IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

METLIFE, INC.,

Plaintiff,

v.

FINANCIAL STABILITY OVERSIGHT COUNCIL,

Defendant.

REDACTED BRIEF

Civil Action No. 15-45 (RMC)

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Constitution and Statutes

Federal Regulations

Legislative Materials

Other Authorities

INTRODUCTION

The 2008–09 financial crisis triggered the most severe recession since the Great Depression. After the collapse of the housing bubble, the nation's largest financial institutions were stuck with toxic assets on their balance sheets, without a sufficient cushion to absorb defaults. Credit markets seized up, as financial firms refused to lend. Blue-chip institutions collapsed in a matter of days. The sudden failures of financial companies triggered a cascade of other failures and near-failures, beginning with panic-fueled runs on firms and funds previously thought stable. Unprecedented infusions of government funds were needed to rescue other firms, including American International Group ("AIG"), whose failure would have been disastrous for the nation's economy. Over time, unemployment spiked. A mortgage crisis led to an unprecedented number of foreclosures. The Dow Jones dropped more than 50%. This crisis made palpably clear that disastrous events often do not occur in isolation, and the market cannot easily swallow the collapse of certain companies.

The crisis also exposed numerous vulnerabilities in the U.S. financial system, including gaps in regulators' jurisdiction over large, complex "nonbank" financial companies—like AIG and the former Lehman Brothers—that play a significant role in the financial system. Many of these nonbank financial companies were not subject to effective consolidated supervision, as no single regulator supervised the parent company and all of its subsidiaries. The crisis revealed that financial distress at banks and nonbanks alike can lead to a broad seizing up of markets, as well as stress at other financial firms, through market exposures and interconnections, all of which can threaten the financial stability of the nation.

It was against this backdrop that Congress enacted the Dodd–Frank Wall Street Reform and Consumer Protection Act ("DFA" or "Dodd–Frank") as "a direct and comprehensive response to the financial crisis that nearly crippled the U.S. economy." S. Rep. No. 111-176, at 2 (2010). To accomplish Dodd–Frank's overarching purpose to "promote the financial stability of the United States," Congress created a new agency—the Financial Stability Oversight Council ("Council" or "FSOC")—with a broad, interagency perspective of the entire financial system, and the authority to respond to risks posed by nonbank financial companies. *Id*.

Dodd–Frank established the Council as an early warning system to detect and address emerging threats to financial stability and the economy. *Id*. In Section 113 of the Act, Congress provided the Council with an important new authority: to determine that a particular nonbank financial company shall be subject to supervision by the Board of Governors of the Federal Reserve System ("Federal Reserve")—including the imposition of enhanced prudential standards—if material financial distress at the company could pose a threat to U.S. financial stability. 12 U.S.C. § 5323(a). The enhanced prudential standards would include, among other things, capital and liquidity requirements to ensure that designated companies are better equipped to meet unexpected losses and sudden liquidity demands, and a requirement to submit a "living will" to eliminate uncertainty about how the company would be wound down in a rapid and orderly manner in the event of its distress or failure. By requiring supervision before it is too late, Dodd–Frank promotes disciplined risk-taking: if a designated company seeks to benefit financially from its risks, the company must safeguard against the possibility that its risks could destabilize the U.S. economy in the event of the company's distress or failure. Congress thus sought to reduce the chance that the American taxpayer will be forced to bear the costs of a company's risk-taking.

In December 2014, the Council—with the affirmative vote of the leader of every major federal financial regulatory agency and the Secretary of the Treasury—found that material financial distress at Plaintiff MetLife, Inc. ("MetLife") could pose a threat to U.S. financial stability. It therefore designated MetLife for supervision by the Federal Reserve and enhanced prudential standards under Section 113 of Dodd–Frank. The Council's designation came after 17 months of close analysis of the company, during which the Council or its staff met with MetLife over a dozen times, reviewed nearly 21,000 pages of material submitted by the company, and issued a 270-page proposed decision that the company challenged in both a written and an oral hearing before the Council. The Council's final determination was set forth in a 341-page nonpublic basis, and a 31-page public basis that omitted confidential business information.

MetLife is widely known as an insurer—indeed, it is the largest publicly traded insurance company in the United States. But MetLife also engages in significant financial activities beyond simply selling life insurance. Its life insurance activities alone did not lead to its designation. Rather, the Council found that MetLife engages in complex financial transactions and capital markets activities which, in a distress situation, not only could expose other major market participants to substantial losses, but could also put cash strains on the company, requiring it to sell assets at a scale and speed that could impair or freeze up broader financial markets. Because MetLife is a significant, active participant in the U.S. financial system, and because it is significantly interconnected with other financial companies through its institutional and capital markets activities and insurance products, the Council concluded that material financial distress at MetLife could impair financial markets so severely as to inflict broader damage on the United States economy.

The Council's conclusions were based on detailed financial analyses and its considered expertise and predictive judgments about risks to the financial system as a whole. MetLife's numerous disagreements with the Council's analysis and conclusions are meritless, particularly given the limited arbitrary and capricious review permitted by Dodd–Frank. Moreover, MetLife's complaints, if accepted, would frustrate the express statutory purpose of the Council: to address potential risks to financial stability posed by the distress of certain companies *before* that distress occurs and poses an imminent, grave threat to the nation's economy.

Because the Council's designation of MetLife was neither arbitrary nor capricious, and because the authority that Dodd–Frank grants the Council is clearly constitutional, judgment should be entered for Defendant.

BACKGROUND

In enacting Dodd–Frank in the wake of the 2008–09 financial crisis, Congress sought to establish safeguards and regulatory tools to reduce the threat that a large, complex financial company—whether a bank or a nonbank—could pose to U.S. financial stability.

Section 113 of Dodd–Frank authorizes the Council to designate certain *nonbank* financial companies, such as MetLife, for consolidated supervision by the Federal Reserve and enhanced prudential standards. 12 U.S.C. § 5323. This nonbank designation authority is a centerpiece of Congress's framework to address the risks exposed during the financial crisis, including risks posed by insurance organizations like AIG. *See* 155 Cong. Rec. H. 14440 (Dec. 9, 2009) (statement of Rep. Frank); 156 Cong. Rec. S. 2259 (Apr. 14, 2010) (statement of Sen. Dodd). This authority reflects an important lesson from the financial crisis: risks to the financial system arise "not only in the banking sector, but also from the activities of other financial firms," including insurance organizations.[1]

[1] *Regulatory Restructuring: Hearing Before the H. Comm. on Financial Services*, 111th Cong. (2009) (statement of Ben Bernanke, Chairman, Board of Governors, Federal Reserve) ("The current financial crisis has clearly demonstrated that risks to the financial system can arise not only in the banking sector, but also from the activities of other financial firms—such as

To date, the Council has designated four nonbank financial companies: AIG, General Electric Capital Corporation, Prudential Financial, Inc., and MetLife. MetLife is the only company to have brought suit challenging its designation.

I. THE FINANCIAL STABILITY OVERSIGHT COUNCIL

The establishment of the Council was one of Dodd–Frank's core reforms. The Council brings together federal and state financial regulators with diverse expertise across the financial system to identify and address potential risks to financial stability. 12 U.S.C. §§ 5321, 5322. The Council's ten voting members include the lead official of every major federal financial regulatory agency; the Council also has five nonvoting members, who serve in an advisory capacity.[2] The Council is intended to be an "early radar system" or "warning system," 156 Cong. Rec. S. 2614 (Apr. 26, 2010) (statement of Sen. Dodd), to help prevent future crises and to protect financial stability by "closing loopholes, improving consolidated supervision, and establishing robust regulatory oversight." 155 Cong. Rec. H. 14409 (Dec. 9, 2009) (statement of

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investment banks or insurance organizations—that traditionally have not been subject, either by law or in practice, to the type of regulation and consolidated supervision applicable to bank holding companies. While effective consolidated supervision of potentially systemic firms is not, by itself, sufficient to foster financial stability, it certainly is a necessary condition."), *available at* http://www.federalreserve.gov/newsevents/testimony/bernanke20090724a.htm.

[2] The ten voting members are the Secretary of the Treasury, who serves as Chairperson of the Council; the Chairman of the Federal Reserve; the Comptroller of the Currency; the Director of the Consumer Financial Protection Bureau; the Chairman of the Securities and Exchange Commission; the Chairperson of the Federal Deposit Insurance Corporation; the Chairperson of the Commodity Futures Trading Commission; the Director of the Federal Housing Finance Agency; the Chairman of the National Credit Union Administration Board; and an independent member having insurance expertise who is appointed by the President with the advice and consent of the Senate. 12 U.S.C. § 5321(b)(1). The five non-voting members are the Director of the Office of Financial Research; the Director of the Federal Insurance Office; a state insurance commissioner designated by the state insurance commissioners; a state banking supervisor designated by the state banking supervisors; and a state securities commissioner designated by the state securities commissioners. 12 U.S.C. § 5321(b)(2).

Rep. Perlmutter). The Council enables regulators to "get above their silo-like focus, so they can look ahead of the crisis and create early trip wires to make sure we do not get to the kind of catastrophic place we ended up in September of 2008." 156 Cong. Rec. S. 2778 (Apr. 29, 2010) (statement of Sen. Warner).[3]

Accordingly, Dodd–Frank tasks the Council with addressing potential risks to financial stability *before* they arise. *See, e.g.*, 12 U.S.C. § 5322(a)(2)(H), (J), (K), (N). The Council's primary statutory purposes are to (1) identify risks to the financial stability of the United States posed by the material financial distress or failure, or ongoing activities, of large, interconnected financial companies; (2) promote market discipline by eliminating expectations on the part of shareholders, creditors, and counterparties of such companies that the government will shield them from losses in the event of their failure; and (3) respond to emerging threats to the stability of the United States financial system. *Id.* § 5322(a)(1).

II. STATUTORY AND REGULATORY FRAMEWORK

A. Nonbank Designations under Section 113 of Dodd–Frank

Under Section 113 of Dodd–Frank, the Council "may determine" that a "nonbank financial company"—defined as a company that, like MetLife, is "predominantly engaged in financial activities," *id.* § 5311(a)—shall be supervised by the Federal Reserve and subject to enhanced prudential standards if the Council concludes that either (1) "material financial distress" at the company "could pose a threat to the financial stability of the United States" (the "first determination standard"); or (2) the "nature, scope, size, scale, concentration,

[3] *See also* 155 Cong. Rec. H14413 (Dec. 9, 2009) ("The bill that we are putting forward says the regulators, as a systemic risk council, will monitor institutions and will monitor activity. If we see an institution getting to that point, we step in and say, raise your capital, stop selling CDSs, stop selling mortgages, giving mortgages to people who shouldn't get them, divest yourself of this or that.") (statement of Rep. Frank).

interconnectedness, or mix of the activities" of the company "could pose a threat to the financial stability of the United States" (the "second determination standard"). *Id.* § 5323(a)(1). The Council reviewed MetLife under the first of these determinations standards.

The statute lists ten factors that the Council shall consider in designating a company under either standard:

> (A) the extent of the leverage of the company;
>
> (B) the extent and nature of the off-balance-sheet exposures of the company;
>
> (C) the extent and nature of the transactions and relationships of the company with other significant nonbank financial companies and significant bank holding companies;
>
> (D) the importance of the company as a source of credit for households, businesses, and State and local governments and as a source of liquidity for the United States financial system;
>
> (E) the importance of the company as a source of credit for low-income, minority, or underserved communities, and the impact that the failure of such company would have on the availability of credit in such communities;
>
> (F) the extent to which assets are managed rather than owned by the company, and the extent to which ownership of assets under management is diffuse;
>
> (G) the nature, scope, size, scale, concentration, interconnectedness, and mix of the activities of the company;
>
> (H) the degree to which the company is already regulated by 1 or more primary financial regulatory agencies;
>
> (I) the amount and nature of the financial assets of the company; [and]
>
> (J) the amount and types of the liabilities of the company, including the degree of reliance on short-term funding.

Id. § 5323(a)(2). In addition, the statute provides the Council with the discretion to consider "any other risk-related factors that the Council deems appropriate." *Id*. § 5323(a)(2)(K).

Dodd–Frank also sets forth procedural requirements for Section 113 designations. Before making any final determination regarding a nonbank financial company, the Council must make a proposed determination by a vote of two-thirds of its voting members (including the affirmative vote of the Chairperson). *Id.* § 5323(e)(1). The Council must then provide the company with notice and an explanation of the basis of the proposed determination. *Id.* § 5323(e)(1). The company then has a right to a written hearing; the Council may, in its "sole discretion," also provide an oral hearing. *Id.* § 5323(e)(2). After any hearing, the Council may make a final determination upon the approval of two-thirds of its voting members (including the affirmative vote of the Chairperson). *Id.* § 5323(e)(3). After a final determination, the Council must provide the company with a written notice and explanation of the basis for the decision. *Id.* § 5323(e)(3).

The Council must reevaluate each of its previous determinations at least annually, and rescind any determination if it finds that the company no longer meets the statutory standards. *Id.* § 5323(d).

B. Enhanced Prudential Standards

Dodd–Frank provides for enhanced prudential standards for both banks and nonbanks. For banks, the Act automatically imposes enhanced prudential standards on any bank holding company with more than $50 billion in assets. *Id.* § 5365(a)(1). More than 30 U.S. bank holding companies meet this threshold.[4] However, for nonbank financial companies, such as MetLife, enhanced prudential standards are not automatic; as explained above, they result from designation under Section 113. *Id.* §§ 5323, 5365. Following a nonbank financial company's designation by the Council, the company is subject to consolidated supervision by the Federal Reserve and application of enhanced prudential standards that the Federal Reserve will adopt

[4] *See* Federal Reserve, *Holding Companies with Assets Greater Than $10 Billion*, *at* http://www. ffiec.gov/nicpubweb/nicweb/ HCSGreaterThan10B.aspx.

through a process of public notice and comment. *See* 12 U.S.C. §§ 5323, 5365; 79 Fed. Reg. 17,240, 17,245 (Mar. 27, 2014). The Federal Reserve is authorized to tailor the enhanced prudential standards to covered companies, including on an individual basis or by category. 12 U.S.C. § 5365(a)(2)(A); *see also id.* § 5365(b)(3). In response to concerns that Dodd–Frank would require the application of "bank-centric" capital requirements to insurance companies, Congress recently adopted clarifying legislation granting the Federal Reserve discretion to tailor capital rules for insurance companies based on risk factors specific to the insurance companies' activities. *See* Insurance Capital Standards Clarification Act of 2014, Pub. L. No. 113-279, § 2 (2014).

C. The Council's Final Rule and Interpretive Guidance Concerning Nonbank Designations

In April 2012, the Council published a final rule and interpretive guidance describing the manner in which the Council would apply the statutory standards, and the processes and procedures that the Council would follow, in making determinations under Section 113. 77 Fed. Reg. 21,637 (Apr. 11, 2012) (adopting 12 C.F.R. Part 1310). The final rule and interpretive guidance were adopted after three rounds of public comment.

To promote transparency and consistency, the Council adopted a three-stage process of analysis and engagement for nonbank designations under Section 113. In Stage 1, the Council applies six quantitative thresholds to a broad group of nonbank financial companies to identify companies that merit further evaluation. The Stage 1 thresholds were intended, in part, to "help a nonbank financial company predict whether [it] will be subject to additional review by the Council." 77 Fed. Reg. at 21,642. In Stage 2, the Council conducts a preliminary analysis of the potential for the companies identified in Stage 1 to pose a threat to U.S. financial stability. Based on this analysis, the Council identifies companies that merit further review in Stage 3, in which the Council engages with the company and builds on the Stage 2 analysis with additional quantitative and qualitative analyses. Following Stage 3, the Council may make a proposed determination and then a final determination. 12 C.F.R. § 1310, App. A (2012).

The interpretive guidance also defines relevant statutory terms. For example, "material financial distress" exists when a nonbank financial company "is in imminent danger of insolvency or defaulting on its financial obligations." *Id.* In addition, the interpretive guidance clarifies factors that the Council will consider when analyzing nonbanks for potential designation, including sample qualitative and quantitative metrics. *Id.* It also describes primary ways—or "channels"—by which the Council, based on its expertise, including the experience from the 2008–09 financial crisis, has determined that a company's material financial distress could threaten the financial stability of the United States. Two of these channels were key bases for the Council's designation of MetLife: first, the potential risks to counterparties and other market participants that could arise from their exposures to a company if it is unable to fulfill its financial obligations (the "exposure channel"); and second, the potential risk that a company could be forced to sell its assets quickly for cash to meet increasing demands in a distress situation, and that a rapid sale of the company's assets (a "fire sale") could disrupt financial markets (the "asset liquidation channel").

III. THE COUNCIL'S ENGAGEMENT WITH METLIFE

Until 2013, MetLife was a bank holding company subject to consolidated supervision by the Federal Reserve. *See* 12 U.S.C. § 5311(a)(4)(B). In February 2013, following the sale of its bank subsidiary, MetLife deregistered as a bank holding company and thus became eligible for designation under Section 113. MetLife met at least two of the Stage 1 thresholds—with over $800 billion in total consolidated assets (against a threshold of $50 billion) and over $50 billion in total outstanding debt (against a threshold of $20 billion) in 2013. *See* Explanation of the Basis of the FSOC's Final Determination ("final basis"), at 43, 101 (Dec. 18, 2014) (Admin. R. "AR" 400, 485). It thus was subject to preliminary review by the Council in Stage 2. In July 2013, the Council voted unanimously to advance MetLife to Stage 3, informed the company that it was being considered for potential designation, and invited the company to meet with Council staff and submit relevant materials. AR 77–79, 360, 744, 30361–30363.

The Council extensively engaged with MetLife over the 17 months that followed. AR 360; *see also* Public Basis for the FSOC's Final Determination ("public basis"), at 2–3 (Dec. 18, 2014) (AR 744–45). Between September 2013 and September 2014, staff of Council members and their agencies met with MetLife's representatives over a dozen times. *Id.* Council staff accepted every meeting request MetLife made and allowed the company to invite any employee, officer, or external advisor it wished; permitted MetLife's representatives to present on any topic they deemed appropriate; and granted every request from MetLife for extensions of deadlines for the submission of written materials. AR 360. At MetLife's request, in April 2014 senior officials of the Council's members and member agencies met with the company's senior leadership, including its chairman and chief executive officer, for approximately two hours. AR 811, 932. Council staff also had five meetings with officials from the state insurance regulatory authorities with jurisdiction over MetLife's lead insurance subsidiaries, including a two-day on-site meeting. AR 360, 312–26, 744–55. All told, MetLife submitted over 21,000 pages of information to the Council. AR 360, 744–55. The Council evaluated the information submitted by MetLife and discussed the analysis of MetLife at eight Council meetings between July 2013 and December 2014.

On September 4, 2014, the Council made a proposed determination that MetLife satisfied the first determination standard under Section 113, with nine members voting in favor and one voting "present." The same day, the Council sent the company a 270-page notice and explanation of the basis of the proposed determination.

MetLife then requested, and the Council granted, a written and an oral hearing before the Council. AR 360, 745. On November 3, 2014, the Council held an oral hearing, with every voting and nonvoting member present. AR 808. MetLife's senior officers presented for approximately an hour, after which the Council members asked questions. AR 652–55. On November 10, 2014, the company submitted additional written materials to supplement those presented during the oral hearing. AR 655, 745.

On December 18, 2014, the Council voted to designate MetLife under Section 113, with nine members in favor and one opposed.[5] AR 356, 655–61. Of the five nonvoting members, one noted his opposition to the final determination.[6] AR 661–67. The same day, the Council provided the company with the final basis for the Council's decision. AR 356–57. The Council also provided the company with the written views of the one dissenting voting member and the one opposed nonvoting member.[7] AR 655–67. The following day, the Council publicly released

[5] The opposing vote was cast by the Council's independent member, 12 U.S.C. § 5321(b)(1)(J), who also voted "present" with respect to the proposed determination. AR 89–90.

[6] Four nonvoting members did not oppose the final determination. The sole nonvoting member to oppose the final determination was the member "designated by a selection process determined by the State insurance commissioners." 12 U.S.C. § 5321(b)(2)(C).

[7] MetLife incorrectly characterizes the dissenting independent member as the only voting member of the Council with relevant expertise to evaluate the potential effects of MetLife's material financial distress. Compl. ¶ 2. The members of the Council have broad and deep expertise in economic, financial, and market issues across the financial system, including in insurance. As one example, the Federal Reserve is responsible for the consolidated supervision

a 31-page explanation of the basis for the determination, which provides an overview of the key bases for the final determination and omits confidential business information. AR 356–57, 743.

IV. METLIFE'S INSTITUTIONAL AND CAPITAL MARKETS PRODUCTS AND ACTIVITIES

MetLife is one of the largest financial services companies of any kind, and the largest publicly traded U.S. insurance company, with $909 billion in total consolidated assets and $4.4 trillion of in-force gross life insurance policies outstanding, excluding annuities. AR 749. But aside from its dominance in the term life insurance market, MetLife has businesses and engages in financial activities that go far beyond what the company refers to as "the traditional business of life insurance." *See, e.g.,* Compl. ¶¶ 7, 16, 27, 92, 128. Indeed, MetLife leads the U.S. life insurance industry in the scale of several of its institutional and capital markets products and activities. These include its issuance of liabilities such as short-term notes and commercial paper to other financial institutions through funding-agreement-backed securities programs; its securities lending activities; and its guaranteed investment contracts. AR 405–12, 751–52.

The Council found that such products and activities—which involve transactions with many large and interconnected banks, corporations, and other companies, AR 440, 456, 684–85—increase MetLife's leverage, the exposures of counterparties to MetLife, and MetLife's reliance on short-term funding, and may therefore give rise to substantial risks in the event of MetLife's distress. For example, the Council found that MetLife has significant liabilities that are (or could become) short-term in nature. However, in a distress situation, MetLife could have

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of financial holding companies with insurance affiliates. In addition, Dodd–Frank established the Federal Insurance Office ("FIO") within the Treasury Department with authorities including identifying insurance regulatory issues that could contribute to a systemic crisis in the U.S. financial system. 31 U.S.C. § 313(c)(1)(A). The Director of the FIO is responsible for advising the Treasury Secretary on major domestic insurance policy issues and serves in an advisory capacity on the Council. *Id.* § 313(c)(2); 12 U.S.C. § 5321(b)(2)(B).

insufficient cash to cover those short-term liabilities.[8] Therefore, MetLife could experience significant liquidity strains, forcing it to sell less liquid assets quickly to pay off its obligations. AR 361–62, 758. The Council's final basis describes MetLife's potential sources of liquidity strain in detail, but three examples illustrate the potential risks arising from its financial products and activities:

- *Funding-Agreement-Backed Notes and Commercial Paper*: MetLife establishes special purpose vehicles ("SPV") that issue debt, much of which is short-term, to financial institutions in the form of notes and commercial paper backed by a "funding agreement" provided by one of MetLife's insurance companies. These funding agreements are unsecured—*i.e.*, they are not backed by collateral—and MetLife had over $35 billion in outstanding obligations through these arrangements. AR 406–10, 764. MetLife buys riskier assets with the proceeds.

  In good times, MetLife can pay off its debt as it comes due by indefinitely issuing subsequent cycles of notes and commercial paper. But the Council found that MetLife's ability to access such funding to repay outstanding short-term debt could be impaired if the company were to suffer material financial distress. This means that, in a distress situation, MetLife could be forced to liquidate assets at fire-sale prices to come up with cash to pay off billions in debt as it comes due. MetLife's distress could also lead to significant losses for the financial firms that invest in the funding-agreement backed obligations. AR 409–10.

- *Securities Lending Activities*: The Council evaluated MetLife's $30 billion securities lending program. In essence, MetLife borrows cash from a counterparty using lower-risk securities as collateral, then uses the borrowed cash to purchase riskier investments. AR 410, 764. The Council found that, in a distress situation, MetLife's securities-lending counterparties could demand the return of their cash, forcing MetLife to sell riskier assets at fire-sale prices. AR 500. MetLife, in fact, experienced significant demands for cash by its securities lending counterparties during the 2008–09 financial crisis. AR 439–40.

- *Guaranteed Investment Contracts ("GICs")*: MetLife offers several types of GICs, which generally are contracts in which an insurance company receives money from clients that the insurer later repays with a guaranteed amount of interest. The client generally has the right to withdraw those investments at any time. MetLife had outstanding $48 billion of GICs as of June 2013. AR 753–54 The Council found that, in a distress situation at MetLife, the holders could withdraw their investments, forcing the

[8] In addition to MetLife's institutional and capital markets products and activities, the Council identified a second source of potential liquidity strain: MetLife's retail insurance and annuity products that entitle policyholders to obtain cash from MetLife. AR 500.

> company to sell assets to meet this sudden, increased demand for liquidity. Further, MetLife could be unable to pay its obligations on the guaranteed-return contracts, exposing the investors to losses. AR 754.

V. THE COUNCIL'S DETERMINATION THAT METLIFE'S MATERIAL FINANCIAL DISTRESS COULD POSE A THREAT TO U.S. FINANCIAL STABILITY

Analyzing MetLife's businesses, investments, and activities under Section 113's first determination standard, the Council found that material financial distress at MetLife could pose a threat to U.S. financial stability, primarily on the basis of the conclusions that: (1) MetLife's distress could lead to significant losses for those with exposures to MetLife; (2) the company could be forced to liquidate assets in a distress situation, leading to the disruption of financial markets; (3) existing regulation does not fully address the risks that MetLife's distress could pose to the financial stability of the United States; and (4) the complexity of MetLife and difficulties of "resolving" the company—that is, winding it down in a rapid and orderly way in the event of its material financial distress—exacerbate the potential for MetLife's material financial distress to pose a threat to U.S. financial stability. Each of these conclusions, explained at length in the final basis, is summarized here.

Exposures. The Council determined that MetLife's inability to pay its obligations to investors and counterparties—which include large, significantly interconnected financial companies, among others—could expose them to significant losses in the event of MetLife's distress. But beyond such exposures of other firms, some 100 million insurance policyholders and contract holders could face losses in the event of MetLife's distress. AR 432–98, 759–63. In addition to the exposures described above, the Council found that institutional exposures to MetLife include $19 billion of long-term and junior subordinated debt, $5 billion of derivatives liabilities, $16 billion under unsecured credit and committed facilities, and $61 billion of outstanding equity securities. AR 760. Further, MetLife's distress could lead to significant market uncertainty, and thus, further disruptions across the financial system: Market participants, unable to know how or to what extent their own counterparties are exposed to MetLife, could withdraw from potentially exposed firms and markets in an effort to mitigate their risks of loss. Preventing such a contagion effect, which can destabilize markets, was an animating force behind the government's decision to step in to save AIG from failure. AR 494.[9]

Asset Liquidation. The Council also found that, if distressed, MetLife could face sudden liquidity strains forcing it to quickly sell assets for cash to satisfy its obligations. The Council determined that a fire sale of MetLife's assets could destabilize markets by causing the market values of those assets to plummet. AR 499–583, 378–82. Those seeking to mitigate the resulting losses in the values of their own assets could, in turn, engage in further asset sales. AR 499.[10]

Existing Regulation. The Council found that although state regulation of MetLife's U.S. insurance subsidiaries may mitigate certain risks, it does not address others. No single regulator has supervisory authority over MetLife and all of its subsidiaries, and no state regulator has authority over MetLife's international activities. Further, MetLife engages in captive reinsurance transactions, which are arrangements that allow MetLife to hold lower-quality

[9] *See* Cong. Oversight Panel, *June Oversight Report: The AIG Rescue, Its Impact on Markets, and the Government's Exit Strategy*, at 108 n.510 (June 10, 2010).

[10] *See, e.g.*, Andrei Shleifer & Robert Vishny, *Fire Sales in Finance and Macroeconomics*, 25 J. Econ. Persp. 30 (Winter 2011); *see generally* Brian Begalle et al., *The Risk of Fire Sales in the Tri-Party Repo Market*, FRBNY Staff Reports, Staff Report No. 616 (2013); Ricardo J. Caballero & Alp Simsek, *Fire Sales in a Model of Complexity*, Mass. Inst. of Tech. Dep't of Econ. Working P. 09–28 (Apr. 2011).

capital and lower reserves than would otherwise be required under state law, increasing the potential that the company will need to sell assets to satisfy sudden demands. AR 379.[11]

Complexity and Resolvability. The Council also found that the potential for MetLife's material financial distress to threaten U.S. financial stability is aggravated by the company's complexity, the opacity of its operations, and the difficulty of winding it down through bankruptcy or other insolvency proceedings. MetLife is a complex organization, with 359 subsidiaries in 50 countries. AR 608–28, 749, 771–72. Its subsidiaries are highly interconnected through various funding or shared service arrangements and guarantees. Far from being subject to consolidated supervision or regulation, MetLife's operations are subject to separate regulatory regimes administered by scores of state, federal, or foreign regulators. Its resolution (*i.e.*, winding down) could thus prolong uncertainty, requiring complex coordination among numerous regulators, receivers, or courts that would have to disentangle a vast web of intercompany agreements. AR 608–16. Indeed, there is no precedent for the resolution of an insurance organization of the size, scope, and complexity of MetLife. AR 771–72, 496, 608–28.

MetLife, in fact, accessed several emergency federal lifelines during the 2008–09 financial crisis. For example, in March 2009, as a bank holding company, MetLife raised $397 million through the Temporary Liquidity Guarantee Program run by the FDIC, which enabled the organization to borrow funds at a lower rate than it otherwise would have been able to

[11] The potential risks from captive reinsurance are further described in the final basis. AR 418–19, 599–601, 754–55, 769.

obtain.[12] AR 429, 594. In addition, one of MetLife's nonbank subsidiaries borrowed $1.6 billion through the Federal Reserve's Commercial Paper Funding Facility. AR 429.

Accordingly, based on the analysis and reasons set forth in the final basis, the Council determined that material financial distress at MetLife could pose a threat to U.S. financial stability. *See* 12 U.S.C. § 5323(a)(1).

VI. THIS ACTION

MetLife's Complaint raises ten claims. Counts One through Seven assert that the designation was arbitrary and capricious under Dodd–Frank and the Administrative Procedure Act ("APA") based on a variety of theories. Counts Eight and Nine assert violations of the due process clause and the separation of powers doctrine. Count Ten asserts a stand-alone claim for injunctive relief.

STANDARD OF REVIEW

Under the Dodd–Frank Act, if the Council determines that a U.S. nonbank financial company shall be supervised by the Federal Reserve, the company may bring suit within 30 days in district court "for an order requiring that the final determination be rescinded." 12 U.S.C. § 5323(h). Upon review, the district court "shall" either "dismiss such action or direct the final determination to be rescinded." *Id.* And the scope of its review "shall be limited to whether the final determination . . . was arbitrary and capricious." *Id.*

"The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Under this "highly deferential"

[12] In addition, its subsidiary bank (which MetLife sold before it deregistered as a bank holding company in early 2013) accessed the Federal Reserve Term Auction Facility 19 times for a total of $17.6 billion in 28-day loans and $1.3 billion in 84-day loans. AR 429.

standard, *AT&T Corp. v. FCC*, 220 F.3d 607, 616 (D.C. Cir. 2000), a court "will not disturb the decision of an agency that has examine[d] the relevant data and articulate[d] a satisfactory explanation for its action," *MD Pharm. Inc. v. DEA*, 133 F.3d 8, 16 (D.C. Cir. 1998) (quotation marks omitted). The court considers only '"whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *State Farm*, 463 U.S. at 43 (citation omitted). It must affirm "if a rational basis for the agency's decision is presented, even though [the court] might otherwise disagree." *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981) (internal citation omitted).

Arbitrary and capricious review is particularly deferential where, as here, the agency's decision involves highly technical analysis of complex financial information within its expertise, as well predictive judgments about financial markets. *See 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'") (citation 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'") (citation omitted). In such cases, a court "must look at the [agency's] decision not as the chemist, biologist, or statistician that [it is] qualified neither by training nor experience to be," *Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Cir. 1976), for "we cannot decide . . . whether technical evidence beyond our ken supports the proposition it is asserted to support," *Simpson v. Young*, 854 F.2d 1429, 1434 (D.C. Cir. 1988); *Serono Labs, Inc. v. Shalala*, 158 F.3d 1313, 1320 (D.C. Cir. 1998). Further, "[w]hen, as here, an agency is making 'predictive judgments about the likely economic effects of a rule,' [courts] are particularly loath to second-guess its analysis." *Newspaper Ass'n of Am. v. Postal Reg. Comm'n*, 734 F.3d 1208, 1216 (D.C. Cir. 2013); *see also Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009) ("The 'arbitrary and capricious' standard is particularly deferential in matters implicating predictive judgments.").

ARGUMENT

I. THE COUNCIL'S PROPERLY DETERMINED THAT METLIFE'S MATERIAL FINANCIAL DISTRESS COULD POSE A THREAT TO U.S. FINANCIAL STABILITY.

Dodd–Frank authorizes the Council to designate a nonbank financial company if it determines that the company's material financial distress, were it to occur, "could pose a threat to the financial stability of the United States." 12 U.S.C. § 5323(a)(1). In making its final determination as to MetLife, the Council extensively considered each of the statutory considerations in Section 113, and provided a reasoned and thorough explanation in the 341-page nonpublic basis, as well as in the public basis. Far from being "vague and generalized," as MetLife contends, Compl. ¶ 102, the Council's analysis extensively considered company-specific facts and circumstances, including risk-related factors particular to MetLife. *See, e.g.*, AR 400–636, 704–726. In considering each of the statutory factors,[13] the Council engaged in

[13] For example, the Council's final basis addresses leverage (the first statutory consideration) at pages AR 549–55; off-balance-sheet exposures (the second consideration) at pages AR 405–24, 456, and 476–83; relationships with other large financial institutions (the third consideration) at pages AR 442–45 and 454–89; importance as a source of credit or liquidity (the fourth consideration) at pages AR 589–93; importance for low-income, minority, or underserved communities (the fifth consideration) at page AR 593; assets under management (the sixth consideration) at page AR 517; activities (the seventh consideration) at pages AR 400–31; existing regulatory scrutiny (the eighth consideration) at pages AR 594–608; financial assets (the ninth consideration) at pages AR 541–49; and liabilities (the tenth consideration) at pages AR 405–18, 442–89, 505–16, 549–55. In addition, the final basis also includes a separate "high-level overview of the Council's consideration of each of the statutory factors," which provides a summary of the Council's key findings, with respect to each of the statutory considerations. Citing this "high-level overview," MetLife's Complaint misleadingly asserts that "FSOC devoted fewer than 10 pages of discussion to the statutory factors." Compl. ¶ 105. However, as

extensive quantitative and qualitative analysis of MetLife's business information, and relied on historical examples and financial models to conclude that material financial distress at MetLife could threaten U.S. financial stability.

The Supreme Court has clearly defined the respective roles of agencies and courts in reviewing determinations such as those at issue here: the agency is charged with assessing relevant factual and policy considerations and with exercising the "power to weigh the competing interests and arrive at a balance" consistent with its statutory objectives. *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 293 (1974) (internal quotations omitted). It is the agency's job "not only to appraise the facts and draw inferences from them but also to bring to bear upon the problem an expert judgment." *United States v. Detroit & Cleveland Nav. Co.*, 326 U.S. 236, 241 (1945). By contrast, the court's function is to determine whether the agency's decision is rational and based on consideration of the relevant factors. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). The "court's responsibility is not to supplant the [agency's] balance of these interests with one more nearly to its liking, but instead to assure itself that the [agency] has given reasoned consideration to each of the pertinent factors." *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968).

Based on its extensive analysis, the Council identified two primary ways this threat could occur: first, MetLife's distress could be transmitted through exposures of counterparties and other market participants to MetLife; and second, MetLife's potential liquidity strains—*i.e.*, its need for cash to pay its obligations as they come due—could force the company to liquidate

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the introduction to that overview states, "[e]xtensive analyses of each of the statutory considerations are provided" in pages AR 400–636 of the basis.

assets in a fire sale, which could destabilize financial markets. Because MetLife is a significant, active participant in the U.S. financial system, and because it is interconnected to other financial companies through both its products and its capital markets activities, among other reasons addressed in the final basis, the Council concluded that material financial distress at MetLife could pose a threat to U.S. financial stability.

MetLife's entire complaint appears to rest generally on its belief that it is a "traditional life insurance company," Compl. ¶¶ 7, 13, and that its "traditional insurance activities" are not of "systemic importance," *see, e.g.*, *id*. ¶¶ 8, 11–12. MetLife states that in the "traditional business of life insurance," life insurers "write long-term policies and invest premium dollars in long-term assets." *Id.* ¶ 8. However, the Council's analysis focused on risks arising from MetLife's business, products, and activities falling outside what the company calls "traditional insurance": MetLife engages in a wide range of activities and capital market offerings that increase its leverage, contribute to the exposures of counterparties to the company, and increase its reliance on short-term funding (which can contribute to a liquidity crisis and fire sales of assets). AR 432–584. In addition, even as to MetLife's "traditional" insurance business, the Council found that a majority of MetLife's U.S. general account insurance liabilities allow policyholders to withdraw their cash from the company, increasing the company's risk of facing sudden liquidity demands. AR 518–19

The final basis details the Council's careful consideration of the relevant factors, and provides more than ample support for the Council's expert determinations—in light of its diverse knowledge of financial markets and deep technical experience—as to whether (and how) MetLife's material financial distress could affect the broader economy. Given its detailed consideration of the statutory factors and its predictive conclusions under the first determination standard, the Council appropriately designated MetLife to be supervised by the Federal Reserve and subject to enhanced prudential standards *before* the company's material financial distress poses an imminent threat to U.S. financial stability. *See, e.g.*, 12 U.S.C. § 5322(a)(1)(A)–(C); *supra* Background Parts IV–V at 13–18. Though MetLife may disagree, it cannot show that the Council's final determination was "so implausible that it could not be ascribed to a difference in view." *State Farm*, 463 U.S. at 43.

The Council "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id.* (citation omitted). Its designation of MetLife was proper.

II. THE COUNCIL PROPERLY EXERCISED ITS DISCRETION IN WEIGHING THE STATUTORY FACTORS AND EVALUATING WHETHER METLIFE'S MATERIAL FINANCIAL DISTRESS COULD POSE A THREAT TO U.S. FINANCIAL STABILITY.

In Count Five, MetLife principally claims that the Council gave too much weight to two of the factors listed among Section 113(a)(2)'s required considerations: MetLife's size and its interconnectedness. *See, e.g.*, Compl. ¶ 101 (alleging that the Council "focused overwhelmingly on MetLife's size and purported 'interconnectedness' with other financial institutions, and on the transmission channels described in the Council's Final Rule and Interpretive Guidance"); *id.* ¶ 103. This claim fails because the Council considered each of the statutory considerations—including MetLife's considerable size and interconnectedness—and appropriately exercised its discretion in weighing the different considerations. *See supra* Part I at 20 n.13.

The Supreme Court has held that where statutorily mandated "consideration[s]" are not "mechanical or self-defining standards," they indicate Congress's recognition that they involve "wide areas of judgment and therefore of discretion." *Sec'y of Agriculture v. Cent. Roig Refining Co.*, 338 U.S. 604, 611–12 (1950). Where, as here, Congress "did not assign the specific weight the [agency] should accord each of these factors, [the agency] is free to exercise [its] discretion in this area." *New York v. Reilly*, 969 F.2d 1147, 1150 (D.C. Cir. 1992); *Brady v. FERC*, 416 F.3d 1, 6 (D.C. Cir. 2005); *see Cent. Roig Refining Co.*, 338 U.S. at 612 ("Congress did not think it was feasible to bind the Secretary as to the part his 'consideration' of these three factors should play in his final judgment—what weight each should be given, or whether in a particular situation all three factors must play a quantitative share in his computation.").

In contrast to the bright-line $50 billion asset threshold that Congress established in Section 165 for identifying bank holding companies that will be subject to enhanced prudential standards, 12 U.S.C. § 5365, Section 113's framework for nonbank designation relies upon the Council's expertise in weighing a range of qualitative and quantitative factors to evaluate risks to the broader financial system. It requires only that the Council "consider" the list of factors in Section 113(a)(2), and provides the Council with the broad discretion to take into account "any other risk-related factors that the Council deems appropriate." *Id.* § 5323(a)(2)(k). While the size of the company is only one of the factors listed in Section 113(a)(2), it is an important one, and it also relates to several of the other statutory considerations.[14] However, no single factor was dispositive in the Council's analysis of MetLife. The Council properly considered MetLife's size and interconnectedness along with the other statutory considerations.[15]

[14] As the Council noted in its final basis, "A number of the factors that the Council is required to consider under Section 113 of the DFA relate to a company's size, including the extent and nature of the company's off–balance sheet exposures; the extent and nature of the company's transactions and relationships with other significant nonbank financial companies and with significant bank holding companies; the importance of the company as a source of credit; the scope, size, and scale of the activities of the company; the amount and nature of the company's financial assets; and the amount and types of the company's liabilities." AR 393 n.132.

[15] Count Five also takes issue with the role of contagion in the Council's analysis. This assertion is addressed in Part III below.

III. METLIFE'S SCATTERED OBJECTIONS FAIL TO CARRY ITS HEAVY BURDEN TO DEMONSTRATE THAT THE FINAL DETERMINATION WAS ARBITRARY AND CAPRICIOUS.

In Count Six, MetLife raises numerous objections to the analytical methods and predictive expert judgments in the Council's 341-page designation. Compl. ¶¶ 108–29. Each of these objections is not only baseless, but has already been thoroughly considered and rejected by the Council. While MetLife contends that the Council "failed to satisfy the statutory standards for designation," *id.* ¶ 108, the company in fact invites the Court to substitute its judgment for that of the Council on numerous technical, predictive judgments falling squarely within the Council's broad and diverse financial and economic expertise. There is no basis for the Court to do so.

A. MetLife Inappropriately Requests that the Court Substitute Its Judgment for that of the Council on Numerous Predictive Conclusions Within the Council's Deep Expertise.

It is well established that the "'arbitrary and capricious' standard is particularly deferential in matters implicating predictive judgments." *Rural Cellular Ass'n*, 588 F.3d at 1105. The Supreme Court's decision in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978), is instructive. In that case, the plaintiffs challenged an FCC policy that prospectively barred the common ownership of newspapers and broadcast stations, but generally "grandfathered" existing ownership combinations, requiring divestiture in only limited circumstances. *Id*. at 779. The D.C. Circuit invalidated the limited divestiture policy as arbitrary, finding that the rulemaking record did not adequately "disclose the extent to which [fuller] divestiture would actually threaten" the harms that were of concern to the agency. *Id*. at 813. The Supreme Court reversed, explaining that any factual determinations involved in the agency's determination relating to the divestiture policy "were primarily of a judgmental or predictive nature." *Id.* Because "'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency,'" "complete factual support" for the agency's decision was "not possible or required." *Id.* at 813–14 (citation omitted).

Section 113(a)(1), by its very terms, requires that the Council make a determination that is "primarily of a judgmental or predictive nature"—whether a company's material financial distress *could* pose a threat to U.S. financial stability.[16] There is no quantitative, bright-line test for such a determination. The Council's final determination, and its many predictive factual conclusions underpinning that determination, depended on the Council's evaluations of voluminous financial data and company-specific risks. In performing its duties under Section 113, the Council applied its unique system-wide perspective, as well as the aggregate financial, economic, and market expertise of its members. Substantial deference is appropriate where, as here, Congress has granted the agency discretion in balancing statutory considerations involving highly technical assessments to make a predictive, economic judgment within the agency's unique expertise. *See Rural Cellular Ass'n*, 588 F.3d at 1105; *Agape Church, Inc. v. FCC*, 738 F.3d 397, 408 (D.C. Cir. 2013) ("We must accord 'substantial deference' to the FCC's predictive judgments," and "[w]e cannot 'substitute our judgment for the agency's, especially when, as here, the decision under review requires expert policy judgment of a technical, complex, and dynamic subject.'") (citations omitted).

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[16] MetLife frames the question as whether MetLife's material financial distress "would pose a threat to the financial stability of the United States," Compl. ¶ 8, and asserts that the threat to financial stability must be "quantified," *id.* ¶¶ 72, 109, 113. Under Section 113, however, the proper question is whether material financial distress "could" pose a threat to U.S. financial stability. In its final determination, the Council properly rejected an interpretation of that standard that would require a finding of a "likelihood" or "probability" of a threat to U.S. financial stability, reasoning that it would "set an unduly high and falsely precise threshold and would thereby impede the Council's ability appropriately to address potential threats to U.S. financial stability." AR 384.

B. The Council Considered and Properly Rejected MetLife's Objections.

MetLife's scattered objections to the Council's analysis and conclusions lack merit, and, as explained below, the Council reasonably rejected them.

Oliver Wyman Study. MetLife contends that the Council drew flawed conclusions regarding the asset liquidation model developed by MetLife's own consulting firm, Oliver Wyman. *See, e.g.*, Compl. ¶ 116. The Oliver Wyman study, according to MetLife, shows that even under the most unrealistic and adverse assumptions of financial distress at MetLife, the company would still be able to liquidate its assets to cover its liabilities without posing a threat to U.S. financial stability. *See, e.g., id.* ¶¶ 114–16. But MetLife neglects to mention that the Council, after carefully considering the Oliver Wyman study, concluded that the study in fact supported the Council's conclusion that price impacts from the forced liquidation of MetLife's assets could severely disrupt key financial markets. AR 375–76. Further, the Council described at length its judgment that the study used assumptions regarding the timing of MetLife's need for liquidity, the types of actions of counterparties that could accelerate MetLife's need for liquidity, and the order in which MetLife would sell its assets, which substantially underestimated key risks and conflicted with experiences in the recent financial crisis.[17]

The battle of the experts that MetLife is attempting to provoke has no place here. *See Marsh*, 490 U.S. at 378 ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original

[17] The Complaint incorrectly states that the Council did not "disclose to MetLife the calculations that agency staff purportedly performed." Compl. ¶ 115. But the final basis describes each change that the Council made to the model's assumptions. AR 566–70. MetLife also criticizes the Council's use of a Monte Carlo simulation, a standard technique for financial analysis. The simulation, which the Council described in the final basis, indicated much greater negative market impacts than under MetLife's assumptions. *Id.*

matter, a court might find contrary views more persuasive."); *Mississippi v. EPA*, 744 F.3d 1334, 1348 (D.C. Cir. 2013) ("[I]t is not our job to referee battles among experts; ours is only to evaluate the rationality of [the agency's decision . . . .").

Existing State Regulatory Scrutiny. MetLife asserts that the Council ignored the "efficacy" of existing state regulatory scrutiny. Compl. ¶ 116. However, the Council carefully considered the degree to which MetLife is already regulated and reasonably determined that there are numerous risks not fully addressed by MetLife's existing regulation.[18] For example, state insurance regulators do not have consolidated supervision over MetLife and have no authority to regulate MetLife's international activities.[19] AR 599. MetLife, in fact, has conceded these points. *See* AR 1183, 1200 (statement of Ricardo Anzaldua, General Counsel, MetLife) (Nov. 3, 2014) (stating that state regulators do not "look at systemic risks across entire economies" and that the state insurance regulatory system "is not designed to serve the purposes that are set out in Dodd–Frank").

Policyholder Responses. MetLife alleges that the Council made unreasonable assumptions regarding policyholder behavior, including that the Council "posit[ed] a virtually instantaneous withdrawal by retail consumers from their insurance policies." Compl. ¶ 113. But the final basis makes clear that the Council's determination "does not assume or rely on a scenario in which all of the liabilities that could potentially be surrendered would in fact be surrendered within seven days." AR 521. On the contrary, the Council found that (1) a

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[18] For example, section 5 of the final basis is devoted to addressing existing regulatory scrutiny, and it addresses this factor at pages AR 377–80, 382, 394, 402, 403, 418–24, 430, 450, 469, 480, 446–54, 483, 501–02, 515, 538, 576–78, 594–610, 620–21, and 660–63, among others.

[19] The Council also extensively considered the extent to which the various state guaranty and security fund associations could mitigate the risk of policyholder losses, as well as these entities' limitations. AR 446–54.

significant portion of MetLife's retail insurance policies entitle policyholders to obtain cash from MetLife within a short period, often with little or no penalty; (2) many of MetLife's insurance policyholders can demand loans from MetLife; and (3) although policyholders have a number of contractual and other disincentives to early withdrawal, these disincentives could serve as less of a deterrent if MetLife's ability to meet its obligations were in doubt.[20] AR 501. Accordingly, it concluded that MetLife could be forced to sell assets to generate cash to satisfy policyholder demands. AR 517–24.

Imposition of Stay by State Regulators. MetLife alleges that the Council wrongly "assume[d] that state regulators would not impose a stay" on policyholder withdrawals from MetLife. Compl. ¶ 116. But, in fact, the Council found that such a stay, if imposed with respect to MetLife, could undermine confidence in the broader life insurance industry. Further, the Council noted that MetLife can defer payouts for up to six months for many products, but that doing so could cause uncertainty to spread to the customers of other insurance companies offering similar products. The Council concluded that such a crisis of confidence could spread to other financial market participants, particularly other insurers, risking increased withdrawals and, thus, further asset sales by MetLife. AR 363, 447–48, 450, 495, 521–22, 765–66.

Contagion. MetLife's contention that the Council acted arbitrarily and capriciously because it considered the potential for contagion also fails. *See* Compl. ¶ 106. The Council's consideration of contagion was consistent with the statutory factors in Section 113, as well as with Dodd–Frank's purpose of requiring the supervision of a company before its material

[20] The Complaint alleges that the Council inconsistently described the potential reactions of policyholders to MetLife's distress. Compl. ¶ 113. However, the final basis addresses two different situations, one in which regulators impose a stay, and one in which no stay is imposed. The Council identified different risks arising from these different fact patterns. AR 520–23.

financial distress can trigger a cascade of damaging effects for the U.S. economy. As the Council noted, "the avoidance of contagion effects was an important concern before the intervention that helped to prevent the potentially disorderly failure of AIG in the fall of 2008." AR 494. In assessing whether MetLife's material financial distress could pose a threat to U.S. financial stability, the Council evaluated company-specific information under the statutory considerations, and it reasonably concluded that MetLife's distress is more likely to cause contagion than the previous bankruptcies of insurers. For example, the Council explained that MetLife's assets exceed $900 billion, while the largest previous insurance bankruptcy involved a company with assets of less than $15 billion. *See* AR 570–71, 749. In addition, the Council found that the failure of a company that is highly interconnected with the financial system, with significant counterparty exposures, and with extensive capital markets activities, is more prone to causing contagion that could threaten U.S. financial stability. AR 498. After evaluating the company's submissions, academic papers, lessons of the recent financial crisis, and historical examples of insurance company failures, the Council reached the reasoned conclusion that material financial distress at MetLife—the largest U.S. insurance company, with 10% of the net assets of the entire U.S. life insurance industry, and a life insurance market share of 16.6%—could lead to contagion, which is one of numerous bases for the Council's designation of MetLife. AR 492–98, 763, 767.

MetLife's numerous objections to the Council's analysis succeed only in inviting the Court to substitute its judgment for that of the Council on matters within the Council's deep, financial-system-wide expertise, including the potential risks posed by nonbanks. The allegations in no way show that the Council's designation was not rational. *See Ctr. for Auto Safety v. Peck*, 751 F.2d 1336, 1370 (D.C. Cir. 1985) (providing that arbitrariness requires an absence of overall rational support, and a court will not reverse for analytical imperfections, uncertainties, or even mistakes in the pieces of the picture that challengers bring to the court). The Council's designation readily satisfies the standards of Section 113.

IV. THE COUNCIL WAS NOT REQUIRED TO CONDUCT A "THRESHOLD VULNERABILITY ANALYSIS" BEFORE DESIGNATING METLIFE UNDER SECTION 113.

In Count Four, MetLife contends that the Council was required to conduct a "threshold inquiry" to assess MetLife's actual "vulnerability to material financial distress" before determining that such distress could pose a threat to U.S. financial stability. Compl. ¶¶ 95–99. But nothing in the text of Dodd–Frank requires such a threshold inquiry. On the contrary, the text, statutory context, and purpose of Section 113 demonstrate that the Council properly assumed the existence of material financial distress at MetLife when evaluating it under the first determination standard.

The text of the statute shows that the Council is to assume material financial distress. Under the first determination standard, designation is appropriate "if the Council determines that *material financial distress* at the U.S. nonbank financial company . . . could pose a threat to the financial stability of the United States." 12 U.S.C. § 5323(a)(1) (emphasis added). Alternatively, under the second determination standard, designation is appropriate "if the Council determines that . . . *the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities* of the . . . company, could pose a threat to the financial stability of the United States." *Id.* (emphasis added). Thus, as the Council explained, the question under the first determination standard is whether "material financial distress at the company, if it were to occur, could pose a threat to U.S. financial stability." AR 383, 744. Accordingly, under that standard, the Council assumes that a company will experience material financial distress, and then evaluates what consequences could follow for U.S. financial stability. Under the second determination standard, by contrast, the Council focuses on the potential consequences flowing from risks related to the ongoing activities of the company, even in the absence of an assumption of material financial distress. In this case, consistent with the first determination standard, the Council made a final determination that material financial distress at MetLife, if it were to occur, could pose a threat to U.S. financial stability. AR 383–96, 746, 757–58.

The statutory context firmly supports this reading. For example, Dodd–Frank Section 112(a)(2), which sets forth the Council's duties, provides that the Council "shall . . . require supervision by the [Federal Reserve] for nonbank financial companies that may pose risks to the financial stability of the United States *in the event of their material financial distress or failure*." 12 U.S.C. § 5322(a)(2)(H) (emphasis added). The italicized phrase confirms that Congress was concerned with risks to the economy "in the event" that a company were to experience material financial distress, and intended that companies posing such risks be supervised by the Federal Reserve without regard to whether they are likely to experience distress.

MetLife does not contend that a requirement to conduct a "threshold vulnerability analysis" can be found in the statutory text. Rather, it argues that such a requirement is implied by the separate "could pose a threat" inquiry: "if distress at a company is highly unlikely," MetLife reasons, "it is likewise unlikely that any such distress 'could' emerge as a threat to the U.S. financial system." Compl. ¶ 96. This logic is flawed. The first determination standard, by its terms, does not require the Council first to conduct an independent analysis of whether a company "could" experience material financial distress, and only then determine whether such distress "could" threaten U.S. financial stability. AR 384.

Moreover, MetLife's reading runs counter to legislative intent. Contrary to MetLife's contention that Section 113 contains a "high threshold for designation," Compl. ¶ 31, the whole point of the Council's authority under Section 113 is to require the supervision of companies *before* their material financial distress emerges as a threat to U.S. financial stability. Accordingly, Congress imbued the Council with the prophylactic authority to address risks of low-probability but high-impact events—events that are difficult to predict but could have catastrophic consequences for national stability if they occur.[21] Congress undoubtedly recognized that no company is immune from distress or failure. Even MetLife has acknowledged this reality. AR 386, 4066 ("[W]e are not saying that an insurance company, including MetLife, in theory, could not fail."). And as history has shown, it was the unpredicted collapses of large, interconnected financial companies that precipitated the nationwide financial crisis and motivated Congress to enact Dodd–Frank.

By preventing the Council from designating a company before the company's vulnerability to material financial distress becomes readily apparent, MetLife's proposed "threshold vulnerability analysis" would defeat Congress's purpose of protecting the U.S. economy from threats posed by companies' unanticipated material financial distress or failure. Indeed, the government decided to offer a rescue loan to AIG when it became clear that its failure was imminent. The Council concluded that material financial distress at MetLife could threaten market stability. The Council thus reasonably rejected MetLife's proposed interpretation of the designation standard, finding that it would "set an unduly high and falsely

[21] *Regulatory Restructuring: Hearing Before the H. Comm. on Financial Services*, 111th Cong. (2009) (statement of Chairman Bernanke) ("Judging whether a financial firm is systemically important is thus not a straightforward task, especially because a determination must be based on an assessment of whether the firm's failure would likely have systemic effects during a future stress event, the precise parameters of which cannot be fully known."), *available at* http://www.federalreserve.gov/newsevents/testimony/bernanke20090724a.htm.

precise threshold and would thereby impede the Council's ability appropriately to address potential threats to U.S. financial stability." AR 384.

MetLife purports to find support for its proposed vulnerability analysis in Section 113(a)(2), in which "several of the statutory considerations" listed "concern a company's vulnerability to financial distress, including the requirement to consider a company's leverage and the degree to which it is already regulated." Compl. ¶ 96. MetLife further contends that its reading is supported by the Council's interpretive guidance, which states that certain factors "seek to assess the vulnerability of a nonbank financial company to financial distress." 77 Fed. Reg. at 21,641. But the very risks that can make a company vulnerable to distress are the ones that can cause its distress to pose a threat to the broader economy. *See, e.g.*, AR 385 (noting that "an assessment of the vulnerabilities at MetLife . . . is relevant to an assessment of whether and how material financial distress at MetLife could be transmitted to other financial firms and markets and thereby pose a threat to U.S. financial stability"). As the statutory context and the Council's interpretive guidance make clear, the Council will consider the factors relating to a company's vulnerability to evaluate whether, and how, the company's vulnerabilities, in a distress situation, could impact the broader financial system—not to assess whether distress could occur. *See* 77 Fed. Reg. at 21,657, 21,659–60.

Finding no support in Section 113(a)(1)'s text, context, or purpose, MetLife argues that the Court should reject the Council's interpretation of Section 113(a)(1) "[i]n order to avoid the conclusion . . . that every large financial institution must be designated as systemic." Compl. ¶ 96. This assertion appears to rest on the canon against absurd results, but MetLife cannot satisfy the "high threshold" for applying that canon here. *United States v. Cook*, 594 F.3d 883, 891 (D.C. Cir. 2010). MetLife's premise, in any event, is unfounded. The Council has noted that fewer than 50 nonbank financial companies met the Stage 1 thresholds, which the Council uses to identify firms for review for *potential* designation. *See* 77 Fed. Reg. at 21,651. Moreover, in the five years since it was first authorized to make such designations, the Council has made four designations, hardly suggesting the absurdity MetLife predicts. There is therefore no basis for MetLife's worry that the Council will (or could) designate for supervision "every large financial institution." Compl. ¶ 96.

At a minimum, the Council's interpretation of the statute is a permissible one that merits *Chevron* deference. *See Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844 (1984); *City of Arlington v. FCC*, 133 S. Ct. 1863, 1873 n.4 (2013) (under *Chevron*, "[s]tatutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency"). Even if the statute could plausibly be given the meaning that MetLife ascribes to it, that clearly is not the only reasonable reading, as shown above. Indeed, even where a statute contains "internal tension" because different provisions point "in divergent ways," "*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); *accord id*. at 2219–20 & n.3 (Sotomayor, J., dissenting). The Council thus acted appropriately in designating MetLife.

V. THE COUNCIL APPROPRIATELY DECLINED TO CONDUCT A COST–BENEFIT ANALYSIS WEIGHING THE "ECONOMIC EFFECTS" OF DESIGNATION OF METLIFE.

MetLife's claim in Count Seven that the Council was required to perform a cost–benefit analysis accounting for the "economic effects" of designation on "MetLife, its shareholders, and its policyholders" is meritless. Compl. ¶ 133. The company suggests that the Council failed to consider that designation will force it to bear "higher costs" under Federal Reserve supervision that are unjustified by any "reduce[d] . . . systemic risk." *Id*. ¶ 131. But it is well-established that an agency need not conduct a cost–benefit analysis in the absence of an express statutory command, and MetLife concedes that Dodd–Frank "does not expressly mandate a cost–benefit analysis." *Id.* ¶ 133.

"When Congress has intended that an agency engage in cost–benefit analysis, it has clearly indicated such intent on the face of the statute." *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510 (1981); *see also City of Portland v. EPA*, 507 F.3d 706, 712 (D.C. Cir. 2007) (when "Congress wanted EPA to undertake cost–benefit analysis, it said so expressly"); *Inv. Co. Inst. v. CFTC*, 720 F.3d 370, 377–78 (D.C. Cir. 2013). Indeed, even where Congress wants an agency to engage in less formal economic analysis—or merely to consider the costs of regulation on a regulated party—it has made its intent clear in the statutory text. *See, e.g.*, *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1039 (D.C. Cir. 2012) ("'[W]hen Congress . . . authorize[d] regulations addressing lead-paint hazards, it instructed EPA to "tak[e] into account reliability, effectiveness, and safety"—but did not mention cost.") (citation omitted).

Here, as MetLife admits, Congress did "not expressly mandate a cost–benefit analysis" in Dodd–Frank Section 113. Compl. ¶ 133. Yet Congress clearly knew how to require the consideration of costs and benefits, and it did so explicitly in many other provisions of Dodd–Frank.[22] Congress has been similarly explicit in other financial regulatory statutes.[23] Its silence on this score in Section 113 is powerful evidence that the Council is not required to consider the

[22] *See, e.g.*, 12 U.S.C. § 5493(d)(7)(A)(i)(IV) (requiring "a cost–benefit analysis" of a certification program for financial counselors); *id.* § 5512(b)(2) (requiring CFPB to consider the "potential benefits and costs to consumers and covered [companies]" of proposed consumer protection regulations).

[23] *See, e.g.*, Commodity Exchange Act, 7 U.S.C. § 19(a)(2) (providing that "[t]he costs and benefits of the proposed Commission action shall be evaluated in light of" five enumerated statutory considerations).

relative costs and benefits of designations, as the Council properly concluded. AR 386; *see* 77 Fed. Reg. at 21,640. The Court should not read into the statute a requirement "to consider costs that has elsewhere, and so often, been expressly granted" by Congress. *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 467 (2001).

Lacking a foothold in the statutory text, MetLife urges the Court to find that the Council was "obligated to consider" the "economic consequences of designation, including the effects on competition and MetLife's shareholders and policyholders," as "an additional 'risk-related factor[]' under Section 113(a)(2)." Compl. ¶ 133. That argument distorts the statutory text beyond recognition. To begin, Section 113 provides that the Council need consider only such "other risk-related factors" that "the Council *deems* appropriate." 12 U.S.C. § 5323(a)(2)(K) (emphasis added). Such language "suggest[s] a broad delegation of discretion" to the agency to decide whether other factors, beyond those enumerated by Congress, are relevant to determining whether a company's material financial distress could pose a threat to the nation's financial stability. *See Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1224 (D.C. Cir. 1993). The determination of which "other risk-related factors" are "appropriate" requires an exercise of economic, technical, and policy expertise that Congress vested squarely in the Council's discretion. In any event, the enumerated factors in Section 113(a)(2) deal with characteristics of nonbank financial companies relevant to the threat the company could pose "to the financial stability of the *United States*"—such as the extent of their leverage, exposures, and interconnectedness, *see* 12 U.S.C. § 5323(a)(1), (a)(2)(A), (B), (G)—not with any costs that additional regulation could impose on those *companies themselves*. At a minimum, the Council's interpretation of the statute is a permissible one that merits deference. *See Chevron U.S.A., Inc.*, 467 U.S. at 844; *see also supra* Part IV at 35.

In enacting Dodd–Frank, Congress was no doubt aware that additional regulation would impose costs on designated companies. But nothing in Dodd–Frank suggests that those were the harms that Congress was concerned about when authorizing the Council to make designations under Section 113. On the contrary, Section 113 makes clear that Congress was instead concerned with the harm that material financial distress at companies like MetLife could impose on *others*, and thus on the financial stability of the entire nation. Moreover, as a practical matter, it is the Federal Reserve, not the Council, that has the statutory authority to establish prudential standards applicable to a particular nonbank financial company, and it has not yet adopted prudential standards for MetLife. MetLife acknowledges that any consequences "for MetLife, its shareholders, and its policyholders," Compl. ¶ 134, would largely "[d]epend[] on the prudential standards that the Board ultimately promulgates for designated insurers," *id.* ¶ 132. Those standards will be established through a separate regulatory process, and MetLife's concerns about the prudential standards are appropriately addressed there.

VI. THE COUNCIL'S DECISION WAS NOT "FATALLY PREMATURE."

In Count Two, MetLife erroneously claims that the Council's decision was "fatally premature." Compl. ¶¶ 80–86. MetLife alleges that it was arbitrary and capricious for the Council to designate it before the Federal Reserve had both (1) established the enhanced prudential standards to which the company will be subject and (2) promulgated "safe harbor" regulations exempting certain types of nonbank financial companies from Federal Reserve supervision. But "an agency need not solve every problem before it in the same proceeding." *Mobil Oil Exploration & Producing, S.E., Inc. v. United Distrib. Cos.,* 498 U.S. 211, 231 (1991). On the contrary, agencies have long been "'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'"

Vt. Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 543 (1978) (citation omitted). Nothing in Dodd–Frank (or, for that matter, the APA) purports to limit that discretion.

MetLife's argument is refuted by the text and structure of Dodd–Frank. The statute lists ten factors that the Council must consider when making a designation. 12 U.S.C. § 5323(a)(2). That Congress did not include on this list the prudential standards that the Federal Reserve would apply to a nonbank financial company if designated is reason enough to conclude that the Council need not have awaited their adoption. *See, e.g.*, *Inv. Co. Inst.*, 720 F.3d at 378 (agency need not consider "hypothetical costs" of future regulation where "the statute does not mandate it").

What is more, the statute plainly contemplates that the Council's designation may precede the adoption of prudential standards. First, Section 113 provides that, "if" the Council determines that a U.S. nonbank financial company could pose a threat to U.S. financial stability, the Council "may" determine that the company "shall" be supervised by the Federal Reserve and subject to prudential standards. 12 U.S.C. § 5323(a)(1). Second, Section 115 provides that the Council "may" make recommendations to the Federal Reserve about the stringency of those prudential standards, and provides that the Council's recommendations "may . . . differentiate among companies . . . on an individual basis or by category." *Id.* § 5325(a)(1), (2). Third, Section 165 provides that the Federal Reserve "shall" establish prudential standards for companies designated by the Council, either "on its own or pursuant to recommendations by the Council." *Id.* § 5365(a). Thus, Dodd–Frank in no way requires the prudential standards to precede designation; if anything, it reflects that the prudential standards will be informed by the Council's determinations. There is no basis for MetLife's suggestion to impose an atextual requirement for the Federal Reserve to expend resources on establishing prudential standards prior to designation, including for companies that might never be designated. Such a requirement would waste not only the Federal Reserve's resources, but the public's as well, given that any prudential standards would be adopted only after notice and public comment. 79 Fed. Reg. at 17,245.[24]

MetLife is further mistaken in its contention that the Council cannot properly consider "the degree to which the company is already regulated" by other agencies, as required by Dodd–Frank, 12 U.S.C. § 5323(a)(2)(H), without "understanding . . . the alternative regulatory requirements that would result from designation," Compl. ¶ 82. As the Council has explained, the question of how much a company "is *already* regulated," 12 U.S.C. § 5323(a)(2)(H) (emphasis added), must be answered by looking at the extent of "*existing* regulatory scrutiny" alone, 77 Fed. Reg. at 21,641 (emphasis added). Nothing in the statute requires the Council to consider the potential effects of *future* prudential standards, and the suggestion is at odds with the statutory text. *See Investment Co. Inst.*, 720 F.3d at 378.[25]

MetLife's assertion that the Council's designation improperly preceded the Federal Reserve's promulgation of "safe harbor" regulations, Compl. ¶ 84, is equally meritless, as nothing in Dodd–Frank requires the Council to await such regulations. Section 170 of Dodd–Frank directs the Federal Reserve to promulgate regulations "on behalf of, and in consultation with, the Council" setting forth criteria for exempting "certain types or classes" of nonbank financial companies from supervision, taking into account the factors used for designation

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[24] At a minimum, the Council's interpretation of the statute is a permissible one that merits deference. *See Chevron U.S.A., Inc.*, 467 U.S. at 844; *see also supra* Part IV at 35.

[25] MetLife's further argument that the timing of the designation prevented the Council from considering "whether and how" designation would mitigate risks to financial stability and "the effects of designation upon MetLife," Compl. ¶ 83, is nothing more than a repackaging of the meritless "cost–benefit analysis" claim asserted in Count Seven.

decisions under Section 113. 12 U.S.C. § 5370(a), (b). But Dodd–Frank does not require the Council to refrain from designating nonbank financial companies until such regulations are finalized, and "[a]bsent constitutional constraints or extremely compelling circumstances," *Vt. Yankee*, 435 U.S. at 543, an "agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures," *Mobil Oil*, 498 U.S. at 230. Here, there are no such compelling circumstances. Indeed, given Dodd–Frank's goal of "*strengthening* the supervision of large, complex financial organizations" in the wake of the recent financial crisis, S. Rep. No. 111-176, at 2 (emphasis added), it is appropriate for the Council to focus its resources first on *designating* companies for Federal Reserve supervision before the Federal Reserve promulgates regulations *exempting* companies from such regulation.

MetLife's final argument—that it was arbitrary and capricious for the Council to designate it under the Council's then-existing procedures, rather than awaiting possible changes to those procedures, Compl. ¶ 85—also fails.[26] MetLife does not dispute that during its designation process the Council followed the procedures that were then in effect. Thus, for purposes of arbitrary and capricious review, it is beside the point whether any later-adopted, supplemental procedures might have benefitted MetLife.[27] Were it otherwise, neither the

[26] In April 2012, the Council published its final rule and interpretative guidance, setting forth the designation process, after three rounds of public notice and comment. 77 Fed. Reg. 21,637. In accordance with that interpretative guidance, which remains in effect, the Council has designated four nonbank financial companies, including MetLife. In October 2014, the Chairperson of the Council publicly stated that the Council would "consider possible changes" to the designation process. Compl. ¶ 85. Those changes were finalized in a set of supplemental procedures adopted in February 2015. Council Supplemental Procedures Relating to Nonbank Financial Company Determinations (Feb. 4, 2015), *available at* http://goo.gl/pueW8d.

[27] MetLife's assertions that the Government Accountability Office ("GAO") "criticized [the Council] for lacking a 'systematic and comprehensive approach'" for making designation determinations, and that the supplemental procedures were a response to that critique, are

Council nor any other agency would be permitted to make incremental process changes. The Council's careful adherence to the then-governing procedures was, by definition, not arbitrary or capricious. *Cf. Troy Corp. v. Browner*, 120 F.3d 277, 281 (D.C. Cir. 1997) (arbitrary and capricious review includes "whether [an agency] has acted consistently with its own procedures").

In any event, MetLife identifies no prejudice from the absence of the supplemental procedures, and there is none. Many of the supplemental procedures simply codify the practices used in the Council's evaluation of MetLife. The supplemental procedures do provide for earlier notification of a potential designation, but here, the Council extensively engaged with MetLife over a period of 17 months. The company points to nothing it would have said or done had it received earlier notice, much less anything that would have changed the outcome. *See First Am. Discount Corp. v. CFTC*, 222 F.3d 1008, 1015 (D.C. Cir. 2000) ("The APA directs reviewing courts to take 'due account' of 'the rule of prejudicial error.'") (quoting 5 U.S.C. § 706). The Council's decision was not "fatally premature."

VII. THE COUNCIL'S DECISION AS TO WHAT RISKS TO ASSESS, AND HOW BEST TO ADDRESS THEM, MERITS SUBSTANTIAL DEFERENCE AND WAS NOT ARBITRARY OR CAPRICIOUS.

In Count Three, MetLife argues that it was arbitrary and capricious for the Council to make a "company-specific" designation under Section 113, rather than adopting an "activities-based approach" to address risk on an industry-wide basis. Compl. ¶ 89.[28] But these are

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incorrect. Compl. ¶ 85 (quoting GAO-14-873T, at 6). In fact, the portion of the GAO report that MetLife quotes refers not to the designation process, but to the Council's approach to describing emerging threats to financial stability in its annual reports. GAO-14-873T, at 6.

[28] MetLife argues that an "activities-based approach" could include "conven[ing] a public conference," Compl. ¶ 89, and potentially lead the Council to "make recommendations to MetLife's primary regulator," *id*. ¶ 93.

different statutory authorities, and they address different kinds of risks to financial stability. Where the Council has identified a company-specific risk, designation under Section 113 is appropriate; where the Council has identified a potential activities-based or industry-wide risk, it may act under some other statutory authority.[29] The Council has broad discretion to determine what risks to financial stability are most pressing, and MetLife's disagreement with the Council's ordering of its priorities is not a basis to set aside the designation. Regardless, an industry-wide approach is no substitute for addressing the specific risks to financial stability posed by a company such as MetLife, as the Council explained. AR 388.

Congress recognized that the Council—which includes the top official of every major federal financial regulatory agency and representatives of a broad range of state financial regulatory agencies—is best equipped to identify and mitigate potential risks to the nation's financial stability. Dodd–Frank authorizes the Council to take a range of actions to promote financial stability, such as identifying regulatory gaps, 12 U.S.C. § 5322(a)(2)(C), facilitating information sharing between federal and state agencies, *id*. § 5322(a)(2)(E), designating nonbank financial companies, *id*. §§ 5322(a)(2)(H), 5323(a)(1), and making recommendations that existing regulators apply additional safeguards, *id*. §§ 5322(a)(2)(K), 5330. But Congress did not "set[] substantive priorities" or "otherwise circumscrib[e]" the Council's "power to discriminate among issues or cases it will pursue." *Heckler v. Chaney*, 470 U.S. 821, 833

[29] MetLife alleges that the Council has a general activities-based authority that allows it to "impose enhanced Board supervision on certain activities that the Council deems to be particularly risky without designating as systemically important the entire company or companies that conduct them." Compl. ¶ 7. The Council's only activities-based designation authority is found in Title VIII of Dodd–Frank, which authorizes the Council to designate certain types of "payment, clearing, and settlement" activities, such as financial activities to facilitate the completion of funds transfers and swaps, to be subject to risk-management standards. *See* 12 U.S.C. §§ 5461–5472.

(1985). For good reason: such decisions "involve[] a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Id.* at 831.

Here, MetLife would require the Council to ignore the specific risks posed by the company's material financial distress, and instead evaluate whether there is some other set of risks that could potentially be addressed using an industry-wide, activities-based approach. But "[a]n agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities," and need not "solve every problem before it in the same proceeding." *Mobil Oil*, 498 U.S. at 230–31 (citations omitted). The Council's authority to designate a particular company under Section 113, and its separate authorities to take an industry-wide, activities-based approach, are not mutually exclusive. Even if the Council were to act to mitigate industry-wide insurance risks, it need not ignore company-specific risks in the meantime. "'[N]othing prohibits federal agencies from moving in an incremental manner.'" *Investment Co. Inst.*, 720 F.3d at 378 (quoting *FCC v. Fox Television Stations*, 556 U.S. 502, 522 (2009)). To "force an agency to aggregate diverse actions to the point where problems must be tackled from every angle at once" would "risk[] further paralysis of agency decisionmaking." *Grunewald v. Jarvis*, 776 F.3d 893, 906 (D.C. Cir. 2015) (citation omitted).

In all events, an industry-wide, activities-based approach is clearly no substitute for a company-specific designation under Section 113. On arbitrary and capricious review, an agency is not held to account for every conceivable policy alternative; it need only "explain [the] rejection of an alternative that was '*within the ambit of the existing Standard*' and shown . . . to be effective." *Clinton Mem'l Hosp. v. Shalala*, 10 F.3d 854, 859 (D.C. Cir. 1993) (quoting *State Farm*, 463 U.S. at 48–51) (emphasis added). An industry-wide approach would involve entirely different regulatory authorities—authorities that are fundamentally different from designating an individual company under Section 113 to plug the gaps in supervision and address risks that could pose a threat to the nation's financial stability.

Regardless, the Council's 341-page designation included detailed factual findings that "cogently explain[ed] why it has exercised its discretion" to designate MetLife. *See State Farm*, 463 U.S. at 49. The Council explained that "an industry-wide evaluation of activities is not necessary or appropriate in the case of MetLife, where a company-specific analysis that takes into account, among other things, the nature, scope, size, scale, concentration, interconnectedness, and mix of the activities of the company, supports a determination that the company's material financial distress could pose a threat to U.S. financial stability." AR 388. Thus, even if an activities-based approach under one of the Council's separate statutory authorities could be considered a reasonable alternative to designation under Section 113, the Council's explanation was more than adequate.

VIII. METLIFE IS A U.S. NONBANK FINANCIAL COMPANY ELIGIBLE FOR DESIGNATION UNDER SECTION 113(A)(1).

Four days before MetLife's November 2014 oral hearing before the Council—and after more than a year of submitting information to the Council and meeting with Council staff—MetLife submitted a letter contending, for the first time, that it was ineligible for designation under Section 113 because it is not a "nonbank financial company," as that term is defined in Dodd–Frank. AR 360, 396. MetLife argued that its foreign insurance activities are not "financial in nature" and therefore could not be included for purposes of determining whether it is a nonbank financial company. The Council rejected MetLife's argument on multiple grounds, detailing its factual findings and reasoning in the final basis. AR 396–400. MetLife reasserts the argument here in Count One. *See* Compl. ¶¶ 75–79.

This claim squarely conflicts with MetLife's prior statements [redacted]. Further, MetLife ignores one of the Council's grounds for concluding that MetLife is predominantly engaged in financial activities, which is valid *even under* MetLife's erroneous interpretations of the relevant statutory provisions. In any event, MetLife's efforts to repudiate its own prior position are unavailing because they conflict with Dodd–Frank and the text, purpose, and longstanding interpretations of Section 4(k) of the Bank Holding Company Act of 1956, as amended ("BHCA"), 12 U.S.C. § 1843(k). Judgment should be entered for the Council on this claim.

A. Background

In Section 113 of Dodd–Frank, Congress authorized the Council to designate certain companies, including U.S. nonbank financial companies. Section 102(a)(4)(B) generally defines a "U.S. nonbank financial company" as one that is both (i) "incorporated or organized under the laws of the United States or any State;" and (ii) "predominantly engaged in financial activities." 12 U.S.C. § 5311(a)(4)(B).

In turn, a company is "predominantly engaged in financial activities" if:

> (A) the annual gross revenues derived by the company and all of its subsidiaries from activities that are financial in nature (as defined in section 4(k) of the [BHCA]) . . . represents 85 percent or more of the consolidated annual gross revenues of the company; *or*
>
> (B) the consolidated assets of the company and all of its subsidiaries related to activities that are financial in nature (as defined in section 4(k) of the [BHCA]) . . . represents 85 percent or more of the consolidated assets of the company.

12 U.S.C. § 5311(a)(6) (emphasis added). Thus, Dodd–Frank does not itself define which activities are "financial in nature" for purposes of determining whether a company is

"predominantly engaged in financial activities" under Section 102(a)(6), but imports by reference the definition under Section 4(k) of the BHCA.[30]

The BHCA, as a general matter, restricts bank holding companies (like MetLife, between 2000 and 2013) from engaging in nonbanking activities. *See generally* 12 U.S.C. § 1843(a)(1)–(2), (b). Congress, however, amended the BHCA in 1999 with the Gramm–Leach–Bliley Act ("GLBA"), Pub L. No. 106–102 (1999), to permit a set of bank holding companies—those that qualify as "financial holding companies"[31]—to engage in activities, or acquire companies engaged in activities, that are "financial in nature." 12 U.S.C. § 1843(k)(1). The definition of activities that are "financial in nature," along with a list of those activities that are *per se* financial in nature, are codified in Section 4(k) of the BHCA. *See* 12 U.S.C. § 1843(k). Congress granted the Federal Reserve the authority to interpret the BHCA. 12 U.S.C. § 1844(b); *see generally Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965).

[redacted] the Federal Reserve approved MetLife's application, permitting MetLife to conduct activities as a bank

[30] Dodd–Frank provides that the Federal Reserve shall establish requirements for determining if a company is predominantly engaged in financial activities. *See* 12 U.S.C. § 5331(b).

[31] *See* 12 C.F.R. § 225.81 *et seq.* (setting forth, *inter alia*, requirements that must be satisfied by bank holding companies electing to become financial holding companies).

holding company and financial holding company. *See also* 87 Federal Reserve Bulletin 268 (2001).

[redacted] MetLife completed its acquisition of ALICO, including its foreign insurance subsidiaries, in 2010. AR 403 n.199.

MetLife also filed annual reports with the SEC for fiscal years 2000 to 2011 repeatedly stating that, as a financial holding company, its "activities and investments are restricted by the BHCA . . . to those that are 'financial' in nature or 'incidental' or 'complementary' to such financial activities." AR 399, 4393. Throughout this period, MetLife maintained its foreign insurance activities, relying on Section 4(k) for the authority to do so.[32]

Now, in a remarkable about-face, MetLife argues that it is not "predominantly engaged in financial activities" because its foreign insurance activities should not be considered "financial in nature" under Section 4(k)—the very provision on which it previously relied to conduct these foreign activities. In other words, MetLife does not dispute that its domestic insurance activities

[32] The BHC Act's Section 4(k) covers not only activities that are financial in nature, but also those that are "incidental to a financial activity." *See, e.g.*, 12 U.S.C. § 1843(k)(3). Because MetLife did not receive a determination from the Federal Reserve that any of its activities were "incidental" to a financial activity, the activities for which it received approval under Section 4(k) were necessarily "financial in nature" to be permissible. *See* 12 C.F.R. §§ 225.88, 225.89 (setting forth procedures for approval of activities that are "incidental" to financial activities).

are "financial in nature," but asserts only that its foreign insurance activities are not "financial in nature" within the meaning of Section 4(k); in MetLife's view, without these foreign activities, it is not "predominantly engaged in financial activities" because less than 85% of its assets or revenues would be "attributable to" its domestic insurance activities. Compl. ¶¶ 72(a), 78.

As explained below, MetLife's arguments run contrary to Dodd–Frank's "predominantly engaged" definition and Section 4(k) of the BHCA. Moreover, accepting MetLife's argument would contradict the purpose of the Council's designation authority, which Congress designed with the specific example of AIG in mind. *See* 155 Cong. Rec. H. 14440 (Dec. 9, 2009) (statement of Rep. Frank); 156 Cong. Rec. S. 2259 (Apr. 14, 2010) (statement of Sen. Dodd). Accepting MetLife's flawed argument would mean that, because of its substantial foreign insurance activities, even AIG would not have met the definition of "nonbank financial company" as of either September 2008 (when AIG's near-failure required the largest government loan in history) or July 2010 (when Dodd–Frank was adopted).[33] This interpretation would thus impermissibly "deny effect to the regulatory scheme" and prevent it from accomplishing its "manifest objects." *Abramski v. United States*, 134 S. Ct. 2259, 2269 (2014); *accord Sullivan v. Hudson*, 490 U.S. 877, 890 (1989) ("Congress cannot lightly be assumed to have intended" a result that would "frustrat[e] . . . the very purposes" of the statute).

[33] Based on publicly available information, AIG's foreign insurance activities evidently constituted at least 44% of its revenues and 29% of its assets in September 30, 2008, and 41% of its revenues and 18% of assets as of June 30, 2010. *See* AIG financial supplement for the quarter ending September 30, 2008, at 3, 4, 50, *available at* http://goo.gl/50gt3A; AIG financial supplement for the quarter ending June 30, 2010, at 1, 3, 50, *available at* http://goo.gl/4pcKjZ; AIG quarterly report on Form 10-Q for quarter ending June 30, 2010, *available at* http://goo.gl/XsEk3L.

B. The Council Correctly Found That MetLife is Predominantly Engaged in Financial Activities Because Over 85% of MetLife's Assets Are "Related to" Its U.S. Insurance Activities, Which Are Financial in Nature Even Under MetLife's Own Definition.

Section 102(a)(6)(B) of Dodd–Frank provides that a company is predominantly engaged in financial activities if 85% of its consolidated assets are "related to" Section 4(k) activities. 12 U.S.C. § 5311(a)(6)(B). Under this provision, the Council found that MetLife is predominantly engaged in financial activities because, even if MetLife's assertions were correct that its foreign insurance activities are not "financial in nature" under Section 4(k), nearly all of its consolidated assets, including its foreign subsidiaries, are *related to* its U.S. insurance activities. AR 399–400.

Importantly, Section 102(a)(6)(B)'s "related to" test with respect to consolidated assets is significantly broader than Section 102(a)(6)(A)'s "derived from" test applying to gross revenues. 12 U.S.C. § 5311(a)(6)(B). The phrase "related to" denotes a "broad scope," one that is "deliberately expansive." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (citations omitted); *see also Moshea v. NTSB*, 570 F.3d 349, 352 (D.C. Cir. 2009) ("Without getting into a metaphysical discussion of the meaning of the phrase 'related to,' it suffices here to say that the words 'related to' are broad.").

MetLife, however, conflates the distinct tests and at once proposes a third test found nowhere in the statute. *See* Compl. ¶ 78 (asserting that MetLife is not "eligible for designation" because "less than 85% of MetLife's consolidated revenues and assets are *attributable to* activities that are 'financial in nature'" (emphasis added)); *see also id.* ¶ 29(b).

MetLife's claim fails because the Council reasonably found that substantially all of MetLife's consolidated assets, including the assets of MetLife's foreign insurance subsidiaries,[34] are "related to" MetLife's U.S. insurance companies "through shared services, agreements, ownership, and otherwise."[35] AR 399–400. MetLife's consolidated assets that are related to activities that are financial in nature therefore far exceed the 85% threshold. The Council's "related to" determination is not arbitrary and capricious. AR 396–400. This finding alone is dispositive of MetLife's claims in Count One.

C. MetLife Is "Predominantly Engaged in Financial Activities" Because Its Foreign Insurance Activities Are "Financial In Nature" Under Section 4(k) of the BHCA.

If the Court accepts the Council's factual conclusion that MetLife's foreign insurance activities are related to its activities that are financial in nature even under MetLife's interpretation, this alone would be dispositive of MetLife's claim, and the Court would need not reach the question of whether MetLife's foreign insurance activities are financial in nature under Section 4(k) of the BHCA.

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[34] MetLife has stated that 98% of its total assets are related to regulated insurance activities. AR 396.

[35] *See, e.g.*, AR 399–400. [redacted] In addition, MetLife reinsures domestic and foreign insurance risk with its captive reinsurers, whose activities the U.S. parent company supports through guarantees and other arrangements. AR 620.

But even setting aside the Council's determination under the "related to" prong of Section 102(a)(6)(B), MetLife's claims fail for two additional, independent reasons: the Council correctly found that MetLife's foreign insurance activities are financial in nature under both Section 4(k)(4)(B) and 4(k)(4)(I) of the BHCA. The Council's findings accord with the text, purpose, and long-standing, settled interpretations of the BHCA, and they are consistent with MetLife's own prior filings with or representations to two federal agencies.

1. MetLife's Foreign Insurance Activities Are Financial in Nature Under Section 4(k)(4)(B) of the BHCA.

The Council correctly found that MetLife is predominantly engaged in financial activities because its foreign insurance activities are financial in nature under Section 4(k)(4)(B) of the BHCA. Section 4(k)(4)(B) covers the activity of "[i]nsuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, or death, or providing and issuing annuities, and acting as principal, agent, or broker for purposes of the foregoing, in any State." 12 U.S.C. § 1843(k)(4)(B). MetLife argues that because this provision contains the phrase "in any State," its foreign insurance activities are not financial in nature. This claim conflicts with settled interpretations of this provision and should be rejected.

As explained above, Dodd–Frank imports by reference existing definitions of activities that are financial in nature under Section 4(k). The Federal Reserve has, since shortly after Section 4(k)'s enactment, interpreted Section 4(k)(4)(B) to include insurance activities whether they are conducted in the United States or abroad. Specifically, Section 225.85(b) of the Federal Reserve's Regulation Y, 12 C.F.R. § 225.85(b), provides that any activity listed in Section 225.86 can be conducted "at any location in the United States or at any location outside of the United States subject to the laws of the jurisdiction in which the activity is conducted." Section 225.86 includes the broad range of insurance activities described in Section 4(k)(4)(B) of the

BHCA. 12 C.F.R. § 225.86(c). Sections 225.85 and 225.86 thus reflect the Federal Reserve's long-standing interpretation that insurance activities conducted outside of the United States are financial in nature under Section 4(k)(4)(B) of the BHCA, and the Council's final basis properly reflects this view. AR 397 (noting that "[n]othing in the phrasing, content, or purpose of the [GLBA] indicates that ["in any State"] was intended to serve as a geographical limitation on the insurance activities authorized for financial holding companies").

In applying Dodd–Frank's definitional provisions, which import by reference the definition of "financial in nature" in Section 4(k) of the BHCA, the Council reasonably applied the Federal Reserve's interpretation of Section 4(k)—one that MetLife itself has not only accepted, but used to its benefit for over a decade.

2. The Activities of MetLife's Foreign Insurance Subsidiaries Are Financial in Nature Under Section 4(k)(4)(I) of the BHCA.

Even if the Court were to accept MetLife's argument that only its *domestic* insurance activities are financial in nature under Section 4(k)(4)(B), Count One still fails because the Council correctly found that MetLife is predominantly engaged in financial activities for a separate and additional reason: the investments of certain of MetLife's domestic insurance companies in foreign insurance subsidiaries are financial in nature under section 4(k)(4)(I) of the BHCA. AR 397–98. Section 4(k)(4)(I) of the BHCA provides that an insurance company's investments (including ownership by an insurance company of subsidiary insurance companies) are financial in nature if they meet a four-part test set out in the statute. 12 U.S.C. § 1843(k)(4)(I).[36] A straightforward application of the four-part test with respect to MetLife's

[36] Under the BHCA's Section 4(k)(4)(I), investments are "financial in nature" if (1) they are not held by a depository institution or a subsidiary of a depository institution; (2) they are held by an insurance company that is predominantly engaged in underwriting life, accident and health, or

Delaware insurance subsidiary, ALICO, makes clear that the domestic and foreign insurance subsidiaries and other assets held by ALICO are financial in nature and are thus properly included in the "predominantly engaged" calculation under Dodd–Frank.[37] AR 397–98.

Specifically, the Council found that ALICO's ownership of its foreign subsidiaries satisfies each of the four statutory requirements: (1) none of the foreign insurance companies are held by a depository institution or a subsidiary of a depository institution; (2) the assets are held by ALICO, a Delaware-chartered insurance company that is predominantly engaged in underwriting life, accident and health, or property and casualty insurance or providing and issuing annuities; (3) the assets are investments made by ALICO in the ordinary course of business of ALICO in accordance with Delaware state law governing such investments; and (4) MetLife does not routinely manage or operate ALICO's subsidiaries except as may be necessary or required to obtain a reasonable return on investment. AR 397–98.

MetLife asserts that the third prong of the test (Section 4(k)(4)(I)(iii) of the BHCA) requires the relevant financial activities to be conducted in the United States. *See, e.g.*, Compl. ¶¶ 76–77. But that section by its terms requires only that, to qualify as financial in nature, the investments be "made in the ordinary course of business of such insurance company in accordance with relevant State law governing such investments." 12 U.S.C. § 1843(k)(4)(I)(iii).

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property and casualty insurance or providing and issuing annuities; (3) they are an investment made in the ordinary course of business of the insurance company in accordance with relevant state law governing such investments; and (4) the insurance company does not routinely manage or operate the subsidiary except as may be necessary or required to obtain a reasonable return on investment. 12 U.S.C. § 1843(k)(4)(I).

[37] ALICO owns significant foreign insurance subsidiaries, including MetLife's large Japanese subsidiary, MetLife Alico Life Insurance K.K. AR 401, 635. When the assets related to, and revenues derived from, those foreign insurance subsidiaries are included in the calculation, together with MetLife's other assets related to and revenues derived from activities that are financial in nature, MetLife is predominantly engaged in financial activities.

ALICO is a Delaware-chartered insurance company whose investments must be made "in accordance with" Delaware law. Unless MetLife is now suggesting that ALICO's investments in its foreign subsidiaries are made in violation of Delaware law, it is not clear how this provision helps MetLife.

In sum, the Council's determination that MetLife is "predominantly engaged" in financial activities is supported by three independent grounds. None of MetLife's arguments to the contrary undermine the appropriateness of the Council's conclusions. Moreover, in this claim, MetLife seeks to derive an unfair advantage: having previously received permission to engage in foreign insurance activities under Section 4(k) authority, it now claims that those *same* activities are *not* covered under Section 4(k), in order to avoid Federal Reserve supervision and enhanced prudential standards. The Court should reject MetLife's last-minute change of heart and enter judgment for the Council on this claim.

IX. THE COUNCIL'S STRUCTURE IS CONSISTENT WITH THE SEPARATION OF POWERS

MetLife's separation of powers claim fails as a matter of law. Compl. ¶¶ 136 (Count Eight), 142–45 (Count Nine). The "basic principle" underlying the separation of powers doctrine is that "one branch of the Government may not intrude upon the central prerogatives of another." *Loving v. United States*, 517 U.S. 748, 757 (1996). Thus, a branch may not "arrogate power to itself" or "impair another in the performance of its constitutional duties." *Id.* Here, MetLife does not claim that the Council intruded on any core power of either the legislative branch or the judicial branch. Nor could it credibly make such a claim. The Council performed the precise duty assigned to it by Congress—to designate certain nonbank financial companies for Federal Reserve supervision, under a framework that Congress designed—and Dodd–Frank provides that the Council's final designation is subject to judicial review here. 12 U.S.C. § 5323(h).

Instead, MetLife asserts that Dodd–Frank violates the separation of powers because it authorizes the Council to perform a "blend" of executive, legislative, and adjudicative functions "without even a separation of functions into offices or divisions." Compl. ¶ 136. But such a "blend" of functions has long been a feature of the administrative process. *See, e.g.*, James M. Landis, *The Administrative Process* 91–92 (1938) (the "administrative process . . . blends within a single administrative agency both the power to initiate complaints and the power to determine whether the alleged facts . . . justify the imposition of a penalty") (quoted in Matthew Bender, 4 *Administrative Law* § 33.02[1] n.1 (2014)). MetLife points to no case holding that this common feature of executive branch agencies violates the separation of powers. On the contrary, just two years ago, the Supreme Court noted that agencies do not "exercise 'legislative *power*' and 'judicial *power*'" at all. *City of Arlington*, 133 S. Ct. at 1873 n.4 (emphasis added). As the Court explained, "Agencies make rules . . . and conduct adjudications . . . and have done so since the beginning of the Republic. These activities take 'legislative' and 'judicial' *forms*, but they are exercises of—indeed, under our constitutional structure they *must* be exercises of—the 'executive *Power*.'" *Id.* (quoting U.S. Const. art. II, § 1, cl. 1) (some emphases added).

Against this backdrop, MetLife's reliance on the Eleventh Circuit's decision in *Elliot v. Securities & Exchange Commission*, 36 F.3d 86 (11th Cir. 1994), is unavailing. Compl. ¶¶ 136, 144. That case presented not constitutional claims, but statutory ones—which the court rejected in any event—and the court did not purport to address the separation of powers or any other constitutional doctrine. *Elliot*, 36 F.3d at 87 (citing 15 U.S.C. §§ 78o, 78u, 78v, and 5 U.S.C. § 554).

Because the Council intruded on no core power of either the legislative or the judicial branch, MetLife's separation of powers claim fails.

X. THE COUNCIL'S DECISION WAS CONSISTENT WITH DUE PROCESS.

MetLife's due process claim also fails as a matter of law. Compl. ¶¶ 137–41 (Count Eight). The designation itself imposes no penalty of any sort, and the company identifies no "liberty" or "property" interest of which it has allegedly been deprived. *See* U.S. Const. amend. V (prohibiting deprivations of "life, liberty, or property, without due process of law"). Its due process claim should be rejected for that reason alone. *See Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972) (cognizable liberty or property interest prerequisite to procedural due process claim).

Regardless, MetLife received ample opportunity to be heard. *See Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) ("opportunity to be heard" is "fundamental requisite" of due process). After notifying MetLife that it was under review, the Council and its staff spent 17 months evaluating the company; met with company representatives over a dozen times; consulted extensively with MetLife's primary regulators; and reviewed over 21,000 pages of materials submitted by the company. AR 745. The Council provided MetLife with a 270-page proposed determination three months before considering whether to make a final determination, *see* Compl. ¶ 50; AR 745; granted the company's request for written and oral hearings; met with the company's senior officers at a two-hour hearing attended by the full Council; and provided the company with a 341-page written explanation of the Council's final determination. AR 360, 745. The company was permitted to submit any information it deemed relevant to the Council's analysis, and was permitted to meet with staff as many times, and on as many subjects, as the company wished.

Rather than claiming that it is entitled to still *more* process, MetLife principally alleges that the mere "combination of legislative, executive, and adjudicative functions" in the Council's members "also resulted in a violation of [its] due process rights." Compl. ¶ 137. However, it is "very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges . . . , and then to participate in the ensuing hearings," as Congress expressly permitted under the APA. *Withrow v. Larkin*, 421 U.S. 35, 52, 56 (1975) (citing 5 U.S.C. § 554(d)(C)). Thus, "the combination of investigative functions does not, without more, constitute a due process violation." *Id.* at 58. Rather, to state a due process claim based on the combination of investigative and adjudicative functions, a plaintiff must establish "special facts and circumstances" that make "the risk of unfairness . . . intolerably high." *Id.*; *see also In re Zdravkovich*, 634 F.3d 574, 579 (D.C. Cir. 2011).

MetLife alleges no "special facts" that could meet that high bar. This is not a case where, for example, "the adjudicator has a pecuniary interest in the outcome," *Withrow*, 421 U.S. at 47 (citations omitted), or a state judge personally investigated, charged, tried, convicted, and sentenced a criminal defendant, *id*. at 53 (citing *In re Murchison*, 349 U.S. 133, 134–36 (1955)). Indeed, in contrast to the circumstances where such "separation of functions" claims have been raised, here no enforcement proceeding has been conducted, no violation found, and no penalty imposed.[38] Instead, MetLife rests its due process claim on the generic "blend" of functions that is "very typical" of administrative agencies. *Withrow*, 421 U.S. at 56; *see also AFGE v. Gates*, 486 F.3d 1316, 1329 (D.C. Cir. 2007) (noting that "many independent federal agencies combine

[38] *Cf., e.g., Lamb v. Panhandle Cmty Unit Sch. Dist. No. 2*, 826 F.2d 526 (7th Cir. 1987) (no constitutional violation where district attorney played prosecutorial and adjudicative role in school disciplinary proceeding); *Hirsh v. Justices of Supreme Court of State of Cal.*, 67 F.3d 708, 714 (9th Cir. 1995) (combination of investigative and adjudicative functions in state bar does did not create unacceptable risk of bias).

these functions," such as the FCC and FTC). And MetLife points to nothing to show any "risk of unfairness" whatsoever, let alone the "intolerably high" risk required to state a due process claim. *Withrow*, 421 U.S. at 56. Thus, it fails to overcome the "well-settled presumption of administrative regularity" in which "courts assume administrative officials 'to be men [and women] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.'" *Lichoulas v. FERC*, 606 F.3d 769, 779 n.8 (D.C. Cir. 2010).

MetLife's other due process arguments are similarly unavailing. To begin, because Dodd–Frank Section 113 is a civil statute that imposes no penalty and forbids no conduct, "the void-for-vagueness doctrine does not apply." *Hodges v. District of Columbia*, 975 F. Supp. 2d 33, 52–53 (D.D.C. 2013); *accord Does v. Mills*, No. 04-2919, 2005 WL 900620, at *10 (S.D.N.Y. Apr. 18, 2005) (citation omitted). Moreover, even if a vagueness challenge could lie, a civil statute will not be voided unless it is "so vague and indefinite as really to be no rule or standard at all," *Boutilier v. INS*, 387 U.S. 118, 123 (1967), and "economic regulation" is subject to an even "less strict vagueness test," *Hoffman Estates v. Flipside*, 455 U.S. 489, 498 (1982). Section 113 easily satisfies this standard, particularly as "clarif[ied]" by the Council's interpretive guidance, *see id.*, which sets forth quantitative thresholds to "help a nonbank financial company predict whether [it would] be subject to additional review," 77 Fed. Reg. at 21,642–43. *See United States v. Lafayette*, 896 F.2d 599 (D.C. Cir. 1990) (per curiam) ("'imprecise but comprehensible normative standard'" not unconstitutionally vague).

MetLife's remaining due process arguments allege that it did not receive access to the "full record" before the Council made its final decision—although the company concedes that it received notice of the proposed designation—in part because the final decision incorporated responses to arguments that MetLife raised shortly before, during, and after its oral hearing on November 3, 2014. Compl. ¶¶ 139–40. Neither allegation states a due process claim, even assuming MetLife had set forth a cognizable liberty or property interest allegedly infringed by the designation. *See, e.g.*, *Fox TV*, 556 U.S. at 513 (the APA "sets forth the full extent of judicial authority to review executive agency action for procedural correctness"); *Vt. Yankee*, 435 U.S. at 549 (1978) (reviewing court may not "impose upon the agency" procedural requirements beyond those mandated by Congress or adopted by the agency itself); *cf*. *Agape Church*, 738 F.3d at 401–02 (final rule need only be a "logical outgrowth" of notice of proposed rulemaking). MetLife's due process claim should therefore be dismissed.

XI. METLIFE'S CLAIM FOR INJUNCTIVE RELIEF SHOULD BE DISMISSED

MetLife's claim for injunctive relief must also be dismissed. Compl. ¶¶ 146–51 (Count Ten). The company seeks to enjoin the Council from "taking any action whatsoever to designate" it until the Federal Reserve has issued enhanced prudential standards and promulgated safe harbor regulations. *Id*. ¶ 152(d). But it is well established that "a request for injunctive relief is a remedy and not a separate cause of action." *Anderson v. Gates*, 20 F. Supp. 3d 114, 129 (D.D.C. 2013) (citations omitted). Count Ten must be dismissed for that reason alone.

Even as a form of relief, an injunction is inappropriate here. Dodd–Frank limits the scope of this Court's review, and it provides for only one remedy: rescission. 12 U.S.C. § 5323(h) (permitting a designated company to seek "an order requiring that the final determination be rescinded," and directing the district court to either "dismiss such action or direct the final determination to be rescinded"). Where Congress crafts such an explicit link between judicial review of an agency decision and a specific form of relief, it is improper to infer the availability of other relief. *See* 5 U.S.C. § 702 ("Nothing [in the APA] . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."); *Parks v. IRS*, 618 F.2d 677, 684 (10th Cir. 1980) (where a "statute provides for certain special types of equitable relief but not others, it is not proper to imply a broad right to injunctive relief"); *Cell Assocs., Inc. v. NIH*, 579 F.2d 1155, 1158–59 (9th Cir. 1978) (where a statute "links particular violations of the Act to particular remedies in a specific and detailed manner," it "points to a conclusion that Congress did not intend to authorize the issuance of [other] injunctions"). Because Dodd–Frank limits the available relief to rescission of the Council's determination, MetLife's claim for injunctive relief is precluded.

Injunctive relief would be unavailable even if MetLife could obtain review under the APA. The APA authorizes a court only to "hold unlawful and set aside" agency action, not to enter an injunction. 5 U.S.C. § 706(2). And it is black-letter administrative law that, where the record does not support the agency's decision, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Thus, even if the Court determines that the Council has misinterpreted its mandate, it may not "devise a specific remedy for the Secretary to follow," but must instead remand to the agency. *Cty. of L.A. v. Shalala*, 192 F.3d 1005, 1011 (D.C. Cir. 1999). MetLife's request for an injunction is improper and should be rejected.

CONCLUSION

For the foregoing reasons, the Court should dismiss Counts Eight, Nine, and Ten, and grant summary judgment to Defendant on the balance of Plaintiff's claims.

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