MetLife, Inc.* at 2 (Dec. 18, 2014) ("MetLife Public Basis").

Plaintiff seeks to nullify that decision, invoking an assortment of arguments that ignore the most basic tenets of administrative law: The scope of an agency's authority and discretion must be measured first and foremost by the terms of its organic statute, and within those Congressionally defined boundaries, the agency is to be afforded wide discretion. Nowhere in the realm of financial regulation is respect for that discretion more vital than in the exercise of FSOC's designation authority – an inherently predictive exercise that, if encumbered with the duty to consider an almost limitless number of alternatives and factors as Plaintiff argues, will be incapable of responding to the types of risk that threaten to plunge our markets, our economy, and our country into another devastating financial crisis. A ruling against FSOC could deal a terrible blow to its ability to exercise its designation authority and thereby address systemic risks *before* they materialize and wreak havoc once again.

IDENTITY AND INTEREST OF BETTER MARKETS

Better Markets, Inc. ("Better Markets") is an independent non-profit organization that promotes the public interest in the financial markets. Focusing extensively on the rulemaking process following the financial crisis of 2008 and passage of the Dodd-Frank Act, Better Markets has submitted over 150 comment letters to FSOC, the Commodity Futures Trading Commission ("CFTC"), the Securities and Exchange Commission ("SEC"), and other financial regulators advocating for strong and swift implementation of comprehensive financial reforms in the securities, commodities, and credit markets. The primary goal of this advocacy has been to promote transparency, accountability, and oversight in our financial markets, so that those markets are capable of serving the real economy without precipitating another devastating financial crisis.

Better Markets has a demonstrable interest in defending financial reform and, more specifically, FSOC's authority. For example, the President of Better Markets, Dennis Kelleher, was recently invited to testify before the Senate Banking Committee regarding, among other issues, the key role of FSOC's designation authority in preventing financial crises. *See* Dennis Kelleher's Testimony Before Senate Banking Committee (Mar. 25, 2015), *available at* http://www.bettermarkets.com/reform-resources/dennis-kellehers-testimony-senate-banking-committee. In other contexts as well, Better Markets has repeatedly highlighted the need to shield the American financial system and the economy from the risks posed by large and highly interconnected nonbank financial institutions. *See* Comment Letter from Better Markets to FSOC on Authority to Designate Financial Markets Utilities as Systemically Important (Jan. 20, 2011); Comment Letter from Better Markets to FSOC on Authority to Designate Financial Market Utilities as Systemically Important (May 27, 2011); Comment Letter from Better Markets to FSOC on Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies

(Dec. 19, 2011); *comment letters collected at* http://www.bettermarkets.com/sites/default/files/FSOC_Comment_Letters.pdf.

Better Markets also has expertise in elucidating the actual obligations that Congress has chosen to impose on regulatory agencies under their organic statutes and under the Administrative Procedure Act ("APA"). The organization has defended the rules of the SEC and the CFTC in court multiple times against relentless legal challenges.[1] Many of those *amicus* submissions have focused specifically on the scope of an agency's duty to conduct economic impact analysis to support its actions, a line of attack that permeates the Plaintiff's arguments in this case. *See, e.g., Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 369-70 (D.C. Cir. 2014) ("*NAM*") (reflecting Better Markets' arguments in upholding SEC's economic analysis of its conflict minerals disclosure rule)*; ICI v. CFTC,* 720 F.3d 370, 377-380 (D.C. Cir. 2013) ("*ICI*") (reflecting Better Markets' arguments in upholding CFTC's economic analysis of its commodity pool operator registration rule); *see also Sec. Indus. & Fin. Mkts. Ass'n v. CFTC*, 2014 U.S. Dist. LEXIS 130871 at 10 (citing Better Markets' description of the bailout funds channeled through AIG to its counterparty banks).

This case represents a huge threat to effective financial reform and the ability of the government to protect the American people. A decision in MetLife's favor could have three adverse consequences.

First, a decision rescinding FSOC's designation of MetLife would halt a process designed

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[1] *See, e.g., Amicus Curiae* Briefs of Better Markets, Inc., filed in *Am. Petroleum Inst. v. SEC*, 683 F.3d 382 (D.C. Cir. 2012) (No. 09-1038); *Int'l Swaps & Derivatives Ass'n v. CFTC*, 887 F. Supp. 2d 259 (D.D.C. 2012) (No. 11-2146); *Inv. Co. Inst. v. CFTC*, 720 F.3d 370 (D.C. Cir. 2013) (No. 12-5413); *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359 (D.C. Cir. 2014) (No. 12-1422); *DTCC Data Repository LLC v. CFTC*, 25 F. Supp. 3d 9 (D.D.C. 2014) (13-0624); *Sec. Indus. & Fin. Mkts. Ass'n v. CFTC*, 2014 U.S. Dist. LEXIS 130871 (D.D.C. 2014) (No. 13-1916).

to mitigate risks to the financial stability arising from MetLife's size, structure, interconnectedness, and operations. It would thus deprive the public of the heightened protections Congress intended to be placed on institutions like MetLife as a means of protecting the American people from the possibility of recurrent financial crises.

Second, a decision rescinding the designation would deal a more far reaching blow by weakening or disabling FSOC's authority to designate other firms as systemically important in the future. Such a ruling would narrow FSOC's discretion and force it to consider new factors, conduct additional analyses, and make further findings that have no basis in the law. These obstacles would make the already difficult task of designation even more challenging, drastically limiting FSOC's ability to discharge its vital preventive role in protecting the economy and the American people.

Finally, a decision overturning FSOC's designation of MetLife could impose unfounded and burdensome requirements on all executive agencies, not just FSOC. The Plaintiff advances a number of claims predicated on the notion that FSOC violated fundamental principles of administrative law. But those arguments distort the APA and the decisions thereunder. If they were validated in this case, then the ability of the entire executive branch to discharge its obligation to protect the American people – and not solely FSOC's ability to exercise its designation authority – would be undermined.

SUMMARY OF ARGUMENT

The financial crisis of 2008 unraveled with startling speed from the unexpected failure or near failure of seemingly stable financial institutions such as AIG and Lehman Brothers. As a result of these painful lessons, Congress recognized the need to endow FSOC with the power, authority, and discretion to make fundamentally predictive judgments about **possible** threats to the financial stability of the United States, not merely threats that are known, proven, or likely. It did

precisely that in Section 113 of the Dodd-Frank Act, and FSOC's designation of MetLife for enhanced supervision was well within the scope of its authority.

AIG's role in the crisis prompted Congress to give FSOC broad-ranging authority to designate nonbanks – including insurance companies – for enhanced supervision, and to take international activities into account in the process. Notwithstanding the fact that AIG was an insurance conglomerate, with significant overseas operations, it nevertheless played a central role in precipitating a financial crisis of epic magnitude here in the United States. This history belies one of the Plaintiff's central themes, which is that by their nature, insurance enterprises cannot pose systemic risks.

Finally, contrary to the Plaintiff's claim, FSOC was not obligated to "consider the economic effects of designation on MetLife." Compl. at 71. The unambiguous wording of Section 113 shows that Congress deliberately chose not to impose that duty on FSOC. The D.C. Circuit has recently affirmed the principle that courts should not impose cost-benefit or economic analysis obligations on agencies without a clear directive from Congress, something that is absent in this case. *See, e.g., NAM*, 748 F.3d at 369.

Other provisions in the same title of the Dodd-Frank Act remove any doubt: Elsewhere, Congress did require FSOC to examine the economic impact of its recommendations to primary regulators. *See e.g.,* 12 U.S.C. § 5330(b)(2)(A). The complete absence of any similar language in Section 113 was thus quite intentional. Moreover, it would be impossible for FSOC to perform the type of analysis Plaintiff suggests, since FSOC cannot know at the time of designation what specific prudential supervision measures the Federal Reserve will ultimately impose on MetLife or any other company – decisions that FSOC has no authority to make. Suggesting that FSOC be

forced to delay the exercise of its designation authority pending action by the Federal Reserve is no answer, since Congress did not require or intend that approach.

Similarly, the APA does not require FSOC to engage in economic impact analysis. Courts have not allowed the APA to be used as the justification for imposing novel procedural burdens on administrative agencies. Finally, it is clear from the statute and its underlying purposes that Congress did not intend FSOC to hold the financial stability of the United States hostage to a catalogue of costs, burdens, or adjustments that any particular systemically significant nonbank financial institution might face upon being designated for prudential supervision.

ARGUMENT

I. Congress gave FSOC broad discretion in making designation decisions, commensurate with the nature and importance of the agency's mission, and FSOC acted well within those wide limits.

Congress established FSOC as a direct consequence of the financial crisis of 2008, and for the purpose of eliminating the regulatory blind spots and gaps in supervisory authority that could lead to another financial crisis, potentially of even greater magnitude. Given the extraordinary costs of the financial crisis, Congress recognized the need to endow FSOC with the authority, expertise, and discretion to make fundamentally predictive judgments about possible threats to the financial stability of the United States. Congress's understanding of the financial crisis, its goal of preventing future crises, and the language it used to define FSOC's broad discretion, all confirm that FSOC's designation of MetLife for enhanced supervision was well within the scope of its authority and the boundaries of the arbitrary and capricious test.

A. Congress acted out of a desire to prevent the extraordinary financial losses and human suffering that inevitably accompany a financial crisis.

To understand Congress's intent when it established FSOC and granted it designation authority, one need only recall that the Dodd-Frank Act was enacted in the aftermath of the worst

financial crash and economic recession since the Great Depression. It caused massive economic losses and human suffering across the country and around the world. Unemployment skyrocketed, housing prices collapsed, and the stock market plummeted, wiping out the savings of many Americans and leading to millions of foreclosures. Tax revenues fell while spending on bailouts and social needs exploded, causing the federal deficit and debt to increase dramatically. The financial crisis will cost Americans tens of trillions of dollars in lost GDP and untold human suffering.[2]

The financial crisis did more harm to American workers than any single event since the Great Depression. The official unemployment rate peaked at 10.2% in October 2009,[3] but under the broader measure of unemployment (the "U-6" rate), it reached 17.5% of the workforce, at which point 26.9 million Americans were un- or under-employed.[4] The time Americans remained on unemployment rose to a peak of 40.9 weeks in November 2011.[5] In 2010, 46.2 million Americans were in poverty, the largest number in the 52 years for which poverty estimates have

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[2] *See The Cost of the Wall Street-Caused Financial Collapse and Ongoing Economic Crisis Is More Than $12.8 Trillion, A Report From Better Markets* (Sept. 15, 2011), *available at* http://bettermarkets.com/sites/default/files/Cost%20Of%20The%20Crisis_2.pdf ("Cost of the Crisis Report"); *see also* David Luttrell, Tyler Atkinson and Harvey Rosenblum, Federal Reserve Bank of Dallas, *Assessing the Costs and Consequences of the 2007-09 Financial Crisis and Its Aftermath*, (Sept. 2013), *available at* http://www.dallasfed.org/research/eclett/2013/el1307.cfm; U.S. GOV'T ACCOUNTABILITY OFFICE, REP. NO. GAO-13-180, FINANCIAL REGULATORY REFORM: FINANCIAL CRISIS LOSSES AND POTENTIAL IMPACTS OF THE DODD-FRANK ACT, (2013).

[3] Bureau of Labor Statistics, U.S. Dept. of Labor, News Release, *The Employment Situation – October 2009* (Nov. 6, 2009), *available at* http://www.bls.gov/news.release/archives/empsit_11062009.pdf.

[4] *Id*. at 19, Table A-12.

[5] Bureau of Labor Statistics, U.S. Dept. of Labor, News Release, *The Employment Situation – July 2012*, at 12, Table A-2 (Aug. 3, 2012), *available at* http://www.bls.gov/news.release/archives/empsit_08032012.pdf.

been published by the U.S. Census Bureau.[6] As of December 2009, 8.1 million children—or 1 out of every 9—were living with unemployed parents, and experiencing unhealthy levels of stress and instability during their formative years.[7]

Housing prices collapsed, triggering home foreclosures on a massive scale. Home values declined 34% through 2011, representing $7 trillion in lost homeowner equity.[8] As a result, real household wealth declined from $74 trillion in July 2007 to $55 trillion in January 2009, representing $19 trillion of evaporated wealth.[9] Real median family net worth fell 38.8%, "erasing almost two decades of accumulated prosperity,"[10] and median family income fell 7.7%, from $49,600 to $45,800, between 2007 and 2010.[11]

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[6] *See* United States Census Bureau, News Release, *Income, Poverty and Health Insurance Coverage in the United States: 2010* (Sept. 13 2011), *available at* https://www.census.gov/newsroom/releases/archives/income_wealth/cb11-157.html.

[7] Phillip Lovell & Julia B. Isaacs, Center on Children and Families, *Families of the Recession: Unemployed Parents & Their Children, Economic Studies 1* (revised June, 2010), *available at* http://www.brookings.edu/research/ papers/2010/01/14-families-recession-isaacs.

[8] CoreLogic, *December Home Price Index Gives First Look at Full-year 2011 Price Changes* (Feb. 2, 2012), *available at* http://www.corelogic.com/about-us/news/corelogic-december-home-price-index-gives-first-look-at-full-year-2011-price-changes.aspx; Board of Governors of the Fed. Reserve Sys., White Paper, *The U.S. Housing Market: Current Conditions and Policy Considerations*, at 3 (Jan. 4, 2012), *available at* http://www.federalreserve.gov/publications/other-reports/files/housing-white-paper-20120104.pdf.

[9] Federal Reserve Flow of Funds (Adjusted to 2012 dollars using the personal consumption expenditures chain price index).

[10] Board of Governors of the Fed. Reserve Sys., Fed. Reserve Bulletin Vol. 99 No. 2, *Changes in U.S. Family Finances from 2007 to 2010: Evidence from the Survey of Consumer Finances* at 1, 17 (June 2012), *available at* http://www.federalreserve.gov/econresdata/scf/scf_2010.htm; Binyamin Appelbaum, *Family Net Worth Drops to Level of Early '90s, Fed Says*, N.Y. TIMES, June 11, 2012 (emphasis added).

[11] Fed. Reserve Bank of St. Louis, *FRED Economic Data, Dow Jones Industrial Average (DJIA)* (2011), *available at* https://research.stlouisfed.org/; Peter A. McKay, *US Stocks Slip As Early Rally Evaporates; DJIA Down 7*, MARKETWATCH (Mar. 6 2009), *available at* http://www.marketwatch.com/story/us-stocks-slip-as-early-rally.

The stock market plummeted by more than 50% in just 18 months, from October 2007 until March of 2009, representing $11 trillion in evaporated wealth.[12] In March 2009, retirement accounts had lost $3.4 trillion, or 40% in value.[13] While there has been a rebound in equities, it is small comfort to the millions of investors who liquidated their positions during the crisis out of sheer panic, the need for liquid funds in retirement, or the flight to safer investments such as bonds. While there has been some recovery of this lost wealth, the statistics fail to account for gross disparities in the distribution of that recovery. For example, all of the economic benefits of the recovery since the crash have gone to the top 10% of earners.[14]

To prevent a second Great Depression, the government was forced to undertake extraordinary efforts that caused the debt and deficit to explode. In two years, the federal budget deficit increased by nearly *nine times* its size, going from $160 billion in 2007 to $1.14 *trillion* in 2009 as a result of automatic stabilizers and Congress's massive stimulus to stop the economic collapse.[15] The public debt more than doubled from $8.85 trillion in the first quarter of 2007 to $18.14 trillion in the last quarter of 2014, as a direct result of the financial crisis and the ensuing economic collapse.[16]

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[12] *See* Cost of the Crisis Report, *supra* note 2, at 34.

[13] Mauricio Soto, Urban Institute, *How is the Financial Crisis Affecting Retirement Savings?* (Mar. 9, 2009), *available at* http://www.urban.org/sites/default/files/alfresco/publication-pdfs/411847-How-Is-the-Financial-Crisis-Affecting-Retirement-Savings-.PDF.

[14] Emmanuel Saez, *Striking it Richer: The Evolution of Top Incomes in the United States* (Updated with 2012 preliminary estimates) (Sept. 3, 2013), *available at* http://eml.berkeley.edu//~saez/saez-UStopincomes-2012.pdf.

[15] Federal Reserve Bank of St. Louis, *Federal Surplus or Deficit* (updated Feb. 20, 2015), *available at* http://research.stlouisfed.org/fred2/series/FYFSD.

[16] Federal Reserve Bank of St. Louis, *Federal Debt: Total Public Debt* (updated Mar. 6, 2015), *available at* http://research.stlouisfed.org/fred2/series/GFDEBTN.

B. To prevent future crises, Congress had to grant FSOC broad and flexible powers, and it did so in the Dodd-Frank Act.

The only way Congress could effectively address the threat of another financial crisis was to establish an oversight body with the broad perspective, exceptional expertise, and flexible powers that are necessary to address potential systemic risks – not simply risks that are already known, proven, or probable. FSOC embodies all of these attributes. Congress structured it to include representatives from every major federal agency in the area of financial regulation, along with representatives from their state counterparts, to ensure broad vision and depth of expertise.[17] It granted FSOC the authority to gather data from many different sources to maximize its awareness of threats to financial stability. And, it gave FSOC a powerful but flexible authority to designate nonbank financial companies for enhanced supervision by the Federal Reserve upon a determination that they could pose a threat to the financial stability of the United States.

This essentially predictive authority was a critical element. One of the most important and startling lessons of the financial crisis was that threats to the stability of our financial system can appear suddenly and unexpectedly from financial institutions and market sectors that appear to be perfectly stable. In 2007, government policy makers and corporate leaders alike had little inkling of the crisis that lay ahead. Then Federal Reserve Vice Chair Donald Cohn stated in August 2007 that he believed the "most likely outcome [of market turmoil] is that it will be limited in duration and effect."[18] Even the Chief Financial Officer of AIG Financial Products explained in August

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[17] In this case, FSOC was called upon to apply a wide range of knowledge to the evaluation of MetLife, much of it focused on the non-insurance-related lending and other activities that largely served as the basis for the designation. *See* discussion *infra* at Section I.C.

[18] *Meeting of the Federal Open Market Committee* (Aug. 7, 2007), *available at* http://www.federalreserve.gov/monetarypolicy/files/FOMC20070807meeting.pdf.

2007 that "it is hard for us with, and without being flippant, to even see a scenario within any kind of realm of reason that would see us losing $1."[19] Just a year later, AIG ignited a financial conflagration and required an historic $182 billion taxpayer bailout.[20]

Recognizing the inherent unpredictability of financial crises, Congress framed FSOC's designation authority in unmistakably discretionary terms that allow for designation based on **possible**, not only certain or likely, scenarios. Section 113 provides that FSOC "**may**" determine that a U.S. nonbank financial company shall be supervised by the Federal Reserve, if FSOC determines that material financial distress at the company "**could**" pose a threat to the financial stability of the United States. 12 U.S.C. § 5323(a)(1). Congress's choice of the word "could" was very significant, as the term is used to indicate "possibility," and to suggest relatively "less force or certainty." *See* The Free Dictionary, http://www.thefreedictionary.com/could (last visited May 21, 2015), Miriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/could (last visited May 21, 2015).[21]

Further evidence of Congress's intent to give FSOC broad discretion lies in its formulation of FSOC's duty to "consider" a series of enumerated factors when making a designation determination. 12 U.S.C. § 5323(a)(2). The federal courts have long made clear that such an obligation simply to consider various factors, unaccompanied by more prescriptive standards, confers upon the agency "wide areas of judgment and therefore of discretion." *Sec'y of Agric. v.*

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19 *AIG Second Quarter 2007 earnings call* (Aug. 9, 2007). *Transcript available at* http://seekingalpha.com/article/44048-american-international-group-q2-2007-earnings-call-transcript?all=true.

20 *See* U.S. GOV'T ACCOUNTABILITY OFFICE, REP. NO. GAO-09-490T, FEDERAL FINANCIAL ASSISTANCE: PRELIMINARY OBSERVATIONS ON ASSISTANCE PROVIDED TO AIG (2009) at 4.

21 *See also* 12 U.S.C. § 5322(a)(1)(H) (general purpose of the Council includes requiring supervision by the Federal Reserve for nonbank financial companies "that **may** pose risks to the financial stability of the United States").

Cent. Roig Refining Co., 338 U.S. 604, 611 (1950); *see also New York v. Reilly*, 969 F.3d 1147, 1150 (D.C. Cir. 1992) ("Because Congress did not assign the specific weight the Administrator should accord each of these factors, the Administrator is free to exercise his discretion in this area"). Moreover, Section 113 expressly grants FSOC the broad authority to consider "any other risk-related factors that the Council **deems** appropriate." 12 U.S.C. § 5323(a)(2) (emphasis added).

This discretion stands in contrast to the procedural requirements that Congress imposed upon FSOC, reinforcing the broad scope of FSOC's authority to make substantive designation decisions. Congress **required** FSOC to issue a notice of proposed determination; to grant a written hearing; to issue a notice of final determination; to consult with primary regulators; and to re-evaluate each designation determination at least annually. 12 U.S.C. § 5323(d), (e), and (g). But it scrupulously minimized intrusions into the exercise of FSOC's judgment when deciding whether to designate a company for enhanced supervision.

C. FSOC reasonably determined that MetLife could pose a threat to financial stability.

In determining that MetLife should be designated for supervision by the Federal Reserve, FSOC followed the dictates of Section 113, as well as the requirements of reasoned decision making. It followed the applicable procedural requirements; considered the appropriate factors; exercised its discretion well within the parameters Congress set in Section 113; and articulated the basis for its decision in exhaustive detail.

FSOC's analysis was exceedingly thorough, as evidenced by the 341 page explanation provided to MetLife.[22] In making its determination, FSOC considered all ten of the factors set forth in Section 113. *See* MetLife Final Basis at 32-38. For instance, in considering "the extent of MetLife's leverage," FSOC noted that, taking into account its operating debt, "MetLife on a consolidated basis has higher total financial leverage and more total debt and operating debt than most of its peer life insurance organizations." *Id*. at 32-33.

FSOC also evaluated MetLife under the framework set forth in guidance that FSOC issued. *See* 12 C.F.R. § 1310, app. A. Specifically, FSOC determined that MetLife's material financial distress could pose significant risks across several transmission channels. This was due in large part to MetLife's foray into a variety of complex financial activities. FSOC examined MetLife's funding-agreement backed securities,[23] commercial paper issuance, and securities lending activities,[24] and found that in the event of financial distress, these borrowing instruments could create liquidity problems.[25] FSOC found Metlife's guaranteed investment certificates ("GICs")

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[22] This brief cites the previously non-public basis for FSOC's final determination regarding MetLife, which was provided to Better Markets by FSOC on May 13, 2015, with redactions that had been made by MetLife. The full title of the document is "Explanation of the Basis of the Financial Stability Oversight Council's Final Determination that Material Financial Distress at MetLife Could Pose a Threat to U.S. Financial Stability and that MetLife Should be Supervised by the Board of Governors of the Federal Reserve System and Be Subject to Prudential Standards." It is hereafter referred to as the "MetLife Final Basis."

[23] FSOC noted that "MetLife's funding agreements and related products, its [funding agreement-backed notes] FABNs, and funding agreement-backed commercial paper (FABCP), constitute a significant portion of the company's capital markets financing activities and contribute to the company's operating leverage." MetLife Public Basis at 9.

[24] MetLife's securities lending "could create or exacerbate certain risks that MetLife could pose to other financial firms and markets." MetLife Public Basis at 11. MetLife was liable for cash collateral in its control for approximately $30 billion in securities as of September 30, 2014. *Id*. at 10.

[25] For instance, the funding-agreement backed instruments exposed MetLife "to liquidity risk in the event that its investors determine not to renew their investment in MetLife's funding

and synthetic GICs[26] could also create liquidity problems if rapidly terminated or withdrawn, MetLife Public Basis at 11, and that MetLife's captive reinsurance agreements and its variable annuities also contributed to asset liquidation risk.[27]

As to the first transmission channel – the Exposure Transmission Channel – FSOC found that MetLife was highly intertwined with the financial industry, and thus could affect that industry negatively through its material financial distress. *Id*. at 17. FSOC noted that while state guaranty and security fund associations ("GAs") could mitigate the exposure of retail policyholders, MetLife's "size, scope, the withdrawal features of some of its life insurance and annuity offerings, and broad national presence," could result in the GAs' having "insufficient capacity to handle a resolution" of one of MetLife's subsidiaries.[28] Moreover, FSOC found that the GAs' exposures and assessments could in turn create new risks to financial stability by spreading economic strain through the insurance industry. *See* MetLife Final Basis at 96.

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agreement-backed securities. This risk would increase if MetLife were to experience material financial distress and the program lost its prime rating." MetLife Public Basis at 10. FSOC found that "certain borrowings under MetLife's other funding agreement-related contracts can be subject to roll-over risk, which creates additional liquidity risk for MetLife." *Id.* MetLife's commercial paper and other borrowings "could force MetLife to liquidate assets, including illiquid assets, if the organization's liquid assets were insufficient to meet" the unexpected demands of material financial distress. *Id.*

[26] MetLife had $6 billion in outstanding traditional GICs, and $42 billion of separate account liabilities with guarantees, some of which are separate account GICs, as of December 31, 2013.

[27] As of September 30, 2014, MetLife "reported $100 billion of variable annuity account values with guaranteed living benefit features and $198 billion of variable annuity account values with guaranteed death benefit features." MetLife Public Basis at 13-14. Additionally, "MetLife's gross notional amount of derivatives outstanding as of September 30, 2014, was $406 billion." *Id*. at 19.

[28] Far from ignoring state regulation and the GAs, as the Plaintiff alleges, FSOC's Public Basis devotes several pages to existing supervision, noting, for example, that "the GAs could have insufficient capacity to handle a resolution of one of MetLife's lead insurance underwriters." MetLife Public Basis at 26-28. The MetLife Final Basis has much more extensive coverage of both the GAs (in Section 4.2) and regulatory scrutiny (in Section 5).

As to the Asset Liquidation Transmission Channel, FSOC found that MetLife "could be forced to sell assets at discount prices," if its policyholders and counterparties withdrew their accounts or funding, "which could impair financial intermediation or financial market functioning," because liquidating assets quickly can disrupt key markets or cause significant losses for other firms. *Id.* at 21. FSOC identified two sources of potential liquidity strains that could cause or contribute to a forced asset sale: MetLife's financial products, which can be terminated or not renewed by the counterparty, and insurance-related liabilities that can be withdrawn or surrendered by the holder. *Id.* FSOC found that MetLife's possession of illiquid assets exacerbated this risk.[29]

As to the Critical Function or Service Transmission Channel, FSOC found that while MetLife participates in a competitive industry, the insurance industry could still be negatively impacted by MetLife's financial woes. *Id.* at 26. Finally, FSOC addressed MetLife's resolvability, finding that "[t]he complexity of MetLife's operations and intercompany relationships, including intra-group dependencies for derivative management, investment management, risk management, cross-border operations, and critical services, creates complexities that could pose obstacles to a rapid and orderly resolution." *Id.* at 29.

In performing these analyses and finding that MetLife should be supervised by the Federal Reserve and subjected to enhanced prudential standards, FSOC acted well within its statutory authority.

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[29] FSOC noted that "[a]t least $37 billion of MetLife's invested assets are encumbered," and that MetLife might be "unable to quickly sell those assets." *Id.* at 24. FSOC also noted that "MetLife's leverage ratio is among the highest of its peers," and that "MetLife has significant operating debt compared to its peers, largely related to its institutional investment products." *Id.*

MetLife argues that FSOC unduly speculated by basing its determination on events that "could" take place rather than on events that were likely to take place. To bolster its argument, MetLife notes that it provided evidence indicating that these events were unlikely. For instance, MetLife argues that it is unlikely that its policyholders would react to its financial distress by surrendering their accounts *en masse*, and that it is unlikely that MetLife would be forced to liquidate its assets ad hoc. Compl. at 24.

But FSOC was not limited to scenarios that were likely to take place. As discussed above, Section 113 provides that FSOC may place a nonbank financial entity under the Board's purview if its "material financial distress . . . **could** pose a threat to the financial stability of the United States." 12 U.S.C. § 5323(a)(1). Section 113 does not state that FSOC should make its determination if material financial distress is **likely** to pose a threat to the financial stability of the United States, or **probably** will pose such a threat. Congress could have limited FSOC's discretion in that way, but chose not to.

D. <u>FSOC's designation decision deserves a high degree of deference.</u>

In Section 113, Congress made clear that FSOC's designation determinations deserve the high level of deference that accompanies the arbitrary and capricious standard of judicial review. That section expressly limits a court's review of any designation to whether the final determination was "arbitrary or capricious." 12 U.S.C. § 5323(h).

Judicial review of agency action under this standard "is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency decision "is entitled to a presumption of regularity," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971), and will be upheld if "the reviewing court can 'reasonably . . . discern' the agency's path . . . even if the agency's decision has 'less than ideal clarity.'" *ICI*, 720 F.3d at 376-377, *quoting Bowman Transp., Inc. v. Arkansas-*

Best Freight Sys., Inc., 419 U.S. 281, 286 (1974). This Court's "role is to determine whether the [FSOC's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *ICI*, 720 F.3d at 377 (internal quotation marks omitted). FSOC clearly passed this test.

This level of deference is especially high where courts review agency decisions that hinge in substantial part on technical economic analyses or predictions, as in this case. Courts "remain ever mindful that in performing a searching and careful inquiry into the facts, we do not look at the [agency's] decision as would a scientist [or economist], but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality." *Am. Trucking Ass'ns v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 249 (D.C. Cir. 2013) (internal quotation marks omitted). Courts give agencies deference, as "[economic] analyses epitomize the types of decisions that are most appropriately entrusted to the expertise of an agency." *Office of Commc'n of United Church of Christ v. FCC*, 707 F.2d 1413, 1440 (D.C. Cir. 1983).

As the D.C. Circuit noted in *Agape Church, Inc. v. FCC*, 738 F.3d 397, 408 (D.C. Cir. 2013), courts "must accord 'substantial deference'" to an agency's "predictive judgments," and "cannot substitute [their] judgment for the agency's, especially when, as here, the decision under review requires expert policy judgments of a technical, complex, and dynamic subject." *See also Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377 (1989) (where the agency's analysis "requires a high level of technical expertise," courts "must defer to the informed discretion of the responsible federal agencies") (internal citation and quotation marks omitted); *Fox v. Clinton*, 684 F.3d 67, 75 (D.C. Cir. 2012) ("arbitrary and capricious review is fundamentally deferential—especially with respect to matters related to an [agency's] areas of technical expertise") (internal citation and quotation marks omitted). The designation process under Section 113 requires FSOC to apply an

extraordinarily high degree of economic expertise, coupled with predictions about "possible" outcomes, and heightened deference is appropriate.

Only where "'the complete absence of any discussion' of a statutorily mandated factor" or where "the agency 'has wholly failed to comply with [a] specific statutory requirement,'" are courts left with "no alternative but to conclude that [the agency] failed to take account of this statutory limit on [its] authority." *Public Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216 (D.C. Cir. 2004), *quoting United Mine Workers v. Dole*, F.2d 662, 673 (D.C. Cir. 1989); *see also State Farm*, 463 U.S. at 43 ("an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise"). FSOC did not omit consideration or discussion of any statutorily mandated factor or overlook any important aspect of the problem, and its explanation is not only consistent with the evidence, but highly plausible—especially in light of AIG's role in precipitating, without warning, the 2008 financial crisis.[30]

II. AIG's role in the crisis prompted Congress to grant FSOC broad-ranging authority to designate nonbanks, including insurance companies and companies with significant foreign operations.

Notwithstanding the fact that AIG was an insurance conglomerate, with significant

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[30] *See Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837, 844 (1984). Under the rule announced in Chevron, "[s]tatutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency." *City of Arlington v. FCC,* 133 S. Ct. 1863, 1868 (2013). Thus, even if it were possible for the Court to conclude that "could" as used in Section 113 might reasonably be interpreted as something other than simply "possible," the Court would nevertheless be bound to apply the meaning adopted by the FSOC. "Chevron dictates that a court defer . . . to the agency's expert judgment about which interpretation fits best with, and makes the most sense of, the statutory scheme." *Scialabba v. Cuellar de Osorio,* 134 S. Ct. 2191, 2203 (2014) (plurality).

overseas operations, it nevertheless played a central role in precipitating a financial crisis of epic proportions *here in the United States*. This history belies one of the Plaintiff's central themes, which is that by their nature, insurance enterprises cannot pose systemic risks, and it informs any analysis of what Congress intended in Section 113.

A. AIG's activities, coupled with gaps in regulatory knowledge and oversight, were a direct cause of the financial crisis and a primary reason why Congress granted FSOC the ability to designate nonbank firms as systemically important.

Prior to the 2008 financial crisis, AIG was the world's largest insurance company. In addition to selling traditional insurance products, one of its subsidiaries accumulated hundreds of billions of dollars of liabilities by "insuring" the assets of many other large financial entities through the use of credit default swaps ("CDS"), for which it had no reserves. Largely through CDS, AIG became interconnected with the entire financial system.

When the mortgage-backed securities AIG was "insuring" with CDS failed, AIG made the stunning disclosure that it lacked the capital necessary to fulfill its obligations. To prevent widespread financial consequences, the federal government provided AIG with a combination of loans and capital infusions totaling $182 billion. *See* Federal Reserve Bank of New York, *Maiden Lane Transactions, available at* http://newyorkfed.org/markets/maidenlane.html. The funds were used not only to satisfy obligations to AIG's counterparties, including a number of large foreign banks, but also to pay for $218 million in bonuses to some of the very AIG executives who recklessly sold the CDS, failed to reserve for losses, and doomed the company to failure. *See* Jamie Heller, *Connecticut AG Says AIG Paid $218 Million in Bonuses*, WALL STREET JOURNAL (Mar. 21, 2009).

Without a rescue, AIG's collapse would have caused significantly more damage to the economy than it actually did. According to the Federal Reserve Bank of New York, allowing AIG to fail would have resulted in a run on insurance companies, money market funds, and other

financial institutions, leading to disarray in those markets and triggering yet further panics.[31] In the words of then New York Federal Reserve President Timothy Geithner, allowing AIG to fail would have been "even more damaging" than the collapse of Lehman Brothers, which was perhaps the most high-profile catalyst of the financial crisis.[32] An AIG failure would have resulted in "mass panic on a global scale." *See Starr Int'l Co. v. USA*, No. 11-cv-779, Dkt. No. 346 at 1431-32 (Fed. Cl. Nov. 4, 2014) (testimony of former Treasury Secretary Timothy Geithner).

AIG's failure and subsequent bailout occurred in large part because no regulator was responsible for overseeing the possible systemic risks posed by the firm. AIG's insurance business was regulated by state insurance commissioners,[33] its thrift was insufficiently regulated by the Office of Thrift Supervision ("OTS"),[34] and its credit default swaps business was entirely unregulated. Congress created FSOC to ensure that another nonbank financial institution could never again throw the global financial system into chaos and force American taxpayers to bail it out.

Policy makers clearly recognized the peril in allowing entities like AIG to escape comprehensive regulatory oversight. Then-Banking Committee Chairman Chris Dodd emphasized that the "bill [leading to the Dodd-Frank Act] extends oversight to dangerous nonbank

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[31] Federal Reserve Bank of New York, *Actions Related to AIG: Consequences of an AIG Failure* (last visited May 20, 2015), *available at* http://www.newyorkfed.org/aboutthefed/aig/#1.

[32] Andrew Zajac and Christie Smythe, *Geithner Vague on How He Arrived at AIG Bailout Rate*, BLOOMBERGBUSINESS (Oct. 8, 2014).

[33] State insurance commissioners only have jurisdiction over insurance products, not the securities or derivatives products an insurance company may hold. *See* McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015.

[34] Unlike the largest banks with which AIG traded CDS, AIG's primary federal regulator was the OTS. OTS was charged with overseeing small savings and loans organizations – not international conglomerates. Moreover, prior to the OTS consolidation into OCC, it was well-known that financial institutions with the right to choose their charter preferred the light-touch approach of the OTS.

financial companies, such as AIG, that could pose a risk to our financial stability, as it did." 156 Cong. Rec. S. 2259 (Apr. 14, 2010) (statement of Sen. Dodd). A colloquy between Senator Corker and FDIC Chair Bair at a Senate hearing succinctly makes the point. Senator Corker asked: "If you had the appropriate ability to deal with a Lehman Brothers or an AIG, would that actually have reduced the risk to the system in the first place?" Chair Bair responded: "I think it would have." *Establishing a Framework for Systemic Risk Regulation: Hearing Before the S. Comm. on Banking, Housing, & Urban Affairs*, S. HRG. 111-297, 111th Cong. 1, 19 (2009). Congressman Ed Royce (R-CA) echoed the same conclusion: "The various State insurance regulators simply do not have the ability to oversee massive global financial firms like AIG. This void has gone unfilled for too long, and the problems that have resulted because of this gap are many." *Perspectives on Systemic Risk: Hearing Before the Subcomm. on Capital Markets, Insurance, & Government Sponsored Enterprises of the H. Comm. on Financial Services*, H. HRG. 111-10, 111th Cong. 1, 6 (2009).

B. Conglomerates like AIG pose risks regardless of whether their operations are domestic or foreign.

MetLife insists that it is not subject to designation because it is not a "**U.S.** nonbank financial company," stressing that too much of its activities or assets are located overseas. Compl. at 40 (emphasis added). Had the Plaintiff's theory been applicable before the financial crisis of 2008, FSOC would have been powerless to designate AIG for enhanced supervision at that time – an absurd result that Congress could not have intended.

Specifically, MetLife argues that FSOC cannot designate a domestic firm which receives more than 15% of its revenues, or has more than 15% of its consolidated assets relate to, its foreign financial activities. Compl. at 40. However, under this reading of the law, AIG would have been excluded from FSOC's purview before the crisis, during the crisis, and after the crisis. According

to its First Quarter 2006 Financial Supplement, foreign insurance activities constituted 39.7% of AIG's revenues and 29% of total assets.[35] At the height of the financial crisis, AIG's foreign insurance activities constituted 44.3% of its revenues and foreign life insurance itself constituted 18.21% of its assets.[36] Following the crisis, when Dodd-Frank was passed, AIG's foreign insurance activities constituted 40.7% of its revenues and foreign life insurance itself accounted for 22.4% of its assets.[37]

MetLife's interpretation of the statute is particularly ironic and untenable, since it was precisely the trading by AIG's foreign subsidiary based in London that led to the company's insolvency and motivated Congress to endow FSOC with designation authority. Thus, under MetLife's theory, it could be a firm's overseas traders who create significant systemic risk for the United States financial system, but who also remove the firm from FSOC's designation jurisdiction. This reading of the law is directly contrary to Congress's intent.

III. Plaintiff's alleged economic analysis requirements are nowhere to be found in statute or case law.

One of the Plaintiff's most important yet groundless attacks is the claim that FSOC was obligated to "consider the economic effects of designation on MetLife" but failed to do so. Compl.

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[35] American International Group, Inc., *Financial Supplement First Quarter 2006* at 4, 30, 31, *available at* http://www.aig.com/Chartis/internet/US/en/1Q06_financial_supplement_tcm3171-443190.pdf.

[36] American International Group, Inc., *Financial Supplement Third Quarter 2008* at 68-69, *available at* http://www.aig.com/Chartis/internet/US/en/FinSupp%203Q2008_11.7.2008_02.54PM_tcm3171-443282.pdf.

[37] American International Group, Inc., *Form 10-Q for quarterly period ending June 30, 2010*, at 19, 185, *available at* http://www.aig.com/Chartis/internet/US/en/June30201010Q_tcm3171-443288.pdf.

at 71. The argument is explicit in Count VII, but it appears in more nuanced forms throughout the Complaint. It has no basis.

Faced with the reality that nothing in the Dodd-Frank Act even remotely requires FSOC to conduct an economic impact analysis before making a designation decision, the Plaintiff has framed its argument by using a variety of labels in addition to "costs"[38] and by invoking the APA and general principles of administrative law as the purported basis of this supposed economic analysis obligation. For example, MetLife argues that FSOC should have considered the "effects that designation would have on MetLife, and its shareholders and policyholders, or on insurance consumers in general." *Id.* at 38. It also suggests that FSOC was prohibited from "imposing onerous burdens on regulated entities in order to prevent purely illusory risks." *Id.* at 47.

And when framing its legal theory, the Plaintiff concedes that Section 113 is devoid of any cost-benefit analysis requirement, *id.* at 72, but contends that FSOC was nevertheless obligated to consider the economic impact of designation on competition and on shareholders under the general principles of administrative law set forth in the APA and in the *State Farm* decision, *id.* at 47 (citing "The APA and basic dictates of reasoned decision-making"); *id.* at 72 (arguing that the economic consequences of designation are an "important aspect of the problem at hand" under *State Farm* (quoting *State Farm*, 463 U.S. at 43)).

Nowhere does MetLife make any mention of the benefits of designation – such as helping to prevent trillions of dollars in losses to the economy, massive unemployment, rampant home foreclosures, and decimated family wealth. However, the most important point here is not that MetLife's arguments about costs and benefits are entirely skewed toward their claimed costs, but

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[38] References to "costs" appear frequently: the "costs on the company;" Compl. at 6; the "costs" on "shareholders and customers;" *id.* at 6; "annual consumer costs," *id.* at 21.

that the law simply does not require FSOC to engage in that type of economic or cost-benefit analysis at all.

A. <u>Congress chose not to require FSOC to conduct any type of cost-benefit analysis when exercising its designation authority.</u>

Whether or not an agency must conduct cost-benefit or economic impact analysis, and the exact nature of that analysis, is determined by what Congress has actually required in the agency's organic statute. The Supreme Court has declared that an agency's duty to conduct cost-benefit analysis is not to be inferred lightly or without a clear indication from Congress. *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."). Sometimes Congress insists on a rigorous cost-benefit analysis, *see, e.g.,* 2 U.S.C. § 1532(a) (requiring the agency to "prepare a written statement containing . . . a qualitative and quantitative assessment of the anticipated costs and benefits," including "the costs and benefits to State, local, and tribal governments or the private sector" and "estimates by the agency of the [action's] effect on the national economy"); sometimes it requires an agency simply to consider certain economic factors, *see* 7 U.S.C. § 19 (requiring the CFTC to "consider the costs and benefits of the action"); and often, as in this case, it does not impose any cost-benefit or economic impact analysis obligation whatsoever on an agency.

In two recent decisions, the D.C. Circuit has reaffirmed this principle and applied it in rejecting industry challenges to agency rules. For example, in *ICI*, the court made clear that "[w]here 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." 720 F.3d at

379 (cited authorities omitted); *see also NAM,* 748 F. 3d at 369.[39]

The provisions governing FSOC designation authority are devoid of any language even hinting that the agency must conduct cost-benefit or economic impact analysis when designating companies for enhanced supervision. *See* 12 U.S.C. § 5323 (containing the designation authority); *see also* 12 U.S.C. § 5322(a)(1)(H) (stating that the general purposes of the Council include requiring supervision by the Federal Reserve for nonbank financial companies "that **may** pose risks to the financial stability of the United States," without any reference to economic impact considerations (emphasis added)). On this basis alone, the Plaintiff's claims based on cost-benefit or economic impact analysis should be dismissed.[40]

Two additional factors reinforce this conclusion. First, Congress knew how to require FSOC to evaluate the economic impact of its regulatory actions, and it did so in other provisions

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[39] To the extent Plaintiff relies on a trilogy of cases in which SEC rules were successfully challenged, that reliance is misplaced. *See Chamber of Commerce v. SEC*, *American Equity v. SEC*, and *Business Roundtable v. SEC*. Both the SEC and CFTC have organic statutes that require the agencies to consider a variety of economic factors when writing rules, such as costs, benefits, efficiency, competition, and capital formation, and these cases interpret those explicit requirements. *See, e.g., American Equity*, 613 F.3d 166, 178, 179 (D.C. Cir. 2010) (holding "the SEC's [efficiency, competition, and capital formation] analysis is lacking," because the agency "did not assess the baseline level of price transparency and information disclosure under state law.") Here, the Dodd-Frank Act does not require FSOC to analyze the economic impact of designations. In fact, requiring FSOC to engage in such considerations would conflict with Congress's intent. *See supra* Section I.

[40] FSOC's obligation to "consider" ten factors when making a designation determination does not impose any type of cost-benefit or economic analysis obligation on FSOC. 12 U.S.C. § 5323(a)(2). None of the factors requires any consideration of costs and benefits of a designation or consideration of the effects of designation on either the designated company, its shareholders or customers; or the wider economy. Rather, they all relate to the degree to which a company "could pose a threat to the financial stability of the United States." The final catchall factor is "**any other risk-related factors** that the Council deems appropriate," which confirms that all of the factors relate to risks posed by the company, not the costs or benefits of a designation. 12 U.S.C. § 5323(a)(2)(K). In addition, Congress's decision to require "consideration" of factors reinforces the breadth of FSOC's discretion. *See* discussion *supra,* at 12-13.

of the Dodd-Frank Act. In Section 120, Congress authorized FSOC to recommend the application of "new or heightened standards and safeguards" by primary financial regulators. 12 U.S.C. § 5330(b)(1). Congress further required that any such recommended standards and safeguards "shall take costs to long-term economic growth into account." Against this affirmative instruction to FSOC in another context, the complete absence of any such requirements in Section 113 can only be read as a deliberate choice. *See, e.g., Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485 (1996) ("Congress . . . demonstrated in CERCLA that it knew how to provide for the recovery of cleanup costs, and . . . the language used to define the remedies under RCRA does not provide that remedy").

Second, Congress could not have intended FSOC to conduct the type of economic impact analysis that Plaintiff suggests, since the nature and scope of any prudential supervision eventually applied to a designated company is to be determined not by FSOC but by the Federal Reserve, at a later point in time. Since FSOC cannot know at the time of designation what additional regulatory requirements may ultimately apply to a designated firm, it could not conduct a meaningful economic impact analysis.

Under Section 113, FSOC analyzes firms to determine if they "could pose a threat to the financial stability of the United States," based on its consideration of 11 factors. However, the Federal Reserve is tasked with supervising designated firms and applying enhanced prudential standards. *See* 12 U.S.C. § 5323(a)(1) (FSOC may designate a company to "be supervised by the Board of Governors and shall be subject to prudential standards"). While the Dodd-Frank Act allows FSOC to make suggestions to the Federal Reserve on how to supervise and apply standards to these firms, the Federal Reserve is the only agency given authority to conduct supervision and regulation. S*ee* 12 U.S.C. § 5325(a)(1) ("the Council may make recommendations to the Board

of Governors concerning the establishment and refinement of prudential standards and reporting and disclosure requirements applicable to" designated firms).

It is clear from this framework that Congress expected the roles of FSOC and the Federal Reserve to be separate and distinct. The legislative history bears this out. Former Treasury Secretary Timothy Geithner explained in Senate testimony that the administration intended the Council "to gather information from any firm or market to help identify and help the underlying regulators respond to emerging risks." *Examining the Administration's Proposal to Modernize the Financial Regulatory System: Hearing Before the S. Comm. on Banking, Housing, & Urban Affairs*, S. HRG. 111-228, 111th Cong. 1, 7 (2009). He further explained that in the proposal, the Council "w[ould] not have the responsibility for supervising the largest, most complex, interconnected institutions," as that "highly specialized, complicated task . . . requires tremendous institutional capacity and organizational accountability" and is best left to the Federal Reserve. Similarly, Senator Mark Warner made clear that he "believe[d] systemic risk ought to be put in a council [of primary regulators, with] a staff that would be solely focused on systemic risk evaluation and have the ability and power to act." *Id.* at 23.

Any suggestion that FSOC should refrain from exercising its designation authority until the Federal Reserve has established enhanced prudential standards for designated nonbanks conflicts with the language and intent of Section 113. Congress clearly elected not to condition designation on the development of the Federal Reserve's standards. Moreover, the suggestion would be unworkable, as it would create a catch-22: Designation would have to await the development of enhanced prudential standards, but the development of those standards, tailored to

any specific institution, would have to await designation.[41] All of these considerations confirm what is otherwise abundantly clear: Congress did not intend FSOC to conduct an economic impact analysis when designating nonbank financial companies for prudential supervision.

B. The APA does not require an economic impact analysis.

The APA's arbitrary and capricious standard does not require an agency to engage in cost-benefit or economic impact analysis. *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 670-671 (D.C. Cir. 2011). Rather, that standard only requires that the agency "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). Furthermore, in conducting its required review of the relevant data, "[t]he APA imposes no general obligation on agencies to produce empirical evidence." *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009). "An agency is not required 'to measure the immeasurable.'" *NAM*, 748 F.3d at 369 (internal citations omitted).

Contrary to the Plaintiff's claim, Compl. at 47, the APA's "reasoned decision making" requirement does not require a balancing of "onerous burdens" against the prevention of "illusory risks." Instead, it simply requires an agency to use the data at hand to come to a decision in line with the requirements and intent of its organic statute, and explain the rationale behind its decision.

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[41] Congress granted the Federal Reserve the ability to tailor enhanced prudential standards to the risk profile of each firm it supervises, and explicitly asked that it do so. *See* 12 U.S.C. § 5365 ("In prescribing more stringent prudential standards under this section, the Board of Governors may . . . **differentiate among companies on an individual basis** or by category . . .") (emphasis added); *see also* Better Markets, *Fact Sheet: Everything You Need to Know About the $50 Billion Threshold* (Mar. 17, 2015), *available at* http://www.bettermarkets.com/keywords/50-billion.

Courts "are generally not free to impose" additional procedural rights on agency rule makings because requiring "perfectly tailored [procedures] to reach what the court perceives to be the 'best' or 'correct' result . . . would be totally unpredictable." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524, 46 (1978).

Here, FSOC's organic statute together with the APA required FSOC to determine whether MetLife could pose a threat to the financial stability of the U.S., in light of elven factors, 12 U.S.C. § 5323(a)(2); to arrive at a reasoned decision; and to "articulate a satisfactory explanation" for its decision, *State Farm*, 463 U.S. at 30, 43. FSOC fulfilled all of these requirements.

C. Requiring a consideration of the effects of designation on MetLife would thwart FSOC's ability to implement Congress's regulatory objectives.

The fundamental rationale for Congress's determination not to require FSOC to analyze the economic impact of its designation decision on a particular firm is clear: It would frustrate FSOC's ability to implement Congress's objectives and protect the financial system from financial crises.

The Plaintiff contends in essence that FSOC must weigh the costs to MetLife when deciding whether the company could threaten the stability of the U.S. financial system. Yet Congress could not have intended that measures to protect our financial system from the ravages of another financial crisis should hinge on the costs that any particular company might have to shoulder in the reform process.

The D.C. Circuit has held that when Congress has established a regulatory regime to achieve certain ends that it considers beneficial, regulators cannot second-guess that legislative judgment. In *NAM*, the court found that Congress had "conclude[d], as a general matter, that transparency and disclosure would benefit the Congo," by helping to reduce the violence accompanying trade in certain types of minerals. *NAM*, 748 F.3d at 370. The court held that the

SEC could not "question the basic premise that a disclosure regime would help promote peace and stability in the Congo." *Id.* "If the Commission second-guessed Congress on that issue, then it would have been in an impossible position." *Id.*

Similarly here, Congress established the designation mechanism to prevent another devastating financial crisis, without regard to the collateral costs that companies might have to bear. The language of Section 113 makes that clear. And just as in *NAM*, if FSOC were required to "second-guessed Congress" by refraining from designation based on company specific economic impacts, then it would be "in an impossible position." *Id.*[42]

Here, FSOC found that MetLife "could pose a threat to the financial stability of the United States," and it voted to designate MetLife for supervision by the Federal Reserve. Requiring the agency to deviate from this course over concerns about the particular consequences that might befall MetLife would violate the letter and spirit of perhaps the most important Congressionally mandated financial reform since the Great Depression. The Court should avoid such a result.

CONCLUSION

For the foregoing reasons, the Court should grant FSOC's motion to dismiss, or in the alternative, for summary judgment.

Dated: May 22, 2015

Respectfully submitted,

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[42] In *NAM,* Congress had required the SEC to issue a rule to achieve humanitarian goals. Similarly here, FSOC's "purposes and duties" are, *inter alia*, to "require supervision by the Board of Governors for nonbank financial companies that may pose risks to the financial stability of the United States." 12 U.S.C. § 5322(a)(1)(H). Thus, Congress has given FSOC broad discretion in deciding whether to designate a particular institution, but Congress has also mandated that FSOC exercise that discretion for the purpose of protecting our financial system from destabilizing risks that can lead to crisis.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this *Brief of Better Markets, Inc. as Amicus Curiae in Support of Defendant Financial Stability Oversight Council* was served this 22nd day of May, 2015, upon counsel for the parties via the Court's CM/ECF electronic filing system, as follows:

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