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)

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT, AND IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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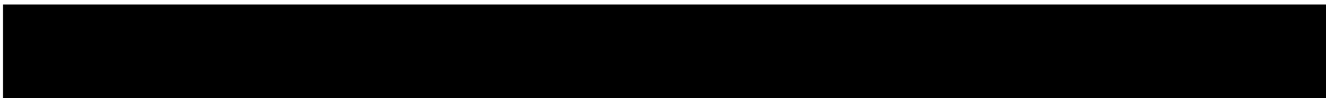

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INTRODUCTION

The Dodd–Frank Act is Congress's response to the recent, crippling financial crisis that laid bare critical vulnerabilities in the nation's financial system. A key lesson of the crisis was that distress at large, complex nonbank financial companies can disrupt the financial system, and yet, for many such companies, no single regulator supervises the parent company and all of its subsidiaries. Thus, in Section 113 of the Act, Congress tasked U.S. financial regulators, working together, to identify nonbank financial companies whose distress could pose a threat to the nation's financial stability, so that those companies would be subject to consolidated supervision and enhanced prudential standards, such as capital and liquidity requirements.

After more than a year and a half of extensive analysis, the Council determined by a 9–1 vote that MetLife's "material financial distress . . . could pose a threat to the financial stability of the United States," 12 U.S.C. § 5323(a)(1), and that it would be subject to such oversight. In designating MetLife—one of the largest, most complex financial companies in the nation—the Council focused not on what the company calls "traditional" life insurance, but on MetLife's activities and capital market offerings that boost its leverage, heighten its reliance on short-term funding, and increase the exposures of its counterparties. These activities include MetLife's $35 billion of outstanding funding agreement–backed securities, its $30 billion securities lending program, and its $48 billion of guaranteed investment contracts. Further, even in its "traditional" insurance business, most of MetLife's U.S. general account insurance liabilities allow policyholders to withdraw their cash from the company, increasing its risk of facing sudden liquidity demands. If MetLife experienced material financial distress, the Council found, these and other activities could expose other market participants to substantial losses and cause the

company to sell relatively illiquid assets in a fire sale, destabilizing financial markets and inflicting serious damage on the nation's economy.

MetLife falls far short of its heavy burden to show that the Council's determination was arbitrary or capricious. The bulk of MetLife's claims—those contesting the Council's fact-specific analyses of complex financial data and existing state regulation—fail to meaningfully grapple with the core of the Council's analysis, and instead invite the Court to substitute its judgment for that of the Council, contrary to black-letter principles of administrative law. As the 341-page final basis shows, the Council conducted an extensive analysis that fully considered MetLife's arguments against designation. Although the company repeatedly accuses the Council of engaging in "speculation," "conjecture," and "guesswork," in fact it simply disagrees with the Council's analysis, predictions, and conclusions, and asks the Court to do the same. But Congress placed the determination of whether a company's material financial distress could pose a threat to the nation's financial stability in the hands of the Council—which includes the leader of every major federal financial regulatory agency—for good reason. The Council's expert judgment and thorough analysis provide a sound basis to sustain its conclusion.

MetLife's other claims are largely untethered to the scheme that Congress designed. While MetLife initially contended that its designation was "premature" because it preceded the Federal Reserve's adoption of enhanced prudential standards, the statute demonstrates that those standards may be issued later—and, indeed, MetLife now abandons the claim. While MetLife argues that the Council was required to consider potential costs that designation might impose on the company, the statute contemplates no such analysis. While MetLife suggests that the Council should have adopted some type of industry-wide, activities-based approach, rather than addressing the specific risks posed by the company, the two approaches are not mutually

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exclusive, and nothing in the statute curtails the Council's discretion to address risks posed by individual companies before taking industry-wide action. And while MetLife insists that the Council was required to assess MetLife's "vulnerability" to distress—and, further, to prove that such distress "would" pose a threat to financial stability—the statute asks only whether a company's distress, if it occurs, "could" pose such a threat. Indeed, MetLife's assurances of its own invulnerability and the negligible consequences of its distress ignore the lesson of the recent financial crisis, embodied in Dodd–Frank, that large, interconnected financial companies can fail without warning, with devastating effects. Congress recognized that no company is immune from failure, and it gave the Council prophylactic authority to preempt potential threats to the nation's financial stability. And in Section 113, Congress made clear that it did not intend to sideline the Council until it could establish the "likelihood" of a company's distress, or that its distress "would" pose a threat to financial stability.

The same weaknesses are apparent in MetLife's argument that it is not "predominantly engaged" in financial activities and thus not eligible to be designated under Section 113. MetLife's argument lacks support in Dodd–Frank and in the text, purpose, and longstanding interpretations of the Bank Holding Company Act, [REDACTED]

[REDACTED]

[REDACTED] Further, excluding nonbank financial companies with significant overseas insurance activities from Section 113 designations would mean that, on the day Dodd–Frank was signed, the Council could not even have designated AIG—the very entity whose catastrophic near-failure motivated Congress to create the Council and its designation authority in the first place. Congress plainly intended to empower the Council to designate major U.S. insurance companies

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with significant foreign insurance activities, like AIG and MetLife, and the statute should not be read otherwise.

MetLife's constitutional claims likewise lack merit. The alleged "blending" of executive, legislative, and judicial functions of which MetLife complains is typical of administrative agencies, and MetLife points to no case holding that this violates the separation of powers. And the Council's extensive engagement with MetLife over a 17-month period provided the company with all the process it was due.

In Dodd–Frank, Congress afforded the Council broad discretion to identify and address potential risks and threats to the nation's financial stability, and the Council exercised that discretion consistent with well-settled principles of administrative law. The record demonstrates that the Council carefully considered each of the statutory factors and provided a reasonable explanation for its determination that MetLife's material financial distress could pose a threat to the nation's financial stability. While MetLife may disagree with that conclusion, the Council's determination is hardly "so implausible that it could not be ascribed to a difference in view," *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983). Judgment should therefore be entered for Defendant.

ARGUMENT

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

As MetLife acknowledges, ML Br. 7, 18–19, the Court's review is limited to whether the Council's final determination is arbitrary and capricious. *See* FSOC Br. 56 (citing 12 U.S.C. § 5323(h)). Yet the company invites the Court to second-guess nearly every aspect of the Council's analysis set forth in the 341-page final basis, including its judgment about how to weigh the statutory factors under Section 113(a)(2). *See* ML Br. 31–57. The common

denominator of MetLife's claims is that they seek to squeeze the Council's expertise and judgment out of the equation. As explained in the Council's opening brief, FSOC Br. 19–20, the final determination was a thorough and reasoned exercise of the Council's authority to make predictive judgments about highly technical issues affecting financial markets and the broader economy. Nothing in MetLife's brief casts doubt on the reasonableness of the Council's final determination.

A. The Council Properly Exercised Its Discretion Under Section 113, and Its Final Determination Is Entitled to Great Deference.

1. MetLife's Claims Contradict the "Could Pose a Threat" Standard of Section 113(a)(1).

In Section 113, Congress authorized the Council to designate a nonbank financial company if the Council determines that the company's material financial distress "could pose a threat to the financial stability of the United States." 12 U.S.C. § 5323(a)(1). Thus, under this standard, the Council may designate a company if the Council concludes that there are plausible situations in which the company's distress "could" pose a threat to U.S. financial stability—that is, even if there are plausible circumstances in which the company's distress *might not* pose a threat.[1] AR 384 (discussing the "could pose a threat" standard); *see also* AR 366 ("the discussion herein addresses a range of outcomes that are possible but vary in likelihood"); AR 566 ("it is necessary to consider a wider range of plausible assumptions in order to understand the potential impact of MetLife's material financial distress").

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[1] Consistent with the standards set forth in Section 113 of Dodd–Frank, and as explained in the Council's interpretive guidance, the Council assesses the potential impact of material financial distress at a company in the context of a period of overall stress in the financial services industry and in a weak macroeconomic environment, which are the conditions under which a company's distress may have a greater effect on U.S. financial stability. AR 364, 366 & 372.

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MetLife, however, studiously downplays the statutory standard, repeatedly placing "could" in scare quotes, as though the Council acted unreasonably by failing to adopt a standard stricter than the one set forth in the statute. *See, e.g.*, ML Br. 47 (complaining that the Council's exposures channel analysis focused on what "could occur," rather than "estimat[ing] the likelihood of potential losses" of counterparties or determining the "actual impact" on counterparties); *id*. at 14 (criticizing the Council for relying on events that "FSOC claimed 'could' happen"); Compl. ¶ 8 (proposing a "would" standard). MetLife's attempt to replace the designation standard in Section 113 with one of its own creation should be rejected. Congress's choice of the words "could pose a threat" reflects the legislative consensus that financial crises "can be hard to predict and can have far-reaching and unanticipated consequences," AR 386, and gives effect to the Council's statutory duty "to identify risks to the financial stability of the United States that could arise" from a company's distress, 12 U.S.C. § 5322(a)(1)(A). Indeed, as Federal Reserve Chairman Alan Greenspan testified, "a financial crisis must of necessity be unanticipated, because if it is anticipated, it will be arbitraged away."[2]

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[2] *The Financial Crisis and the Role of Federal Regulators: Hearing Before H. Comm. on Oversight and Gov't Reform*, 110th Cong. (2008) (statement of Chairman Greenspan), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg55764/pdf/CHRG-110hhrg55764.pdf; *see also id.* ("[I]f a financial crisis by definition is a discontinuity in asset prices, then it means from 1 day to the next people were surprised. Something fundamentally different happened."); *Oversight of Implementation of the Emergency Economic Stabilization Act of 2008 and of Government Lending and Insurance Facilities: Hearing Before H. Comm. on Fin. Svcs.*, 110th Cong. (2008) (statement of Secretary Paulson) ("If we have learned anything throughout this year we have learned that this financial crisis is unpredictable and difficult to counteract."), *available at* http://www.treasury.gov/press-center/press-releases/Pages/hp1279.aspx;http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg63136/html/CHRG-111hhrg63136.htm; ECF 30-1, Law and Finance Professors Amicus Br. 8 ("It is unsurprising that Congress chose conditional, predictive language when describing the standard for designations. . . . [T]he regulator must conduct this assessment for a broad range of potential states of the world . . . . That is why Congress required that FSOC show only that a nonbank firm's distress '*could* pose a threat . . . .'").

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While it is clear that MetLife challenges the Council's application of the "could pose a threat" standard, as well as its weighing of the statutory considerations under Section 113(a)(2), *see* ML Br. 31–33—judgments that are entitled to great deference on arbitrary and capricious review—MetLife does not appear to challenge the Council's interpretations of the statutory text, let alone offer any cogent alternative in its place. But to any extent that MetLife disputes the Council's interpretations of the statute, MetLife fails to overcome the deference to which the Council is entitled under *Chevron*. In Dodd–Frank, Congress gave the Council authority to determine, through adjudication,[3] whether a company such as MetLife "could pose a threat to the financial stability of the United States." 12 U.S.C. § 5323(a)(1); *see id.* § 5323(e)(2). Thus, if MetLife is challenging the Council's interpretation of the statutory text, "'*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.'" FSOC Br. 35 (citation omitted); *see also id.* at 37, 40 (citing *Chevron*). MetLife offers no response to this argument—indeed, its brief does not so much as mention *Chevron*—and thus concedes the point.

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[3] It is well settled that an agency may elucidate the meaning of a statute through adjudication, rather than by issuing generally applicable rules or guidance. *See, e.g.*, *Heckler v. Ringer*, 466 U.S. 602, 617 (1984); *Pharm. Res. & Mfrs. Am. v. Thompson*, 362 F.3d 817, 821–22 (D.C. Cir. 2004); *see also BP West Coast Prods., LLC v. FERC*, 374 F.3d 1263, 1272 (D.C. Cir. 2004) (granting *Chevron* deference to an agency's interpretations of a statute under which the agency has adjudicative authority but no rulemaking authority); *Menkes v. U.S. Dep't of Homeland Sec.*, 637 F.3d 319, 330-33 (D.C. Cir. 2011) (affording *Chevron* deference to an agency interpretation reached through informal adjudication). As the Supreme Court recently observed, "there is no . . . case" "in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013) (emphasis added).

2. The Council's Predictive Judgments Regarding Financial, Economic, and Regulatory Considerations Affecting Financial Stability Are Entitled to Great Deference.

MetLife's assertion that the final designation does not make predictions or apply the Council's expert knowledge is simply wrong. *See, e.g.*, ML Br. 55. The final basis thoroughly explains the Council's predictive judgments that MetLife's distress could impair financial intermediation or financial markets severely enough to inflict significant damage on the broader economy. *See generally* AR 400–636. As explained in its opening brief, the Council based its predictive judgments about the potential for MetLife to pose a threat to U.S. financial stability on its assessments that: (1) MetLife's material financial distress could lead to significant losses for market participants and policyholders with exposures to MetLife; (2) the company could be forced to liquidate a significant amount of 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 U.S. financial stability; and (4) MetLife's complexity and the potential difficulties of "resolving" (*i.e.*, winding down) the company exacerbate the potential for MetLife's distress to pose a threat to U.S. financial stability.[4] FSOC Br. 15.

These conclusions were "primarily of a judgmental or predictive nature," *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 813 (1978), and the Council applied its financial system–wide expertise in considering all relevant factors and making such judgments on inherently uncertain issues. The Council's predictive conclusions are entitled to

[4] While MetLife challenges three of these four bases of its designation, it does not contest the Council's detailed findings or conclusions as to how the company's complexity, as well as the company's financial and operational interconnections across jurisdictions, significantly increase the obstacles to an orderly resolution of the company, AR 609–36.

great deference. *See* FSOC Br. 19–20 (collecting cases).[5] That the those judgments required highly technical analysis of complex financial and economic information relevant to system-wide risks and regulatory gaps further enhances the deference due. *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). And the statute's express directive to make such inherently predictive judgments, which, by definition, focus on future possibilities, should entitle the Council's decision to even greater deference. *See, e.g.*, *SoundExchange, Inc. v. Librarian of Congress*, 571 F.3d 1220, 1223–24 (D.C. Cir. 2009) (copyright royalty judges' statutory directive to "estimate the effect of the royalty rate on the future of the music industry" "increase[d] the deference [the court] owe[d] the agency") (citation omitted); *see also Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 28–29 (1961) (affording deference to agency's forecast, "based on [its] expert knowledge," of how an interstate sale of natural gas would affect future prices).

3. The Council Reasonably Exercised Its Discretion in Weighing the Section 113(a)(2) Considerations.

MetLife incorrectly asserts that the Council "departed from Section 113(a)(2)'s designation criteria," ML Br. 31. The company does not dispute that the Council considered

[5] MetLife's reliance on *International Ladies' Garment Workers' Union*, 722 F.2d 795 (D.C. Cir. 1983), is unavailing. *See* ML Br. 55, 59. There, the D.C. Circuit noted that it "must be particularly deferential when reviewing an agency's predictive judgments about areas that are within the agency's field of discretion and expertise," *id.* at 821, but found that the Secretary of Labor's decision at issue was arbitrary and capricious because he had failed "even to consider" certain "highly relevant" factors, *id*. at 823–24, 826. MetLife, by contrast, fails to make any such showing. The Council not only considered all factors relevant to the analysis contemplated by Section 113 (including the ten considerations listed in Section 113(a)(2)), but it also considered MetLife's numerous objections to its economic analysis and conclusions, and adequately explained its reasoning as to each. *See* FSOC Br. 23–27.

each of the ten statutory factors, *see* FSOC Br. 23–24; instead, it complains that the Council gave them only "perfunctory attention," ML Br. 33. This argument appears to rest on the erroneous allegation that "FSOC devoted fewer than 10 pages of discussion to the statutory factors." Compl. ¶ 105. But the Council has already refuted this baseless claim: in fact, the final basis extensively addresses each of the statutory factors throughout the entire analysis. *See* FSOC Br. 20–21 n.13. MetLife offers no response.

Instead, MetLife turns its challenge to the *weight* that the Council gave to its findings under the statutory factors. Specifically, MetLife contends that the Council gave undue consideration to two factors—the company's size and interconnectedness—and too little to the degree of existing regulation by state regulators.[6] Size and interconnectedness relate to several of the other statutory considerations, *see, e.g.*, FSOC Br. 24 & n.14, and no single factor was dispositive in the Council's analysis of MetLife.[7] FSOC Br. 24. Consistent with its interpretive guidance, the Council's designation of MetLife was based on its assessment of the various factors "separately and in conjunction with each other to evaluate, in its judgment, the potential for a company's material financial distress to pose a threat to U.S. financial stability," AR 367. MetLife's claim that the Council failed to grasp "the significance and efficacy" of state

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[6] MetLife's claims concerning the Council's consideration of MetLife's existing regulation are addressed fully in *infra* Part I(C), at 16.

[7] MetLife argues that because the Council weighed all the statutory considerations under Section 113(a)(2) and no single consideration was dispositive in its designation of MetLife, any error in the Council's analysis requires rescission of the designation. ML Br. 34 (citing *Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 839 (D.C. Cir. 2006)). MetLife's assertion is incorrect. The Council explained that no single statutory factor was dispositive in its determination, and it also identified two separate grounds for its designation under Section 113(a)(1): first, MetLife's distress could pose a threat to U.S. financial stability through the "exposures channel," based on market participants' exposures to MetLife, AR 368; and second, MetLife's distress could pose a threat to U.S. financial stability through the "asset liquidation channel," based on the potential for asset liquidations by MetLife, AR 372. *See* FSOC Br. 15–16.

regulatory mechanisms, ML Br. 32, "amounts to nothing more than another policy disagreement" with the Council's conclusions concerning the company's existing regulation, and must be rejected. *Inv. Co. Inst. v.* CFTC, 720 F.3d 370, 380 (D.C. Cir. 2013). As explained below in Part I(C), the Council carefully considered existing state regulation of MetLife and gave a reasonable basis for its expert judgment that state regulation does not fully address the risks that MetLife's distress could pose to U.S. financial stability.

Fundamentally, MetLife's argument ignores the discretion that Congress placed squarely with the Council, in recognition of its members' deep and wide-ranging expertise in evaluating system-wide financial risk. Congress "did not assign the specific weight the [Council] should accord each of these factors," but instead intended that the Council be "free to exercise [its] discretion" to weigh relevant risk-related factors and address potential threats to U.S. financial stability. *New York v. Reilly,* 969 F.2d 1147, 1150 (D.C. Cir. 1992); FSOC Br. 23–24. Indeed, the statutory requirement to "consider" the ten listed factors demonstrates Congress's intent to vest the agency with broad discretion. *See* FSOC Br. 18–20. While MetLife ignores the cases cited by the Council, it cites no case that calls into question the reasonableness of the Council's judgment about how to weigh the risk-related factors under Section 113(a)(2)—a judgment that is entitled to significant deference. *See id.* at 23–24.

4. The Council Conducted a Robust, Detailed Analysis.

MetLife's repeated characterization of the Council's extensive analysis as "*ipse dixit*," *see* ML Br. 20, 44, 54, 55, 57, is directly contradicted by the level of detail with which the final basis explains the Council's analysis. The 341-page final basis extensively describes the facts and analysis underpinning the Council's conclusion that material financial distress at MetLife could pose a threat to U.S. financial stability. For example, the final basis contains 67 pages on

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how the direct and indirect exposures of MetLife's creditors, counterparties, investors, policyholders, and other market participants are such that they, or the financial markets in which they participate, could be impaired if MetLife were to experience material financial distress. AR 432–98. It contains 85 pages on how MetLife could experience liquidity strains that could cause or contribute to a forced asset liquidation, the characteristics of MetLife's relatively illiquid assets that it could be forced to sell, why the company's forced asset liquidation could impair the functioning of important financial markets, and how the analysis prepared for MetLife by Oliver Wyman underestimated the negative effects of MetLife's asset sales. AR 499–583.

As just one example, MetLife asserts that it was *ipse dixit* for the Council to state that the company's procedures for [REDACTED] "could be less effective in the event of broader financial market stress," ML Br. 44 (citing AR 417 n.285). But MetLife neglects to mention that the Council explained its reasoning on the very next page of the final basis: [REDACTED] as could happen during conditions of broader market stress. AR 417–18. Accordingly, the Council reasonably explained that [REDACTED] AR 417 n.285.

The foregoing explanations, like the many other explanations in the balance of the final basis, carefully detail each component of the analysis. AR 431–636; *see also* FSOC Br. 15–18. Taken together, they "cogently explain why [the Council] has exercised its discretion in a given manner, and . . . enable[the Court] to conclude that the [Council's] action was the product of reasoned decisionmaking." *Ass'n of Private Sector Colls. & Univs. v. Duncan*, — F. Supp. 3d

—, No. 14–1870, 2015 WL 3866659, at *8 (D.D.C. June 23, 2015) (internal citations and quotation marks omitted). On arbitrary and capricious review, "nothing more" is required. *Id.*

B. MetLife's Purported "Principles of Risk Analysis" Ignore the Text and Purpose of Section 113.

In designating MetLife, the Council considered a range of plausible outcomes of MetLife's material financial distress. *See, e.g.*, AR 366 ("the discussion herein addresses a range of outcomes that are possible but vary in likelihood"); AR 566 ("it is necessary to consider a wider range of plausible assumptions in order to understand the potential impact of MetLife's material financial distress"). But in MetLife's view, the Council was required to "examine both the probability and magnitude of harm" from MetLife's distress. ML Br. 35 (emphasis omitted). Relying primarily on a guide to health and environmental risks and on models of bank stress testing, MetLife posits the existence of certain "accepted risk analysis methodologies" and faults the Council for not taking those approaches. *Id.* 33–37. Even if MetLife were correct that there were such a thing as a universally accepted risk-analysis methodology to evaluate a company's financial strength (and there is not), MetLife has not shown that any such approach is contemplated by the standards and criteria for designation under Section 113(a), much less that the Council's approach—which aligns squarely with the "could pose a threat" standard under Section 113(a)(1)—is so unreasonable as to be arbitrary and capricious.

The most glaring problem with MetLife's claim is that it confuses the distinct analytical exercises of considering whether inherently uncertain outcomes "could" occur, on the one hand, with estimating the absolute "probability" or "likelihood" of specifically defined outcomes, on the other. *See* ML Br. 35–36. Far from requiring the Council to identify a specific quantum of risk or specific level of possible "harm" to U.S. financial stability that merits designation, Section 113 requires that the Council weigh various company-specific, risk-related factors to

make an expert judgment as to whether there are circumstances in which the company's distress "could pose a threat to the financial stability of the United States," 12 U.S.C. § 5323(a)(1). *See also supra* Part I(A)(1), at 5 (discussing text and purpose of the "could pose a threat" standard under Section 113(a)(1)); *see infra* Part II(A), at 37–38 & n.30 (explaining Section 113's prophylactic purpose). The Council properly declined to quantify the "probability" or "likelihood" of a threat to U.S. financial stability, explaining that such a standard would set "an unduly high and falsely precise threshold" and "impede the Council's ability appropriately to address potential threats to U.S. financial stability," AR 384; *see also* 77 Fed. Reg. 21,642 (AR 6) ("[T]he Council does not believe that a determination decision can be reduced to a formula."). Indeed, "the complex and dynamic nature of systemic-risk analysis often renders quantitative measures unduly narrow or even misleading in this context."[8] ECF 30-1, Law and Finance Professors Amicus Br. 22. In any case, MetLife provides no basis on which the Court could conclude that the Council's failure to use MetLife's "risk analysis methodologies" renders the Council's approach—which involves predictive judgments under the "could pose a threat" standard, based on a range of qualitative *and* quantitative information[9]—arbitrary and

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[8] The *amici* supporting the Council's designation of MetLife independently conducted a "purely quantitative" assessment of MetLife's systemic risk, concluding that MetLife ranks fifth among all U.S. financial companies of any kind based on its degree of systemic risk. ECF 32-1, Brief of Professors Viral Acharya et al. as Amici Curiae In Support of Defendant 26. *Amici* concluded that their assessment "strongly support[s] the FSOC's conclusion," while noting that their calculation does not reflect the qualitative considerations that Congress required the Council to consider. *Id.*

[9] In all events, it is difficult to reconcile MetLife's assertions that the Council's analysis was "speculative" with the fact that the 341-page final basis is replete with quantitative analyses. To take just a few examples, the Council analyzed exposures to MetLife through the capital markets, AR 454–89, 684–85; the amounts of MetLife's total and restricted assets, AR 543–44; and MetLife's leverage, AR 549–555. The final basis also sets forth a detailed quantitative fire-sale impact analysis. AR 686-697. The Council also noted quantitative risk measurements used by

capricious.[10] *See Sierra Club v. U.S. Dep't of Transp.*, 753 F.2d 120, 128 (D.C. Cir. 1985) (it "is clearly within the expertise and discretion of the agency to determine proper testing methods"); *Catawba Cnty., N.C. v. EPA*, 571 F.3d 20, 39 (D.C. Cir. 2009) ("Nor do we agree with petitioners that EPA's failure to quantify its analysis somehow rendered its interpretation . . . arbitrary and capricious"); *Int'l Union, UAW v. Pendergrass*, 878 F.2d 389, 392 (D.C. Cir. 1989) (OSHA regulation to diminish a "significant risk of harm" did not require "precise estimate" or "duty to calculate the exact probability of harm").

MetLife's claim that the Council's "assumptions were predicated on illusory risks," ML Br. 38, is similarly unavailing. As explained below, the Council's analysis was not "ahistorical," *infra* Part I(C), at 20–21, and the Council rationally explained its conclusions concerning policyholder surrenders or withdrawals, *see infra* Part I(E), at 28–31. *See Rural Cellular Ass'n*

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market participants including "S-risk," under which MetLife ranks highly, and in one S-risk analysis "is placed fourth in the systemic risk top-10 list for U.S. financial companies." AR 687 n.1454.

[10] MetLife's insistence that the Council was required to consider the approach found in bank-specific stress tests is puzzling (as well as ironic, given MetLife's strenuous attempts elsewhere in its brief to emphasize the distinction between "traditional insurance activities" and banking, *see, e.g.*, ML Br. 6. Bank-specific stress tests are aimed primarily at identifying whether an individual bank holding company may have too little capital to withstand a crisis—not to assess whether the company has the potential to transmit its distress to the broader financial system. *See, e.g.*, Federal Reserve, "Stress Tests and Capital Planning" (last updated June 25, 2014), *available at* http://www.federalreserve.gov/bankinforeg/stress-tests-capital-planning.htm. It is therefore unsurprising that Congress did not refer to stress tests anywhere in Dodd–Frank's subtitle A, which establishes the Council and its duties and authorities. By contrast, a separate part of the statute—subtitle C, which grants the Federal Reserve additional authority with respect to certain nonbank financial companies and bank holding companies—requires the Federal Reserve and certain other regulators to conduct stress tests that provide for "at least 3 different sets of conditions . . . including baseline, adverse, and severely adverse." 12 U.S.C. § 5365(i)(1)(B)(i). The specific conditions set forth for those stress tests starkly contrast with Congress's delegation of broad authority to the Council under Section 113, which requires instead that the Council weigh a number of company-specific qualitative and quantitative factors to determine whether a company's distress "could pose a threat" to U.S. financial stability.

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v. FCC, 588 F.3d 1095, 1108 (D.C. Cir. 2009) (FCC "enjoys broad discretion in exercising its predictive judgment to determine the point at which [subsidies and fees] might become so large as to risk making basic telephone services unaffordable" and, thus, "to determine the point at which it must take immediate action to prevent irreversible damage to the . . . market generally").

C. The Council Adequately Considered MetLife's Existing Regulation and Rationally Explained Its Analysis and Conclusions.

Although MetLife complains that the Council's analysis of existing state regulation of MetLife was based on "mere speculation," ML Br. 41–45, it is clear that MetLife merely disagrees with the Council's conclusions. In all events, MetLife's arguments cannot detract from the fact that the Council clearly satisfied its obligation under Section 113(a) to "consider . . . the degree to which the company is already regulated," 12 U.S.C. § 5323(a)(2)(H).

1. The Council Reasonably Concluded that MetLife's Existing State Regulation Does Not Fully Address the Risks Posed By MetLife's Material Financial Distress.

MetLife mistakenly asserts that the Council "assum[ed] the utter ineffectiveness of state regulators."[11] ML Br. 41. As already explained in its opening brief, FSOC Br. 16, 28, the Council did no such thing. Rather, after carefully considering MetLife's existing regulation—which principally addresses policyholder protection, not threats to financial stability—the

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[11] *Amici* supporting MetLife largely reiterate many of the considerations regarding insurance and state insurance regulation that the Council assessed in the final basis. *E.g.*, ECF 43-1, Nat'l Ass'n Ins. Comm'nrs Amicus Br. 5–21 (describing aspects of state regulation such as risk-based capital, supervisory colleges, examination authority, hazardous condition findings, and insurer solvency laws). But, like MetLife, these *amici* focus on the regulation of life insurance generally, ignoring the Council's concerns about MetLife's capital markets activities and complex financial transactions that go far beyond the "traditional" life insurance business and result in exposures throughout the financial system and short-term liabilities that could lead to fire sales of assets. *E.g.*, ECF 44-1, Am. Council of Life Insurers Amicus Br. 2 (offering the court "a unique industry-wide perspective on . . . traditional life insurance companies); ECF 46-1, Academic Experts Amicus Br. 8 (arguing that insurance companies "tend to have long-term liabilities").

Council concluded that while the existing regulation may effectively mitigate some potential risks to financial stability, AR 379, it does not address many others. FSOC Br. 16, 28; AR 377–80, 394, 594–608. For example, the Council noted that MetLife is no longer supervised on a consolidated basis, though it had been supervised by the Federal Reserve from 2001 until 2013 when it was a bank holding company. AR 377, 594. Accordingly, no single regulator has consolidated supervision over the company, and state regulators do not have authority over all of the company's affiliates or international activities.[12] AR 599. Further, the Council determined that a resolution of MetLife, in the event of its insolvency, could be complicated by the multiplicity of regulators—state, federal, and foreign—with authority over MetLife's many divisions.[13] AR 610. Indeed, MetLife's resolution (*i.e.*, winding down) could 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. An important purpose of the Council is to help prevent future crises and protect financial stability by "closing loopholes, improving consolidated supervision, and establishing robust regulatory oversight." 155 Cong. Rec. H. 14409 (Dec. 9, 2009) (statement of Rep. Perlmutter).

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[12] For example, the Council found that state regulators' authorities have never been tested by an event of material financial distress at an insurance company of the size, scope, and complexity of MetLife's large insurance subsidiaries. AR 630. Further, states' examinations of MetLife may not be completed or reported until years after the fact. AR 596.

[13] *See* ECF 34-1, Insurance Scholars Amicus Br. at 8 ("In sharp contrast to the group-level regulatory scrutiny of financial conglomerates that systemic-risk regulation demands, state insurance regulation focuses almost exclusively on individual insurance companies and not their holding companies. . . . Even if it wanted to, no state has the legal or practical ability to conduct umbrella oversight of insurance groups for systemic risk. From a legal standpoint, state insurance regulators lack meaningful authority over insurance holding companies or their non-insurance subsidiaries.").

Further, MetLife makes several assertions that the Council "disregarded" or "ignored" evidence concerning MetLife's existing regulation. Each is baseless and is flatly contradicted by the Council's final basis:

Intervention by State Regulators. The Council extensively considered state regulators' authority to impose stays on policyholder withdrawals and surrenders in the event of MetLife's distress, *e.g.*, AR 363, 373, 378, 447–48, 450, 495, 501, 521–22, as well as the potential effects of a fire sale of assets by MetLife if no stay were imposed, AR 499–583. As detailed below in Part I(E), at 28–31, the Council found that imposing such a stay on MetLife's millions of policyholders and contract holders could undermine confidence in the broader life insurance industry and spread uncertainty to the customers of other insurance companies with similar products, and potentially to other counterparties and investors. AR 495. The Council's analysis was based in part on historical evidence regarding policyholder contagion in the insurance industry, including an analysis of insurer failures in the 1980s and 1990s. AR 495–96.

The Council also considered the views prepared by MetLife's consulting firm, Oliver Wyman, and explained why Oliver Wyman's conclusions concerning the potential for contagion had limited value, including that there is no historical precedent for the failure of an insurance organization of the size, scope, and complexity of MetLife. In particular, the Council noted that the assets of the three largest U.S. insurers cited in Oliver Wyman's analysis totaled $38 billion, which amounts to less than 10% of MetLife's general account assets ($570 billion as of mid-2013). AR 497. In the Council's view, such weaknesses "significantly limit[][ed] any predictive value for policyholder behavior" of Oliver Wyman's analysis. AR 497.

Coordination Among State Regulators. MetLife asserts that the Council "disregarded evidence of the effective coordination between state regulators." ML Br. 42. In fact, the record

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reveals that the Council carefully considered the collective effect of state regulators' oversight of MetLife. *See, e.g.*, AR 599 (describing "supervisory colleges" that meet annually or semiannually and noting that they do not "have direct supervisory authority over the holding company or its non-insurance subsidiaries").

State Guaranty Associations. MetLife asserts that the Council "dismissed the state Guaranty Associations as presumptively unable to handle a resolution of MetLife." ML Br. 43. In truth, the Council weighed the strengths and weaknesses of the state guaranty associations, considering, among other things, guaranty associations' historical uses, purposes, and capacity, and noting that [REDACTED]

[REDACTED]

[REDACTED] AR 448–54. The Council found that guaranty associations may have insufficient capacity to handle a resolution of MetLife's insurance subsidiaries, due to MetLife's size, scope, and broad national presence; for example, MetLife estimated that [REDACTED]

[REDACTED]

but the total annual assessment capacities of the guaranty associations of all 50 U.S. states, the District of Columbia, and Puerto Rico were just \$2.9 billion for life insurance and \$3.4 billion for annuities. AR 434, 448–54.

Captive Reinsurance, Securities Lending, and Guaranteed Investment Contracts. MetLife also disagrees with the Council's conclusions regarding the extent to which existing regulation mitigates potential risks arising from the company's complex financial products and activities. ML Br. 43–44. As explained in its opening brief, FSOC Br. 26–30, the Council addressed each of MetLife's objections in the final basis. For example, the Council noted that MetLife's use of captives increases the company's short-term liquidity and refinancing risks, and

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increases its opacity. AR 419, 600–01. Further, while MetLife asserts that regulators' reliance on risk-based capital mitigates risks arising from the use of captive reinsurance,[14] ML Br. 43 n.19, the Council explained that the use of captive reinsurance renders risk-based capital a less relevant indicator of a company's risk profile, AR 419. For example, the Council estimated that [REDACTED] AR 423. The Council also noted that numerous organizations—including the Federal Insurance Office, the Federal Reserve Bank of Minneapolis, credit rating agencies, state insurance regulators, and the National Association of Insurance Commissioners—have focused their attention on the increasing use of captive reinsurance transactions that are intended to reduce a company's overall capital and reserves without actually transferring risk outside of an insurance holding company system. AR 420–21. Against that backdrop, MetLife's assertion that the Council's concerns about captive reinsurance are "manufactured illusory shortcomings," ML Br. 43, is simply not credible.[15]

Historical Performance. Nor does the Council's analysis "def[y] historical fact and real-world experience[s] at every turn," as MetLife charges, ML Br. 56. For example, contrary to MetLife's erroneous assertion that the Council disregarded MetLife's performance during past

[14] With respect to risk-based capital, the Council also determined that the calculation of life insurance risk-based capital excludes certain risks that are relevant for the Council's analysis, including tail risks, liquidity risks, and specific operational risks. AR 597. The Council also found that if MetLife were to rapidly enter material financial distress, the risk-based capital framework might not provide sufficient time for state insurance regulators to respond, because available data relating to the company's condition could be stale. AR 597–98.

[15] MetLife also erroneously asserts that the Council engaged in "double counting of a collateral financing arrangement [that] caused it to overstate MetLife's unsecured credit and committed facilities exposure by a factor of three." ML Br. 44. In fact, the final basis repeatedly notes that [REDACTED] AR 440, 456, 491.

crises, *id*. 38, the Council explicitly considered the significant decreases in MetLife's equity capital, its share price, and the value of its assets during the recent financial crisis, AR 427–28. The Council also found that MetLife increased its reliance on borrowings from Federal Home Loan Banks during the crisis, from $4.6 billion at the end of 2007 to $15.2 billion at the end of 2008, AR 429, and that MetLife experienced reduced access to funding through funding agreement–backed securities, AR 431. In addition to addressing MetLife's arguments about its historical strength, AR 427–31, these findings contributed to the Council's analysis of the ways in which MetLife's characteristics and vulnerabilities could contribute to the potential for the firm's distress to pose a threat to financial stability, AR 431.

2. MetLife's Reliance on Statements of a Non-Voting Member and Dissenting Member of the Council Is Unavailing.

MetLife's assertion that the Council gave insufficient consideration to the views of dissenting Council members or state insurance commissioners is mistaken. *See* ML Br. 55–56. In fact, the final basis repeatedly addresses the substance of those views, although it does not specifically cite to the dissenters or the state regulators every time it discusses an issue on which there was a difference of opinion. For example, the Council addressed dissenters' concerns about the Council's asset liquidation analysis, *see* AR 499–583, and about certain mitigants to the risks posed by exposures to MetLife, *see* AR 455.

While the Council considered the views of the three Council members with specific insurance expertise (two of whom disagreed with the designation),[16] it also appropriately took into account the views of its members with relevant expertise in the U.S. economy, financial institution insolvencies, capital markets, derivatives, and consumer financial protection. Much

[16] Federal Insurance Office Director McRaith, like Commissioner Adam Hamm, is a nonvoting member of the Council.

of the Council's analysis focused not on what the company calls its "traditional" life insurance business, but on MetLife's complex financial transactions and capital market activities, and the ways in which those activities could cause MetLife's distress to impair financial market functioning.[17] Financial-stability issues cross regulatory jurisdictions.

D. The Council's Analysis of Counterparties' Exposures to MetLife Was Rational and Consistent with the Statutory Purpose.

MetLife next argues that the Council's analysis under the "exposure channel" should have focused on estimates of the actual losses that are likely to be experienced by MetLife's counterparties and investors in the event of MetLife's distress. *See* ML Br. 45–49. As explained below, the Council's analysis under the exposure channel accords with a key lesson of the financial crisis—that focusing solely on the direct and quantifiable losses of counterparties would understate the risks at issue, because such a narrow focus would ignore the means by which the distress of a large, interconnected financial institution could destabilize the U.S. economy.

1. The Council Provided a Well-Reasoned Explanation for Its Determination That MetLife's Distress Could Pose a Threat Through the Exposure Channel.

The Council found that, in the event of material financial distress, MetLife's inability to pay its obligations to investors and counterparties—which include large, significantly interconnected financial companies—could expose them to significant losses. This conclusion is consistent with the "exposure channel" described in the Council's interpretive guidance: based on experience from the 2008–09 financial crisis, a company's distress could impair U.S.

[17] Indeed, even the dissenting voting member wrote that he "share[s] concerns about some of MetLife's activities, particularly in the non-insurance and capital markets activities spheres, and in the resulting exposures identified and described in the [Council's final basis]," which "might conceivably pose a threat to the U.S. financial stability under certain circumstances." AR 656.

financial stability through the exposures that counterparties and other market participants have to the company. *See* FSOC Br. 10 (describing the "exposure channel"); *see also* 77 Fed. Reg. 21,657 (AR 21).

The Council also concluded that MetLife's distress could lead to significant market uncertainty, which, in turn, could propagate disruptions across the financial system. For example, 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. AR 494-98. Preventing such a "contagion effect," which, as the 2008–09 financial crisis showed, can greatly destabilize markets, was an animating force behind the government's decision to offer AIG a lifeline to save it from failure. AR 494; *see also* FSOC Br. 5-10, 16.

In considering the possible impact of exposures to MetLife, the Council relied heavily on quantitative assessments, evaluating and measuring numerous types of exposures. For example, the Council considered the importance of exposures to MetLife by comparing their size to counterparties and to the U.S. economy, and assessed relevant risk mitigants, such as the amount and nature of collateral held by counterparties. *See, e.g.*, AR 432–42, 488, 490. As even MetLife admits, the Council "identif[ied] and describe[d], one-by-one, the different types of financial arrangements that MetLife enters." ML Br. 47. Indeed, as explained in detail in the final basis, the Council found that MetLife's activities or products that could expose counterparties and investors to losses in the event of distress include MetLife's $35 billion of outstanding funding agreement–backed securities, $30 billion securities lending program, $48 billion of guaranteed investment contracts, $19 billion of long-term and junior subordinated debt, $5 billion of derivatives liabilities, $16 billion of unsecured credit and committed facilities, and

$61 billion of outstanding equity securities. *See, e.g.*, AR 760, 763. In addition, some 100 million insurance policyholders and contract holders could face losses in the event of MetLife's distress. AR 432–98, 759–63; FSOC Br. 15–16.

2. MetLife's Objections to the Council's Exposure Channel Analysis Misunderstand the Relevant Inquiry.

MetLife contends that the Council erred by declining to estimate the losses that market participants are likely to incur in the event of the company's distress. ML Br. 45–49. For example, MetLife argues that it should not have been designated because the eight largest U.S. bank holding companies passed the Federal Reserve's most recent CCAR test. ML Br. 45–46. These claims ignore a key lesson of the financial crisis—that focusing solely on the direct and quantifiable losses of counterparties understates the risk that can arise both from simultaneous losses imposed on a wide array of counterparties, as well as from the possibility that uncertainty regarding the extent of potential losses will lead market participants to pull back from a range of firms and markets. As the Council noted, markets can be destabilized as a result of "relatively modest direct, individual losses" at numerous financial institutions. AR 493. Indeed, the Council explained in the final basis that (1) exposure estimates "assist in an analysis of the company's interconnectedness and a comparison of exposures to MetLife with exposures to other financial institutions," AR 489; (2) in the event of MetLife's distress, market participants' uncertainty regarding other entities' exposures to MetLife may lead to protective behavior "such as reducing exposures to counterparties and customers, selling illiquid assets, or pulling back from other risky activities to increase liquidity in anticipation of an unmeasurable shock," AR 441; (3) and investors such as money market mutual funds, which are focused on the market liquidity and value of their holdings of MetLife's debt securities, are highly sensitive to "even a small drop in the value of MetLife's debt securities," AR 490–91.

The Council's explanation of its exposure analysis was consistent with Congress's purpose in establishing the Council's authority under section 113. *See, e.g.*, *AIG: Hearing Before H. Comm. On Fin. Servs.*, 111th Cong. (2009) (statement of Chairman Bernanke) ("Moreover, as the Lehman case clearly demonstrates, focusing on the direct effects of a default on AIG's counterparties understates the risks to the financial system as a whole. Once begun, a financial crisis can spread unpredictably."), *available at* http://www.federalreserve.gov/newsevents/testimony/bernanke20090324a.htm.[18] Thus, it was reasonable for the Council not to rely on the outcome of the Federal Reserve's stress tests, because the standard for designations under Section 113 is different than that for a stress test, which asks whether a particular firm is strong enough to withstand market disruptions.[19]

[18] Particularly in light of the recent financial crisis, MetLife's claim that the Council's consideration of contagion violates the Dodd–Frank Act, Compl. ¶ 106, is baffling. As the Council explained in the final basis, its consideration of the potential for contagion and the impact of contagion on markets was well-grounded in recent history and supported by academic literature. AR 492–98.

[19] For similar reasons, MetLife's argument based on bank damages and fines is off the mark. MetLife argues that the Council's conclusions are incorrect because MetLife's own estimates of potential counterparty losses are less than damages and fines paid by three banks in recent years (ranging from $8.9 to $16.7 billion), which did not trigger material financial distress in those institutions. ML Br. 46. The Council extensively analyzed the amount and nature of exposures to MetLife in the final determination, with findings including that capital markets exposures to MetLife totaled $183 billion, and that five of the largest bank holding companies had exposures to MetLife of between 4% and 11% of their equity value. AR 435. These exposures are unlike damages and fines paid by banks; for example, fines and damages are often foreseen months or years in advance, are often imposed when markets are not generally stressed, are frequently specifically reserved for by firms, so that the losses are accounted for months or years in advance, and are limited to the specific firm or firms subject to the fine, rather than simultaneous losses across a large number of firms. It was therefore reasonable for the Council not to consider damages and fines paid by banks as indicative of the potential effects of MetLife's distress. *Cf. Thompson v. Clark*, 741 F.2d 401, 408 (D.C. Cir. 1984) (in "assessing the reasoned quality of the agency's decision," the APA has never required "an agency to respond . . . to every issue or alternative . . . no matter how insubstantial") (citation omitted); *see also Tex. Mun. Power*

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Also unavailing is MetLife's disagreement with the Council's calculation of the total exposures of counterparties,[20] *see* ML Br. 47, which seeks to replace the Council's estimates of *exposures* with MetLife's guesswork about likely counterparty *losses*. As the Council explained, "the exposure estimates are not estimates of market participants' expected losses." AR 491. In this vein, MetLife asserts that the calculation of total exposures should be reduced based on factors such as collateral held by third parties and expected amounts that counterparties could recover from MetLife in the event of its default. ML Br. 44, 48. MetLife also argued for the exclusion of $18 billion of loans to MetLife from Federal Home Loan Banks and from Farmer Mac, and the exclusion of letters of credit that third parties are committed to provide MetLife in certain circumstances. AR 491. But the Council carefully considered and reasonably rejected each of these arguments. AR 489–92. For example, it determined that reducing exposure estimates based on expected recovery rates is inappropriate in an evaluation of exposures, because it essentially seeks to convert the exposure analysis into an estimate of expected losses;

Agency v. EPA, 89 F.3d 858, 870 (D.C. Cir. 1996) (an "agency need not respond to comments if that response would mainly restate 'what had already been set forth' in [a] published notice").

[20] Specifically, MetLife asserts that it "demonstrated" that "FSOC's estimated exposure was as many as four times greater than any reasonably possible counterparty loss." ML Br. 47. MetLife estimated aggregate capital markets exposures to the company as $90 billion. AR 489. The Council's estimate, explained in great detail in the final basis, was $183 billion. The Council reasonably concluded that even exposures at the lower ends of these estimates could lead the company's material financial distress to pose a threat to U.S. financial stability. *Id.* In addition, MetLife mistakenly asserts that the Council "erred in identifying the relevant counterparties" with a total of $35.3 billion of exposures arising from MetLife's "U.S. Pension Solutions" business. ML Br. 48. MetLife sharply criticizes the Council for allegedly not acknowledging that plan participants, not plan sponsors, bear the exposure, and thus any losses would be widely dispersed. ML Br. 48. The Council, however, answered this criticism: "Although some of the exposures from MetLife's institutional products for group plans may be dispersed among individual policyholders, material financial distress at MetLife could force pension plans and other institutional users of these products to write down certain of their assets from book value to market value, which could result in significant costs for the pension plans and potentially also for their institutional sponsors." AR 443.

and that simply omitting various existing obligations from the estimates, as MetLife suggested, would exclude significant exposures that market participants have to MetLife. AR 490–91.

The Council also explained that exposures to MetLife that are mitigated through collateral are properly included in the calculation of exposures because they can still pose risks—for example, "if MetLife's counterparties liquidated their significant amount of collateral during a period of overall stress in the financial services industry, these liquidations could place downward pressure on the prices of the assets involved, potentially spreading financial distress to other market participants that hold assets of the same class." AR 490. At the same time, contrary to MetLife's assertion, the Council also considered the extent to which collateral could mitigate risks posed by MetLife. *See, e.g.*, AR 435, 438, 457, 482, 490. The Council determined that while collateral can mitigate direct losses, it does not fully account for the potential negative repercussions of MetLife's distress, for example due to the potential for fire sales of assets held as collateral. AR 489–90.

And contrary to MetLife's assertion that the Council "failed to take any account of" recent regulatory reforms adopted by the SEC for money market mutual funds ("MMFs"), ML Br. 49, the Council specifically addressed those reforms. The Council found that up to 65 MMFs could "break the buck" if MetLife were to default on its funding agreement-backed securities. AR 460, 467. Further, the Council noted that certain of the SEC's recent reforms do not apply to retail MMFs, which comprise a majority of those MMFs that hold MetLife's funding agreement-backed securities. *Id.* In any event, the SEC's reforms will not be implemented until October 2016, 79 Fed. Reg. 47,932 (Aug. 14, 2014), so any mitigation of potential risks relating to MetLife from those reforms has not yet occurred. *See* AR 369 n.39, 436 n.397, 460 n.522, 467 n.540. The Council's exposure channel analysis is thus reasonable and entitled to deference.

E. The Council Provided a Reasoned Explanation for Its Analysis Under the Asset Liquidation Channel.

In addition to its conclusions under the exposure channel, the Council set forth another ground for its designation of MetLife: the asset liquidation channel. Here again, MetLife contests nearly every aspect of the Council's judgment, but its arguments do not undermine the reasonableness of the Council's analysis and conclusions. The Council found that if MetLife were to experience material financial distress, it could face sudden liquidity strains, forcing it to quickly sell assets for cash to satisfy its obligations, AR 499–583; FSOC Br. 13–14, 16–17.

[REDACTED]

[REDACTED] AR 543.

The Council found that a resulting fire sale of MetLife's assets could cause their market values to plummet, destabilizing markets. AR 372–76. The Council also found that those seeking to mitigate the resulting losses in the values of their own assets could, in turn, sell more assets, further destabilizing markets.[21] AR 499. The Court should defer to these predictive judgments.

Policyholder Surrenders and Withdrawals. MetLife claims that the company could not face liquidity strains from surrenders and withdrawals because its "customers will not irrationally act contrary to their own economic self-interest" and policyholder surrenders can be stayed by state regulators' moratoria, or payments on the surrenders can be deferred by MetLife for up to six months. ML Br. 50–51. As an initial matter, MetLife's claim ignores that the Council identified several other sources of potential liquidity strains at MetLife that are independent of policyholder surrenders, including its issuance of liabilities such as short-term notes and

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[21] *Amici* in support of the Council confirm the reasonableness of the Council's asset liquidation analysis. *See, e.g.*, ECF 32-1, Economics Professors Viral Acharya et al. Amicus Br. 21, 23 (noting that "the concerns raised by the FSOC" regarding a potential fire sale of relatively illiquid assets by MetLife "are legitimate").

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commercial paper through funding agreement–backed securities programs, its securities lending activities, and its guaranteed investment contracts. *See* FSOC Br. 13. MetLife's brief fails to meaningfully address any of these points.[22]

In any event, the Council rationally addressed MetLife's arguments about policyholder surrenders and withdrawals. AR 524–32. The Council found that, while disincentives like penalties may reduce the scope of withdrawals, significant portions of potential withdrawals would not be subject to those disincentives. AR 525 (noting that [REDACTED] The Council also explained that it may not be "irrational," as MetLife claims, for an institutional counterparty or policyholder to withdraw from an insurance company that is on the brink of insolvency: institutional investors can rapidly lose confidence in a firm and unexpectedly retreat from it, while MetLife policyholders can withdraw a total of $50 billion from MetLife with little or no penalty. AR 500. The Council also noted that retail customers' expectation of liquidity may have risen because MetLife and other insurers have marketed retail insurance and annuity products as financial assets with

[22] The Council's asset liquidation analysis is detailed in Section 4.3 of the final basis, AR 499–583. The Council analyzed the features of MetLife's financial arrangements with institutional counterparties and retail policyholders that allow them to withdraw from MetLife in the event of the company's distress and thereby potentially trigger a liquidity strain and fire sales by MetLife. AR 499–503. The Council identified risks such as the $31 billion of MetLife's funding agreement–backed securities that matured or were subject to renewal by investors in the first six months of 2013, AR 508; $30 billion of MetLife's securities lent that can be returned to the company in exchange for cash within 90 days, AR 514; [REDACTED] (including $50 billion of U.S. general account liabilities that may be withdrawn for little or no penalty), AR 500, 520; and $116 billion of policyholder liabilities against which MetLife's customers can take out policy loans, AR 535.

guaranteed liquidity and other features that allow policyholders to access the funds in times of need. AR 570.

The Council also found that certain of MetLife's other arguments about surrender disincentives were based on faulty assumptions. For example, it noted that MetLife's proposed comparison of cash surrender values to a "notional benefit" may not appropriately consider either the time value of money or the requirement for policyholders to continue making payments to a distressed MetLife despite their understandable doubts about MetLife's continued claims-paying ability. AR 525. Surrender disincentives could serve as less of a deterrent if MetLife's ability to meet its obligations were in doubt; in the event of MetLife's material financial distress, surrender disincentives may be overridden by a policyholder's desire for perceived safety and liquidity, especially where there is no meaningful surrender penalty. AR 517–39. The Council's conclusions are firmly grounded in concrete analysis of policyholders' contractual rights, the financial characteristics of the surrender disincentives, the existence of countervailing incentives to withdraw from MetLife in the event of the company's distress, and historical insurer insolvencies. *See* ECF 34-1, Insurance Scholars Amicus Br. 15-19 ("policyholders who become concerned about their carrier's solvency may well demand withdrawals, cash surrender values, or policy loans, producing a run on liabilities analogous to a classic bank run").

Further, the Council's asset liquidation analysis did not depend on an assumption that regulators would not impose a moratorium on policyholder withdrawals, as MetLife appears to suggest. FSOC Br. 501–51. Rather, the Council analyzed both scenarios: if the regulators impose a stay, *see* AR 363, 373, 378, 447–48, 450, 495, 501, 521–22, and if they do not, AR 499–583. Among other things, the Council noted that a regulatory stay would apply only to the

$142 billion of withdrawable life insurance liabilities, not MetLife's other liabilities. AR 495. The Council also found that, in light of the scope and scale of MetLife's insurance businesses, invoking a stay on withdrawals from MetLife could undermine confidence in the broader life insurance industry and spread uncertainty to the customers of other insurance companies with similar products, and potentially to other counterparties and investors.[23]

The Council's detailed findings are amply supported by the record, including historical evidence and relevant research literature. *See, e.g.*, AR 496 nn.672 & 673 (citing GAO study and economic research).[24] *See also* ECF 34-1, Insurance Scholars Amicus Br. 16–19 (noting potential risks from the imposition of a stay on MetLife). They merit deference here.

MetLife's Asset Liquidation Study Prepared by Oliver Wyman. MetLife next contends that the Council failed to disclose the calculations it used in evaluating the asset liquidation analysis prepared for MetLife by Oliver Wyman, and that the Council unreasonably rejected

[23] MetLife erroneously asserts that a reference in the final basis to a potential "crisis of confidence" in the life insurance industry that could be triggered by a stay on withdrawals from MetLife constitutes "an entirely new rationale for designation." ML Br. 51. In fact, a loss of confidence in the stability of the insurance industry is relevant to the Council's analysis of exposures to MetLife, in which the Council noted that markets can be destabilized when financial institutions pull back from markets to reduce their exposures. That behavior can impair financial market functioning. AR 492-94. Even if MetLife were correct that this analysis somehow does not fit squarely within the "transmission channels" described in the Council's interpretive guidance, the guidance expressly allows the Council to consider other relevant ways in which a company's distress may threaten U.S. financial stability, 77 Fed. Reg. 21,657 (AR 21), and the Council included this analysis in the basis for its proposed determination regarding MetLife, AR 153.

[24] MetLife asserts that the Council's findings regarding the potential harm arising from a stay were somehow inconsistent with the fact that designation enables the Federal Reserve to order the company to take risk-reducing actions, which may include requiring the company to terminate some of its activities. ML Br. 51. But there is an obvious difference between state insurance regulators prohibiting policyholders from extracting their cash from MetLife in the event of the company's distress, on the one hand, and the Federal Reserve as regulator ordering the company to cease engaging in certain risky activities, on the other.

MetLife's proposed conclusions from Oliver Wyman's analysis. ML Br. 51–53. In reality, the Council found that a number of the assumptions Oliver Wyman used in creating its "Scenario Three" were not in fact "conservative," as MetLife asserts, ML Br. 52, but instead underestimated the negative effects of MetLife's asset sales, AR 576–82.[25] For example, the Oliver Wyman study assumed that MetLife, in material financial distress, could sell assets over a six-month period in order to pay its obligations. The Council noted that material financial distress can occur in a substantially shorter timeframe (as it did during the recent financial crisis) and considered the effects of MetLife's asset liquidation over alternative periods of 90, 30, or 14 days. AR 568–69. Using the plausible alternative assumptions resulted in negative price impacts up to [REDACTED] as detailed in the final basis. AR 574, 576.

Importantly, the Council never claimed that its own asset liquidation analysis predicted the sole way in which MetLife's fire sale could occur. Instead, the Council noted that while "there may be certain scenarios in which MetLife's asset liquidation would not disrupt key markets . . . [t]he application of assumptions for these key variables that are different from—but no less plausible than—Oliver Wyman's generates price impacts that could have significant effects on debt markets." AR 556. Because the Council provided a rational explanation for its conclusions, the Council's predictive judgments—not MetLife's—should be accorded

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[25] MetLife also criticizes the assumptions underlying "Scenario Four" as having "no basis in history or logic." ML Br. 52. But that scenario was created entirely by MetLife's own consulting firm, and the Council made clear that it did not rely on it. AR 567 ("the analysis does not rely on Oliver Wyman's Scenario Four or its assumption that all general account policyholders would surrender their policies").

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deference.[26] *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 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 . . . .").

Inexplicably, MetLife insists that the Council used "unspecified" or "indeterminate" assumptions in testing the Oliver Wyman analysis. ML Br. 53. In reality, the Council specified the three Oliver Wyman assumptions that it adjusted for its testing: (1) the timing of MetLife's liquidity demands and asset liquidations, (2) whether MetLife's counterparties would take actions that accelerate liquidity demands on MetLife, and (3) the order in which MetLife would sell various types of assets. AR 567. The Council disclosed the specific calculations it applied to adjust the three assumptions and explained why these adjustments were appropriate.[27] *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 535 (D.C. Cir. 1983) (agency may use "predictive models" as long as it "explain[s] the assumptions and methodology used"). The Council also noted that several other of Oliver Wyman's assumptions—such as Oliver Wyman's failure to account for the fact that more than $64.5 billion of MetLife's assets "are restricted and may not be readily available for immediate sale," AR 579—had the effect of

[26] Further, the Council reasonably tested the Oliver Wyman study's assumptions, as MetLife itself had acknowledged that some of its study's assumptions were not realistic. AR 577 ("Oliver Wyman's asset sale model does not reflect the assumed constraint that assets will be liquidated in an order that does not compel insurance regulators to intervene. . . . MetLife notes that, in reality . . . it would sell a mix of assets across a number of asset classes rather than proceed with sales of assets in order from most liquid to least liquid.").

[27] The final basis details the Council's methods of calculating the timing of liquidity demands and asset liquidations, *see* AR 568–69; counterparty actions, AR 574–75; and order of potential asset sales by MetLife, AR 578–79.

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reducing Oliver Wyman's estimates of the potential harm from MetLife's asset sales, but the Council did not adjust Oliver Wyman's model to address those deficiencies. Therefore, the company's claim that it had no opportunity to consider the Council's analysis before the designation, ML Br. 53, is baseless. AR 247–48.

Monte Carlo Simulation. MetLife also challenges the Council's use of a Monte Carlo simulation to model the effects of hypothetical asset sales by MetLife, arguing that it failed to take into account the "fiduciary obligations" of MetLife's officers and directors to "maximize the recovery for MetLife's shareholders and policyholders." ML Br. 54. MetLife's claim obscures the fact that the Council applied the Monte Carlo simulation only because it found that MetLife's own prediction of the order of hypothetical asset sales, which MetLife presented to the Council in its Oliver Wyman analysis, depended on the unrealistic assumption that the company would sell its most liquid assets first, without adjustments that would be necessary for regulatory purposes. AR 577. In addition, the Council noted that, in the context of market stress, MetLife may face strong incentives to sell less-liquid assets first to obtain a first-mover advantage. AR 577. Indeed, MetLife admitted that, in reality, it would sell a mix of assets across a number of asset classes rather than proceed with sales of assets in order from most liquid to least liquid. AR 577.

In light of the uncertainty regarding the potential order of asset sales—and importantly, the company's acknowledgement that it would sell a mix of assets rather than conforming to Oliver Wyman's unrealistic assumptions—the Council acted reasonably when it applied a Monte Carlo simulation, a standard technique for determining average values across a range of potential scenarios. AR 578; *see also* ECF 30-1, Law and Finance Professors Amicus Br. at 23 n.22 (noting that the Monte Carlo method "has been established in the finance literature for at least

forty years and has been applied to a wide variety of well-known problems in the field"). The Council conducted its analysis by creating 500 randomized potential asset liquidation scenarios, all of which used Oliver Wyman's assumptions other than the order of asset sales, and then averaging the resulting price effects. The Monte Carlo analysis confirmed the Council's conclusion that Oliver Wyman's approach resulted in significant understatements of the harm that could arise from MetLife's fire sales. AR 577–79.

This approach, which "involve[s] complex judgments about . . . data analysis that are within the agency's technical expertise," merits an "extreme degree of deference." *Alaska Airlines Inc. v. TSA*, 588 F.3d 1116, 1120 (D.C. Cir. 2009) (citation omitted); *see also* ECF 32-1, Economics Professors Viral Acharya et al. Amicus Br. 23 (noting that "[i]f MetLife were to face financial distress and liquidate its holdings [of U.S. corporate debt securities or asset-backed securities], it would certainly need to sell them at fire-sale prices—resulting in losses that would spread to other financial firms").

II. THE COUNCIL REASONABLY CONCLUDED THAT IT NEED NOT CONDUCT METLIFE'S PREFERRED "VULNERABILITY ANALYSIS."

MetLife argues that, before designating the company, the Council was required to conduct a threshold assessment of MetLife's "vulnerability" to material financial distress by determining the "likelihood" of such distress. ML Br. 26. But MetLife's preferred "vulnerability analysis" is at odds with the statute's text, context, and purpose, as well as with the Council's interpretive guidance. FSOC Br. 31–34. Indeed, because the statute provides for the Council to *assume* material financial distress under the first determination standard, MetLife

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cannot show that the Council acted unreasonably by declining to evaluate the "likelihood" or "probability" that MetLife would experience material financial distress.[28]

A. The Council Reasonably Declined to Assess the "Probability" or "Likelihood" That MetLife Would Experience Material Financial Distress.

Under Section 113(a)'s first determination standard, the Council may designate a company "if the Council determines that material financial distress at the [company] . . . could pose a threat to the financial stability of the United States." 12 U.S.C. § 5323(a)(1). As the Council has explained, this standard considers whether "material financial distress at the company, if it were to occur, could pose a threat to U.S. financial stability." FSOC Br. 31–32 (quoting AR 383, 744). By contrast, the second determination standard "considers whether a company's present characteristics pose a threat even in the absence of material distress."[29] ML Br. 28.

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[28] Contrary to MetLife's suggestion, *amici* in support of the Council never argued that the Council is required to consider the probability that a company will experience material financial distress. *See, e.g.*, ML Br. 28–29. Quite the opposite; the *amici* in support of the Council who actually addressed this issue confirmed the reasonableness of the Council's approach, explaining that "it was reasonable for the FSOC to focus not on the current probability that MetLife will experience distress, but instead on the likely consequences if MetLife were to experience distress at a time of broader weakness in the financial sector. . . . Such unexpected problems could not be predicted in a 'threshold inquiry into MetLife's vulnerability,' Compl. ¶ 8, as MetLife urges this Court to require, and therefore such an inquiry would fail to address meaningful issues of systemic risk." ECF No. 32–1, Economics Professors Viral Acharya et al. Amicus Br. 9. The *amici* whose brief MetLife cites, *see* ECF 30-1, Professors of Law and Finance Amicus Br. 2, do not purport to address this question.

[29] As demonstrated in the Council's opening brief, the statutory context firmly supports its construction of Section 113(a). FSOC Br. 32. In Dodd–Frank Section 112(a)(2)(H), Congress tasked the Council with designating nonbank financial companies that may pose risks to financial stability "in the event of their material financial distress or failure"—not, for example, if the Council determines that the company "is, or is likely to be, unable to pay its obligations," as Congress wrote in an unrelated provision of Dodd–Frank, 12 U.S.C. § 5383(c)(4)(D). Congress similarly used the term "in the event of material financial distress or failure" in Sections 115 and 165 of Dodd–Frank with respect to the requirement that financial companies

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MetLife argues that the first determination standard precludes an assumption of material financial distress. Yet, it offers no contrary interpretation grounded in the text of that standard. Further, MetLife admits that *no* version of its preferred "vulnerability analysis" appears in the statute. *See* ML Br. 27 (stating that the statute "does not incant the words 'vulnerability,' 'likelihood,' or 'probability'"). In an attempt to sidestep the text of the first determination standard, MetLife suggests that because some of the ten statutory considerations in Section 113(a)(2) "relate to" a company's "vulnerability" to financial distress, ML Br. 27, Congress must have intended to require the Council to consider the "likelihood" or "probability" of material financial distress occurring at the company, *id*. That conclusion does not follow.

In Section 113(a)(2), Congress prescribed ten specific factors that the Council "shall consider" in designating a company under Section 113(a)(1). *See* 12 U.S.C. § 5323(a)(2)(A)–(J).[30] Nowhere among those statutory factors is a requirement that the Council assess a company's "likelihood" or "probability" of experiencing material financial distress. For good reason. As history has shown, distress at nonbank financial companies like AIG and Lehman Brothers can be sudden and unpredictable. FSOC Br. 32–35. Congress established the

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prepare "living wills," to reduce risks *assuming* those companies fail, without consideration of the *likelihood* of their failure. 12 U.S.C. §§ 5325, 5365. MetLife fails to support its conclusory assertion that Section 112(a)(2) "in no way implies that 'the event' should simply be assumed"—likely because MetLife cannot propose any alternative reading of that phrase.

[30] In addition, Section 113(a)(2)(K) provides that the Council is to consider "any other risk-related factors that the Council deems appropriate." 12 U.S.C. § 5323(a)(2)(K). MetLife's alternative argument—that the Council was required to consider the likelihood of the company's distress as an additional "risk-related factor" under Section 113(a)(2)(K), *see* ML Br. 27 n.11, fails for similar reasons that its argument under Section 113(a)(1) fails. The Council's authority is prophylactic under the first determination standard. FSOC Br. 33. The factors set forth under Section 113(a)(2) are relevant to the Council's assessment under the first determination standard. *See infra* Part II(A), at 38–39. Therefore, it was not arbitrary and capricious for the Council to decline to consider the likelihood of a company's material financial distress.

Council's authority to designate nonbank financial companies for the purpose of taking action to address potential threats at a time when they seem unlikely to occur—*i.e.*, well before a company reaches the cusp of failure and the financial system is on the edge of collapse. As explained in the final basis, MetLife's proposed application of the first determination standard "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.'" *Id.* 33–34 (citing AR 384). It is farfetched to suppose that, by directing the Council to consider the ten specific factors listed in Section 113(a)(2), Congress intended to create an implied threshold requirement under Section 113(a)(1) that the Council assess whether a company's material financial distress is demonstrably probable or likely.

While certain considerations under Section 113(a)(2) may relate in some ways to a company's vulnerability to distress, those considerations, more pertinently, are relevant to the judgment Congress actually assigned to the Council: an assessment of *how* a company's distress could pose a threat to U.S. financial stability. *See* AR 385 (explaining relevance of MetLife's leverage, liquidity risk and maturity mismatch, and existing regulation to determination under the first determination standard). In other words, the very risks that can make a company vulnerable to distress can also 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"). This explains their inclusion in Section 113(a)(2): to illuminate the types of risks that are relevant to the question, posed in Section 113(a)(1), of whether a company's distress (or ongoing activities) could pose a threat to U.S. financial stability. MetLife's logic thus fails because, as the company admits, the

first determination standard seeks to assess the potential "impact of a company's material financial distress" on U.S. financial stability, ML Br. 28. Here, the Council reasonably considered all of the statutory factors listed in Section 113(a)(2), including the factors that relate to MetLife's "vulnerability"—such as its leverage, existing regulation, and amounts and types of assets and liabilities—in assessing how these factors could affect the transmission of MetLife's distress to the broader financial system—*not* to address the likelihood of the company's distress. *See* AR 383–96, 746, 757–58.

As a last resort, MetLife argues that a finding of probability or likelihood of distress under the first determination standard is essential for the "statutory framework to function," because otherwise the second determination standard would be rendered a "dead letter." ML Br. 28. But the text and structure of Section 113(a)(1) make clear that the two determination standards are alternative bases for a designation and pose separate inquiries. FSOC Br. 31–32; 12 U.S.C. § 5332(a)(1)(A). MetLife does not resist this conclusion, *see* ML Br. 28, yet the company attempts to conflate the Council's separate authorities in a way that has no basis in the text, context, or purpose of Section 113.[31] Further, the mere fact that the Council has not designated any company under that standard in the two years since the Council's first designation of a nonbank financial company hardly portends that the law is a "dead letter," or

[31] The statutory context and structure confirm that Congress intended to grant the Council discretion to designate a nonbank financial company if either its material financial distress *or* its ongoing activities could pose a threat to U.S. financial stability, with no indication that the Council must make findings as to the likelihood of distress under either scenario. FSOC Br. 32 (quoting Dodd–Frank Section 112(a)(2)). Section 112(a)(1), which sets forth the purposes of the Council, directs it "to identify risks to the financial stability of the United States that could arise from the material financial distress or failure, *or ongoing activities*, of" nonbank financial companies. *Id.* § 5322(a)(1)(A) (emphasis added). The distinction between the risks posed by a company's "material financial distress or failure" and those posed by its "ongoing activities" tracks the Council's authority under Section 113(a)(1) to designate a nonbank financial company under either the first or second determination standard.

that the statutory structure can no longer "function." ML Br. 28. Indeed, it is not difficult to imagine that a company might satisfy the second standard but not the first; as the statute clearly contemplates, a company could meet the second determination standard if its ongoing, risky activities might threaten U.S. financial stability even in the absence of the company's distress or failure. *See* 77 Fed. Reg. 21,657 (AR 21).

Unable to identify a textual basis for its claim, MetLife instead relies on an ambiguous notion of "vulnerability," which it equates with the "likelihood" or "probability" that it will experience material financial distress. *See, e.g.*, ML Br. 26. Yet it admits that these words do not appear in the statute, *id.* 27 (statute "does not incant the words 'vulnerability,' 'likelihood,' or 'probability'"), and it offers no consistent definition of its own.[32] Further, while MetLife admits that its failure is possible "in theory," FSOC Br. 33 (citing AR 386, 4066), it offers only the fig leaf that its distress is "extremely unlikely," Compl. ¶ 8. All told, the fact that neither MetLife nor its *amici*, *see, e.g.*, Chamber of Commerce Br. 6–10, can decide what they mean by "vulnerability analysis" only underscores the conclusion that such an inquiry is not "congressionally mandated," as MetLife claims. Compl. ¶ 27; *see* FSOC Br. 31–35.

Accordingly, the Council's construction of Section 113(a) is, at the very least, a permissible one. *See* FSOC Br. 35 (citing *Chevron*). To overcome the text of Section 113(a)(1), MetLife "has to do better than concoct an interpretation purportedly based on the statute's context." *Pharm. Research & Mfrs. of Am. v. FTC*, — F.3d —, 2015 WL 3556040, at *9 (D.C. Cir. June 9, 2015). Rather, it "must show that the statute unambiguously forecloses the

[32] MetLife variously maintains that the Council was required to calculate the "likelihood" of MetLife's material financial distress, ML Br. 27; assess "the likelihood of the crisis [the Council] is purporting to prevent," *id.* at 28; make "some assessment of probability" of distress, *id.* at 28; find a "reasonable possibility" of a threat from MetLife's distress, Compl. ¶ 8; or evaluate the "plausibility" that a company will experience material financial distress, ML Br. 27.

[Council's] interpretation" of the first determination standard under Section 113(a)(1). *Id.* (citation omitted). MetLife's reliance on the Section 113(a)(2) considerations falls far short of this burden.

Unable to overcome *Chevron,* MetLife instead relies on *Public Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209 (D.C. Cir. 2004), for the proposition that the Council's failure to calculate the likelihood of MetLife's distress was arbitrary and capricious.[33] ML Br. 27. But *Public Citizen* only highlights the flimsiness of MetLife's claim. That case involved the agency's failure to consider a "specific statutory requirement," *id.* at 1216, and turned on the principle that an expressly mandated statutory factor is, by definition, an "important aspect of the problem" before the agency. *Id.* (quoting *State Farm*, 463 U.S. at 43). As the court noted, "[w]hen Congress *says* a factor is mandatory, that expresses its judgment that such a factor is important." *Id.* (emphasis added). Here, however, Congress expressed no such judgment: as MetLife freely acknowledges, its preferred "vulnerability analysis" appears *nowhere* in the statutory text. ML Br. 27.

B. The Council's Application of the First Determination Standard Is Consistent With Its Interpretive Guidance.

MetLife also argues that the Council departed from its interpretive guidance by declining to assess the likelihood of MetLife's material financial distress. *See* ML Br. 29–30. But the

[33] Significantly, MetLife does not dispute that the *Chevron* framework applies to its claim. Nonetheless, the "analysis of disputed agency action under *Chevron* Step Two and arbitrary and capricious review is often 'the same, because under *Chevron* step two, [the court asks] whether an agency interpretation is arbitrary or capricious in substance.'" *Agape Church, Inc. v. FCC*, 738 F.3d 397, 410 (D.C. Cir. 2013) (citation omitted); *see also Nat'l Auto. Dealers Ass'n v. FTC*, 864 F. Supp. 2d 65, 81 n.19 (D.D.C. 2012). The Council's construction of Section 113(a) easily satisfies both the *Chevron* and the arbitrary and capricious tests because it was '"rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute."' *Agape Church*, 738 F.3d at 410 (quoting *State Farm*, 463 U.S. at 42).

interpretive guidance nowhere implies that factors relating to the "vulnerability of a nonbank financial company to financial distress" require an assessment of the likelihood or probability that the company will experience such distress. As both the interpretive guidance and the final basis make clear, the statutory factors relating to a company's vulnerability to distress assist the Council in assessing *how* a company's material financial distress could be transmitted to the broader financial system—not *whether* the company's distress will ever occur. 77 Fed. Reg. 21,657 (AR 21) ("the Council intends to assess how a nonbank financial company's material financial distress or activities could be transmitted to, or otherwise affect, other firms or markets"); AR 385 & n.95 ("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").

For example, the interpretive guidance states that, as a general matter, companies that are highly leveraged "are more likely to be more vulnerable to financial distress," and that leverage can increase counterparty exposures and the size of a forced asset liquidation. 77 Fed. Reg. 21,658–21,659 (AR 22–23). Here, the Council found that MetLife has high leverage and, consequently, in the event of its material financial distress, would be more vulnerable to liquidity pressure and thus a need to liquidate more assets in a shorter time period to satisfy its obligations. AR 549–55. The Council also explained how a consequent fire sale of assets could pose a threat to U.S. financial stability. AR 499–583. In other words, as the interpretive guidance contemplates, the Council's analysis of MetLife's leverage was relevant to its determination that MetLife satisfies the first determination standard under Section 113(a)(1). 77 Fed. Reg. 21,658 (AR 22).

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Further, MetLife erroneously contends that the Council now, for the first time, "claims that all of the criteria [concerning vulnerability to distress] fall into the second category regarding the "impact [on] the broader financial system" of the company's distress.[34] ML Br. 30. Though MetLife insists that the Council's construction of the first determination standard "crystallized for the first time during the designation proceedings," *id.* 29, the Council, in fact, set forth its interpretation of the first determination standard not only in its interpretive guidance, but also in the public bases for its designations of three other nonbank financial companies.[35]

Nor does MetLife support its assertion that the Council assumed "a state of financial distress far more severe" than the definition of "material financial distress" in the Council's interpretive guidance. ML Br. 30–31. As an initial matter, it is not even clear what MetLife means by "far more severe" degrees of distress.[36] In any event, MetLife's bare assertions fail to

[34] This criticism is especially puzzling in light of the fact that MetLife itself admits that the inquiry under the first determination standard is "based on the impact of a company's material financial distress," ML Br. 28.

[35] As the public bases for the Council's designations of AIG, Prudential Financial, Inc., and General Electric Capital Corporation, Inc., each make clear, the Council considered the potential impact on U.S. financial stability of the company's material financial distress "if it were to occur" or "in the event of" the company's material financial distress—the Council did not evaluate or consider the "probability" or "likelihood" that the designated company would experience distress. *See* Basis of the Financial Stability Oversight Council's Final Determination Regarding American International Group, Inc. 1, 6, 7, 10, 12 (July 8, 2013), http://www.treasury.gov/initiatives/fsoc/designations/Documents/Basis%20of%20Final%20Determination%20Regarding%20American%20International%20Group,%20Inc.pdf; Basis of the Financial Stability Oversight Council's Final Determination Regarding Prudential Financial, Inc. 1, 3 (Sept. 19, 2013), http://www.treasury.gov/initiatives/fsoc/designations/Documents/Prudential%20Financial%20Inc.pdf; Basis of the Financial Stability Oversight Council's Final Determination Regarding General Electric Capital Corporation, Inc. 1, 7, 10 (July 8, 2013), http://www.treasury.gov/initiatives/fsoc/designations/Documents/Basis%20of%20Final%20Determination%20Regarding%20General%20Electric%20Capital%20Corporation,%20Inc.pdf.

[36] MetLife cites only the statement of the Council's sole dissenting voting member, ML Br. at 31, but the quoted statements do not support MetLife's assertion that the Council misapplied the

establish that the Council departed from its interpretive guidance, which explains that the Council will consider material financial distress to exist when a company is in "imminent danger of insolvency or defaulting on its financial obligations." 12 C.F.R. § 1310, App. A (2012). Indeed, MetLife cannot make such a showing because "material financial distress" does not encompass one single scenario; rather, the Council "considers the range of potential outcomes of MetLife's material financial distress, rather than relying on a worst-case scenario or any other specific scenario," AR 366.

In sum, MetLife identifies *no* statutory provision that the Council allegedly violated, and no way in which the Council departed from its interpretive guidance. In view of the text and purpose of Section 113(a), the Council reasonably declined to conduct MetLife's preferred vulnerability analysis.

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

MetLife concedes that the Council was not required to conduct a "mandatory cost–benefit analysis" before designating the company. ML Br. 60. It further concedes that the Council was "not . . . required to weigh the relative costs and benefits of designation" even in a less formal manner. *Id*. It argues, instead, that the government has "misconstrue[d]" its claim in Count Seven, which is simply that the Council was required to consider the "effects" or "consequences" that "designation will have on MetLife, its stakeholders, and consumers." *Id*. But, as its Complaint makes clear, by "effects" MetLife means adverse "*economic* effects." Compl. ¶ 130 (subheading) (emphasis added); *see id*. ¶ 133 ("economic consequences"). And what are those?

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definition of "material financial distress," as MetLife appears to suggest; rather, they were made in support of the dissenter's argument that the second determination standard, rather than the first, would have been the more appropriate standard for evaluating MetLife. AR 657–58.

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Costs, of course. *See, e.g.*, ML Br. 61 ("the Company's costs"); Compl. ¶ 10 ("significant costs on the Company"); *id.* ¶ 21 ("substantial costs for MetLife").

Regardless of the framing, then, this claim must fail. MetLife does not dispute the basic principle that whether an agency must—or indeed may—consider the potential costs of regulation on a regulated party depends on the text of the authorizing statute. *See* FSOC Br. 36. Here, while Section 113 of Dodd–Frank sets forth ten factors for the Council to consider when applying the designation standard, it is silent as to costs. Where a statute "expressly directs [an agency] to regulate on the basis of a factor that on its face does not include cost, [it] normally should not be read as implicitly allowing the Agency to consider cost anyway." *Michigan v. EPA*, 135 S. Ct. 2699, 2709 (2015) (citing *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 467 (2001)). Even if Section 113 implicitly allows the Council to consider costs, it certainly does not *require* the Council to do so, as MetLife suggests.

MetLife's reliance on *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011), is therefore misplaced. There, the statute expressly required the SEC "to consider the effect of a new rule upon 'efficiency, competition, and capital formation,'" *id.* at 1148 (quoting 15 U.S.C. §§ 78c(f), 78w(a)(2), 80a–2(c))—a "unique" provision that imposes a "'statutory obligation'" on the SEC "'to determine as best it can the economic implications of the rule,'" *id.* (citation omitted). The text of Section 113 says nothing comparable.[37]

The Supreme Court's recent decision in *Michigan v. EPA* is consistent with this principle. There, the statute directed the EPA to regulate power plant emissions "if [it] finds such

[37] The only other case that MetLife cites, *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), is even farther off the mark. In that case, the EPA itself interpreted the statute to permit the consideration of the "cost-effectiveness" of emission controls, and its authority to do so was not in dispute. *Id.* at 902–03, 917–18 (citations omitted). Rather, the court found that the EPA had not adequately explained how it arrived at the particular emissions goals it chose. *Id.* at 917–18.

regulation is appropriate and necessary," but set forth no particular factors for the agency to weigh. 42 U.S.C. § 7412(n)(1)(A). The Court held that, "read naturally in [that] context," the phrase "'appropriate and necessary' requires at least some attention to cost." *Michigan*, 135 S. Ct. at 2701. It emphasized, however, that "[t]here are undoubtedly settings in which the phrase 'appropriate and necessary' does not encompass cost." *Id.* at 2707. The key, it explained, is to read the statutory terms "fairly and in context." *Id.* at 2709.

Here, MetLife would have the Court pluck a single word out of the statute and ignore the rest. Seizing on the word "appropriate" in Section 113(a)(2)(K), it argues that the Council is "obligated" to "supplement" the ten enumerated factors, adding cost as an "additional 'appropriate' consideration." ML Br. 61. But that is not what the statute says. In fact, the statute provides that the Council need consider only such "other *risk-related* factors" that "the Council *deems* appropriate." 12 U.S.C. § 113(a)(2)(K) (emphasis added). The potential cost to a designated company cannot properly be considered a "risk-related" factor, because it is unrelated to the question posed by the statutory standard: whether the company's "distress . . . could pose a threat to the financial stability of the United States." 12 U.S.C. § 5323(a)(1). Moreover, Section 113(a)(2)(K) must be read "fairly and in context" with the ten enumerated factors that precede it. *Michigan*, 135 S. Ct. at 2709. As the Council has explained, each of those factors deals with characteristics of companies relevant to potential risks to the "'financial stability of the United States,'" not with any costs that additional regulation could impose on a particular designated company. FSOC Br. 37 (quoting 12 U.S.C. § 5323(a)(1)). Further, the statutory language reflects not an obligation to adopt any additional factor, but instead "'a broad delegation of discretion'" to the agency to exercise its expertise. *Id.* (quoting *Marshall City Health Care Auth. v. Shalala*, 988 F.2d 1221, 1224 (D.C. Cir. 1993)). To these points, MetLife offers no response.

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MetLife's remaining arguments do not change the analysis. Notably, it complains not about costs imposed by the designation itself—the only agency action properly at issue here—but instead about possible future costs from "the imposition of enhanced prudential standards." ML Br. 61. Yet it is the Federal Reserve, not the Council, that has the statutory authority to adopt those standards. *Id.* at 62. Until those standards are finalized, the "costs" about which MetLife complains— —are nothing more than conjecture. *Id.* at 61.[38] In any event, Congress made the judgment that nonbank financial companies that satisfy the designation standard under Section 113 should be subject to enhanced prudential standards to "mitigate or eliminate" risks to financial stability. 12 U.S.C. § 5365(a). It is for Congress to decide whether the benefits of mitigating or eliminating such risk are worth any costs borne by designated companies.

In addition, MetLife largely ignores the recently enacted "fix" to Section 171 of Dodd–Frank, a section commonly known as the Collins Amendment. *See* Insurance Capital Standards Clarification Act of 2014, Pub. L. No. 113–279, § 2 (Dec. 18, 2014) (adding 12 U.S.C. § 5371(c)). This change makes clear that the Federal Reserve may tailor its prudential standards to insurance companies and need not subject companies like MetLife to the standards imposed on banks. Indeed, in the company's own words, the change provides "flexibility to the Fed to employ insurance-like rules as opposed to bank-like rules to non-bank SIFIs, including MetLife." AR 4064–65. Thus, when faced with industry concerns regarding enhanced prudential

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standards, Congress chose not to limit in any way the Council's authority to designate insurance companies, but instead to clarify that the Federal Reserve has discretion to tailor the prudential standards to insurers. This reflects Congress's judgment that cost considerations are appropriately addressed in the context of the Federal Reserve's adoption of those standards.

Further, enhanced prudential standards will be adopted by the Federal Reserve through notice and comment procedures, 79 Fed. Reg. 17,240, 17,245 (Mar. 27, 2014), so MetLife will have a separate opportunity to challenge those standards, either during the notice and comment process or in separately filed litigation.[39] For now, its theory that Section 113 of Dodd–Frank unambiguously requires the Council to consider the potential costs of those standards before making a designation cannot be squared with the statutory text. *See Michigan*, 135 S. Ct. at 2709; *Whitman*, 531 U.S. 467. At a minimum, the Council's interpretation of the statute is a permissible one that merits deference. *See Chevron*, 467 U.S. at 844.

IV. METLIFE'S CONCEPTION OF AN "ACTIVITIES-BASED APPROACH" IS IRRELEVANT TO THE COUNCIL'S DUTY UNDER SECTION 113 TO IDENTIFY POTENTIAL THREATS TO U.S. FINANCIAL STABILITY POSED BY INDIVIDUAL COMPANIES.

MetLife argues that before the Council could designate the company under Section 113, the Council "was required to consider each of" a variety of unrelated authorities the Council has under Dodd–Frank "and to explain its decision" not to use each of those other authorities. ML

[39] The company acknowledges that any consequences "for MetLife, its shareholders, and its policyholders," Compl. ¶ 134, would largely "[d]epend[] on the prudential standards that the [Federal Reserve] ultimately promulgates for designated insurers," *id.* ¶ 132. Indeed, at its hearing before the Council, [redacted] AR 4060. Those rules are not yet known, [redacted] AR 4043–44. At the same time, certain benefits of designation, such as consolidated supervision by the Federal Reserve, arise upon designation, so MetLife's argument that the Council "could not reasonably rely on" those benefits, ML Br. 62, is mistaken.

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Br. 58. But nothing in Dodd–Frank requires the Council to use, or consider whether it should use, another authority to address the risks that Section 113 contemplates the Council will address through designation. In any event, in its final determination, the Council explained its reason to decline MetLife's invitation to undertake a so-called activities-based approach as an alternative to proceeding with the designation.

Dodd–Frank does not constrain the Council to address a given risk in only one way. Rather, it gives the Council broad discretion in determining what risks to financial stability should be given priority. *See* FSOC Br. 43–44; *Mobil Oil Exploration & Producing Se., Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230–31 (1991) (an "agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities"); *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985) (an "agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities"). Further, the statute gives the Council a range of authorities that are not mutually exclusive. *See* FSOC Br. 43–44. The Council is not restricted to the sort of "either-or" approach to addressing risk that MetLife suggests. Indeed, MetLife asserts that the Council should pursue an activities-based approach to risks applicable to the insurance industry generally even though MetLife recognizes that the Council has already designated the insurance companies AIG and Prudential Financial, Inc. under Section 113. MetLife thus implicitly recognizes that the Council has taken a consistent approach to addressing risks in the insurance industry. *See* ML Br. 7, 67. Just as the Council's designation of certain insurance companies under Section 113 does not preclude the Council from considering whether there may be insurance market–wide activities that pose risks to financial stability and warrant industry-wide action, the possibility that there may be such insurance market–wide risks does not preclude the Council from also designating a company

under Section 113 to address company-specific risks. *See* FSOC Br. 43–44; *Grunewald v. Jarvis*, 776 F.3d 893, 906 (D.C. Cir. 2015) (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"); *Inv. Co. Inst.*, 720 F.3d at 378 ("'[n]othing prohibits federal agencies from moving in an incremental manner'").

In fact, the Council's previous public statements make clear that it has taken action to address certain market-wide risks in the insurance industry. For example, the Council's 2015 annual report recommends that the Federal Insurance Office and state insurance regulators continue to monitor growing risks posed by insurance companies' increased risk-taking in a low-interest-rate environment;[40] recommends that state insurance regulators and the National Association of Insurance Commissioners continue to work to improve the public availability of certain insurance-related data, *id.* at 14; and highlights that the use of captive reinsurance "can reduce clarity about the financial condition" of life insurers," *id.* at 70.[41] In other words, while MetLife insists that the Council must explain its decision not to take other approaches to address potential risks posed by MetLife before designating the company, the Council has already taken insurance industry–wide approaches in addition to designating MetLife under Section 113.

In any event, the Council explained in its final basis why it was declining MetLife's invitation to undertake an activities-based approach as an alternative to designation. The Council stated that it is precisely because of the company-specific threat to financial stability posed by

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[40] *See* 2015 FSOC Ann. Rep. 10, *available at* http://www.treasury.gov/initiatives/fsoc/studies-reports/Documents/2015%20FSOC% 20Annual%20Report.pdf.

[41] *See also, e.g.*, 2014 FSOC Ann. Rep. 12, *available at* http://www.treasury.gov/initiatives/fsoc/ Documents/FSOC%202014%20Annual%20Report.pdf (recommending that the FIO and state regulators monitor and assess interest rate risk in the insurance industry).

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MetLife that designation under Section 113 is appropriate. AR 388. As the Council explained, Section 113 of Dodd–Frank authorizes company-specific designations based on the considerations set forth in the statute, and does not make an industry-wide approach a prerequisite to designation. AR 387–88. For those reasons, an industry-wide evaluation of risks is not "necessary or appropriate in the case of MetLife" before designating the company under Section 113.[42] *Id.*; *see also* FSOC Br. 44–45. In other words, when the Council has identified an individual nonbank financial company whose distress could threaten U.S. financial stability, an approach other than addressing the risks of that specific company is not a "superior" approach, as MetLife suggests, ML Br. 60.[43]

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[42] MetLife is therefore wrong in asserting that the Council's opening brief was the first time it explained that an activities-based approach is not a reasonable alternative to designation under Section 113. And contrary to MetLife's argument, *Clinton Mem'l Hosp. v. Shalala*, 10 F.3d 854 (D.C. Cir. 1993), clearly stands for the proposition that an agency need not explain the rejection of an alternative that is not within the ambit of the statutory standard under which the agency made the decision at issue. The approaches that MetLife advocates fall outside the ambit of the authority under Section 113 to address company-specific risks. For example, Title VIII of Dodd–Frank authorizes the Council to designate certain activities, such as financial activities to facilitate the completion of funds transfers and swaps, to be subject to enhanced risk-management standards. *See* 12 U.S.C. §§ 5461–5472. Similarly, MetLife's suggestion that the Council's ability to make nonbinding recommendations to regulators under Section 120 of Dodd–Frank is a substitute for designation under Section 113 is not credible given the purpose and effect of a designation under Section 113. Because MetLife's "activities-based" approach falls outside the ambit of Section 113, MetLife's reliance on *Chamber of Commerce of U.S. v. SEC*, 412 F.3d 133 (D.C. Cir. 2005), and *Laclede Gas Co. v. FERC*, 873 F.2d 1494, 1498 (D.C. Cir. 1989)—neither of which addressed such a circumstance—is misplaced. *See Chamber of Commerce*, 412 F.3d at 144–45; *Laclede Gas Co.*, 873 F.2d at 1498. Further, MetLife's claim that the Council asserted "for the first time in its brief" that the activities-based approach "is authorized by a different provision of Dodd–Frank than FSOC's designation authority under Section 113" is baffling. ML Br. 58 n.23. It is clear that the Council's authority under Section 113 is company-specific, not industry-wide.

[43] MetLife's only example of what it means by an "activities-based alternative" is the Council's current work to identify any potential industry-wide risks arising from asset management products and activities. ML Br. 59. MetLife incorrectly asserts that the Council has decided to take action regarding asset management risks on an industry-wide basis and not to designate any

Thus, the Council gave a thorough and detailed explanation of the reasons it designated MetLife, and it adequately explained the reasons it rejected MetLife's proposed approach in favor of a company-specific designation. AR 387–88.

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

MetLife's contention that it is ineligible for designation under Section 113 should be rejected. *See* ML Br. 20–25. As the Council explained in its opening brief, its conclusion that MetLife is "predominantly engaged" in financial activities is supported by three independent grounds, any one of which is sufficient to uphold its determination under Section 102(a)(6). *See* FSOC Br. 45–55. MetLife's arguments to the contrary conflict with Dodd–Frank, as well as with the text, purpose, and longstanding interpretation of Section 4(k) of the Bank Holding Company Act of 1956, as amended ("BHCA"), 12 U.S.C. § 1843(k). MetLife does not dispute that under its arguments even AIG—the specific example Congress had in mind when it established the Council and granted the Council the authority to designate nonbank financial companies—would not have met Dodd–Frank's definition of "nonbank financial company" when Dodd–Frank was enacted, or when the company's near-failure required the largest government loan in history. *See* FSOC Br. 49.

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asset manager. *Id*. In fact, as the Council has repeatedly made clear, it has not determined either whether there are risks to financial stability arising from asset managers or their activities that the Council should address, or how the Council may address any risks that it identifies, as the news article MetLife quotes reflects. *See* John Heltman, *Fed's Tarullo Favors Activities-Based Regulation for Asset Managers*, Am. Banker (June 5, 2015); *see also* Notice Seeking Comment on Asset Management Products and Activities, 79 Fed. Reg. 77488 (Dec. 24, 2014). The record regarding the Council's approach to asset management is clear: when the Council issued its rule and interpretive guidance on nonbank financial company designations in 2012, the Council stated that it was continuing to analyze the extent to which asset managers may pose threats to financial stability, but that "the Council intends to evaluate asset managers under the current interpretive guidance." 77 Fed. Reg. 21,644 (AR 8).

What is more, MetLife's claim that it is ineligible for designation squarely conflicts with its own prior position concerning Section 4(k) of the BHCA, [REDACTED] MetLife [REDACTED] argues that the *Council's* deference to that long-standing interpretation was arbitrary and capricious. What is good for the goose, apparently, is not good for the gander.

Judgment should be entered for the Council on this claim.

A. The Council Reasonably Concluded That More Than 85% of MetLife's Assets Are "Related To" Its U.S. Insurance Activities.

The Council reasonably determined that MetLife is predominantly engaged in financial activities under Section 102(a)(6)(B) of Dodd–Frank because— even assuming that MetLife's assertions were correct that its foreign insurance activities are not "financial in nature" under Section 4(k) of the BHCA, *see* ML Br. 24–25—nearly all of its consolidated assets, including the assets of its foreign subsidiaries, are *related to* its U.S. insurance activities. AR 399–400; FSOC Br. 50. MetLife resists this determination, inviting the Court to adopt an unduly narrow reading of the "related to" test and to discount the Council's fact-specific determination that MetLife's foreign subsidiaries' assets are related to its U.S. insurance activities. ML Br. 21. The Court should decline this invitation because the Council's application of the "related to" test comports with Dodd–Frank's text, purpose, and design, and, in addition, the Council's findings with

respect to the relationships between MetLife's foreign subsidiaries and its domestic activities were well-reasoned.[44]

MetLife admits that its domestic insurance activities are "financial in nature" under Section 4(k), ML Br. 21, but disputes that Section 4(k) applies to its foreign insurance activities. Thus, the question under Section 102(a)(6) is whether MetLife's foreign subsidiaries' assets are "related to" its domestic insurance activities, which are undisputedly "financial in nature"; if they are, these assets must be included in the 85% calculation.

Based on its analysis of MetLife's domestic and foreign operations, the Council reasonably concluded that, "through [their] shared services, agreements, ownership, and otherwise," more than 85% of MetLife's consolidated assets, including the assets of both its domestic and foreign subsidiaries, are "related to" MetLife's domestic insurance activities. AR 399–400; FSOC Br. 45–55. [REDACTED] AR 400 n.168. [REDACTED] AR 627. In addition, the Council noted that MetLife reinsures both domestic and foreign insurance risk with its captive reinsurers, which are supported by the U.S. parent company. AR 620. Thus, given its findings concerning the particular types of relationships between MetLife's domestic and foreign insurance businesses, the Council reasonably concluded that assets of certain of MetLife's foreign subsidiaries,

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[44] As the Council noted in its opening brief, *see* FSOC Br. 51, if the Court accepts the conclusion that MetLife's foreign assets are related to its U.S. activities that MetLife concedes are financial in nature, this would be dispositive of MetLife's claim, and the Court would need not reach the question of whether MetLife's foreign insurance activities themselves qualify as financial in nature under Section 4(k) of the BHCA.

including MetLife Japan, are "related to" MetLife's U.S. insurance activities under Section 102(a)(6)(B) and thus are "financial in nature." Accordingly, it was not arbitrary or capricious for the Council to include those foreign assets in the 85% calculation.

MetLife does not contest the Council's factual conclusions concerning the relationships between its foreign subsidiaries and its domestic insurance activities. Instead, the company appears to argue that its foreign subsidiaries' assets are not "related to" its domestic insurance activities because, by MetLife's account, they are "two steps removed" from the domestic insurance activities. ML Br. 25. But MetLife offers no indication of what it believes these "two steps" are, or how they might preclude MetLife's foreign assets from being "related to" its U.S. insurance activities. *See* ML Br. 24–25. But even assuming *arguendo* that the foreign subsidiaries' assets are somehow "two steps removed" from MetLife's domestic insurance activities, they still comfortably fit within the "related to" test under Section 102(a)(6)(B), which is "deliberately expansive" in scope. FSOC Br. 50 (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)); *accord Moshea v. NTSB*, 570 F.3d 349, 352 (D.C. Cir. 2009); *United States v. Abdur-Rahman*, 708 F.3d 98, 101 (2d Cir. 2013). Indeed, the case law is clear that the "'ordinary meaning'" of "related to" "'is a broad one'" that generally means "'to have [some] bearing or concern []; refer; to bring into association with or connection with.'" *Friedman v. Sebelius*, 686 F.3d 813, 820 (D.C. Cir. 2012) (quoting *Morales*, 504 U.S. at 383)).

While MetLife cites *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), in acknowledgment of the breadth of the term "related to," ML Br. 24, it relies on other cases for its assertion that "related to" can also serve as "words of limitation," *id.* (quoting *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)). But MetLife's reliance on those cases is inapposite. As *Shaw* makes clear, courts "must give effect to this plain

language unless there is good reason to believe Congress intended [the phrase 'relate to'] to have some more restrictive meaning." *Id.* at 97 (citations omitted). Here, MetLife fails to show any such "good reason."[45] *Id.* And there is none: nothing in Dodd–Frank's text or history suggests that Congress intended that "related to" have such a restrictive meaning that it would exclude assets that are related to a company's financial activities "through [their] shared services, agreements, ownership, and otherwise."

Similarly unavailing is MetLife's argument that the Council's interpretation of "related to" "effectively strip[s] the 'derived from' provision [in Section 102(a)(6)(A)] of any independent force or effect," ML Br. 25. As MetLife itself notes, Congress prescribed two separate tests in Section 102(a)(6) of Dodd–Frank for defining "nonbank financial company." The first test, set forth in Section 102(a)(6)(A), focuses on revenues "derived from" financial activities, 12 U.S.C. § 5311(a)(6)(A), and the second test directs the Council to take account of the *consolidated assets* of the company *and* all of its subsidiaries "related to" activities that are financial in nature, *id.* § 5311(a)(6)(B). With respect to the first test, the term "derived from" is limited in scope and means "to take, receive, or obtain . . . from a specified source." *In re Miller*,

[45] MetLife's reliance on *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), and *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015), is misplaced for similar reasons. In both decisions, the Supreme Court made clear that Congress's use of the term "relate to" in a statute generally demonstrates Congress's intent for a "broad and indeterminate scope," *see Mellouli*, 135 S. Ct. at 1990, but that there may be instances when the "objectives," *see N.Y. State Conf.*, 514 U.S. at 655, and "context" of a statute "tug in favor of a narrower reading." *Mellouli*, 135 S. Ct. at 1990 (narrow interpretation of "relate to" given where the government's "sweeping interpretation departs so sharply from the statute's text and history that it cannot be considered a permissible reading"); *see also N.Y. State Conf.*, 514 U.S. at 655–56 (reasoning that broad interpretation of the phrase "relate to" "would . . . read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality"). By contrast, as explained above, the Council's application of the "related to" test under Section 102(a)(6)(B) comports not only with the ordinary meaning of the text but also Congress's intent that the Council identify risks to the financial stability of the United States posed by the activities of large, globally interconnected financial companies like MetLife.

519 B.R. 819, 823 (B.A.P. 10th Cir. 2014). By contrast, the second test, set forth in Section 102(a)(6)(B), is broader in scope than the "derived from" test and requires that the Council determine whether 85% of the consolidated assets of the company and all of its subsidiaries are "related to" activities that are financial in nature. MetLife turns traditional rules of statutory interpretation on their head by suggesting that the Court must construe different words in the statute to have identical meanings. *See Sosa v. Alzarez-Machain*, 542 U.S. 692, 711, n.9 (2004) ("when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended") (internal citation and quotation marks omitted); *Pillsbury v. United Eng'g Co.*, 342 U.S. 197, 199 (1952) (identifying the presumption that Congress means different things when it uses different words); *see also Tuaua v. United States*, 788 F.3d 300, 303 (D.C. Cir. 2015) ("It is a well-established canon of statutory interpretation that the use of different words or terms within a statute demonstrates . . . intent to convey a different meaning for those words.") (citation and internal quotation marks omitted).

The Council's application of Section 102(a)(6)(B) comports not only with the text and structure of Section 102(a)(6) but also with Dodd–Frank's purposes. *See, e.g.*, FSOC Br. at 49 (explaining how the 2008–09 financial crisis and near-failure of AIG led to Dodd–Frank's enactment). Because the Council applied the statute in a manner that is consistent with the ordinary meaning of "related to" and that comports with the statutory purpose, the Council's determination is a reasonable one that merits deference.

B. 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. This section provides that "[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" is financial in nature. 12 U.S.C. § 1843(k)(4)(B).

The Council appropriately deferred to the Federal Reserve's long-standing interpretation of Section 4(k)(4)(B), set forth in Regulation Y, 12 C.F.R. § 225. 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. *See* Regulation Y, 12 C.F.R. § 225.85(b); 66 Fed. Reg. 400, 406 n.14 (Jan. 3, 2001) (considering the intent of the Gramm–Leach–Bliley Act, which amended the BHCA in 1999 to permit certain activities under Section 4(k)); FSOC Br. 47. And because Congress has tasked the Federal Reserve with administering the BHCA, the Federal Reserve's interpretation of that statute is entitled to *Chevron* deference. *See Coosemans Specialties, Inc. v. Dep't of Agric.*, 482 F.3d 560, 564 (D.C. Cir. 2007). Relying on the Federal Reserve's longstanding interpretation of Section 4(k), the Council noted that "[n]othing in the phrasing, content, or purpose of the Gramm–Leach–Bliley Act indicates that ["in any State"] was intended to serve as a geographical limitation on the insurance activities authorized for financial holding companies." AR 397.

MetLife argues that it was unreasonable for the Council to rely on the Federal Reserve's longstanding interpretation—"regulatory gloss," in MetLife's words—of Section 4(k), set forth in Regulation Y. ML Br. 23. This argument misses the mark. Dodd–Frank's Section 102(a)(6) incorporates the BHCA's Section 4(k) by reference, and the Federal Reserve has long interpreted this provision to include foreign insurance activities. Given that the language at issue in the BHCA's Section 4(k) is replicated in Regulation Y—and given that the phrase "activities that are financial in nature" appears in both the BHCA and Dodd–Frank (Dodd–Frank, of course,

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expressly adopts the BHCA's definition)—MetLife offers no reason why the Federal Reserve's long-standing interpretation of that very language would no longer apply. *Cf. Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears.").[46]

Indeed, courts have long presumed that Congress is aware of an administrative interpretation of a statute when it incorporates that statute into a new law. *See Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) ("Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations."); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.").[47] Absent some clear indication to the contrary (which MetLife has not shown), it is presumed that Congress was aware of the Federal Reserve's longstanding interpretation of Section 4(k)(4)(B) when it incorporated by reference Section 4(k) of the BHCA into Section 102(a)(6) of Dodd–Frank. *See Lorillard*, 434 U.S. at 581. Under

[46] MetLife makes an offhand attempt to argue that the Federal Reserve in Regulation Y does not "define" financial activities to include foreign insurance activities, but rather purports to "authorize" financial holding companies to conduct foreign insurance activities. ML Br. 23 n.9. The Federal Reserve's treatment of foreign insurance activities, including foreign insurance activities, was necessarily an interpretation of Section 4(k). While the Federal Reserve does have authority to find that an activity is "complementary to" or "incidental to" a financial activity, those specific authorities were not implicated in the relevant portion of Regulation Y.

[47] For example, in *Cooper Techs. Co. v. Dudas*, 536 F.3d 1330 (Fed. Cir. 2008), the court presumed that Congress had knowledge of an agency's prior interpretation of a statute where "[t]he statute that Congress amended dealt specifically with Patent Office procedure, and the Patent Office had previously published its interpretation of that statute in the Federal Register." *Id.* at 1342–43.

these circumstances, it was appropriate—and certainly neither arbitrary nor capricious—for the Council to rely on the Federal Reserve's longstanding interpretation of Section 4(k)(4)(B).

Seeking to create the appearance of regulatory uncertainty where there is none, MetLife argues that the Court should ignore the Federal Reserve's long-standing interpretation on the basis that it appears in Regulation Y, rather than in Regulation PP.[48] But the preamble to the Federal Reserve's release adopting Regulation PP extensively references the Federal Reserve's long-standing interpretations of Section 4(k), including Regulation Y's interpretations of Section 4(k)(4)(B). The Federal Reserve has long interpreted Section 4(k)(4)(B) to include foreign insurance activities in Regulation Y, and the Council appropriately deferred to that interpretation in its designation of MetLife.[49] *Cf. Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1331, 1337–

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[48] Dodd–Frank assigns to the Federal Reserve rulemaking authority to implement the "predominantly engaged" test in Section 102(a)(6). *See* Dodd–Frank Section 102(b), 12 U.S.C. § 5311(b). The Federal Reserve did so in Regulation PP. *See* 66 Fed. Reg. 20,756 & 20,762 n.47 (Apr. 5, 2013); *see also id.* at 20,759 n.29 (preamble of Regulation PP referring to and comparing the Federal Reserve's past interpretations in Regulation Y); *id.* at 20,763 n.61; *id.* at 20,764 n.69; *id.* at 20,765 n.76; *id.* at 20,767 n.96.

[49] *See* 12 C.F.R. § 225.85(b); *see also* 66 Fed. Reg. 400, 406 (Jan. 3, 2001). The Federal Reserve specifically addressed this issue in Regulation Y because commenters asked whether certain Section 4(k) activities were permissible financial activities when conducted abroad, to which the Federal Reserve answered yes. *See* 66 Fed. Reg. at 406 n.14. Neither MetLife nor other commenters raised this issue during the Regulation PP rulemaking process. It is reasonable that the Federal Reserve did not repeat its views on the "in any State" language in Regulation PP, when its position was already well-established in Regulation Y. *See, e.g.*, *West Virginia v. EPA*, 362 F.3d 861, 872 (D.C. Cir. 2004) (holding that rulemaking proceedings in which the EPA revisited certain growth-rate calculations did not reopen issues regarding settled aspects of its calculation methods). Moreover, Regulation PP contains an appendix listing the various financial activities described in Section 4(k) that omits certain conditions from Section 4(k) that "do not define whether an activity is itself financial but were imposed on bank holding companies to ensure that the activity is conducted by bank holding companies in a safe and sound manner or to comply with another provision of law." 66 Fed. Reg. at 20,757. In providing this appendix, the Federal Reserve in no way overrode its longstanding position expressed in Regulation Y that foreign insurance activities are financial in nature.

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38 (2013) (according *Auer* deference to the agency's interpretation where there was "no indication that [the agency's] current view [wa]s a change from prior practice").

Furthermore, as the Council observed in its opening brief, the result of MetLife's position is that AIG—the nonbank financial entity that helped precipitate the financial crisis of 2008–09 and prompted Congress to create the Council in the first place—would not have been eligible for designation on either September 2008 (when its near-failure required the largest government loan in history) or July 2010 (when Dodd–Frank was enacted). *See* FSOC Br. 49. "It is implausible that Congress meant the Act to operate in this manner." *King v. Burwell*, 135 S. Ct. 2480, 2494 (2015). Congress obviously would not have created the Council only to simultaneously prohibit it from designating nonbank financial companies with significant overseas financial activities (like AIG), even where such entities could present risks to U.S. financial stability. MetLife makes no effort to grapple with the absurd results that inevitably follow from its position, contending simply that Congress "spoke clearly" of its intent to foreclose nonbank designation based on a certain percentage of overseas activities.[50] ML Br. at 21–22.

MetLife provides no basis on which this Court could conclude that the Council's deference to the Federal Reserve's interpretation was unreasonable, let alone that MetLife's geographically restrictive reading of Section 4(k)(4)(B) is the only correct one. For this reason alone, the Court should enter judgment for the Council on Count One.

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[50] Congress designed Dodd–Frank so that any company that could pose a threat to U.S. financial stability could be designated, regardless whether the company is based in the U.S. or abroad (*see* 12 U.S.C. § 5311(a)(4)(A)–(B)), but MetLife's approach would create a specific carve-out for U.S.-based insurance companies with substantial overseas operations. Given that Congress intended to reduce the threat that a large, complex financial company could pose to U.S. financial stability when it enacted Dodd–Frank, it defies logic that Congress would "have intended" a result that would "frustrat[e] . . . the very purposes behind the [statute]." *Sullivan v. Hudson*, 490 U.S. 877, 890 (1989).

C. Alternatively, MetLife's Investments In Foreign Insurance Subsidiaries Are Financial in Nature Under Section 4(k)(4)(I) of the BHCA.

Even if the Court rejects both of the independent bases described above for the Council's conclusion that MetLife is predominantly engaged in financial activities, MetLife's argument still fails because the Council correctly found in the alternative that MetLife is predominantly engaged in financial activities (and thus is a U.S. nonbank financial company) on the basis that certain of MetLife's investments in foreign insurance subsidiaries are "financial in nature" under Section 4(k)(4)(I) of the BHCA. For the reasons explained in the Council's opening brief, this is yet a third independent ground upon which the Court may grant judgment in favor of the Council on Count One. *See* FSOC Br. 53–55.

MetLife devotes less than a sentence of text and one footnote to its response. ML Br. 22. And in that bare response, MetLife reverses course from the implausible position it took in its Complaint [REDACTED] now apparently conceding that activities need *not* be conducted in the United States to qualify as "financial in nature" under Section 4(k)(4)(I) of the BHCA.

MetLife previously argued that the activities of its foreign insurance subsidiaries do not qualify as "financial in nature" under Section 4(k)(4)(I) because the third prong of the test under that section contains the phrase "in accordance with relevant State law," 12 U.S.C. § 1843(k)(4)(I)(iii). According to MetLife's prior submissions, the reference to "State law" in Section 4(k)(4)(I) suggests that the relevant activities cannot qualify as "financial in nature" under that provision unless they are conducted in the United States.[51] Compl. ¶¶ 76–77.

[51] MetLife's now-abandoned argument is set forth in its Complaint, *see, e.g.*, Compl. ¶¶ 72(a), 77; in its [REDACTED] AR 396; and in [REDACTED] AR 360.

But as the Council explained, the third prong of the test in Section 4(k)(4)(I) requires only that a U.S. insurance company's investment in a subsidiary be made "in the ordinary course of business of such insurance company in accordance with the relevant State law governing such investments" to qualify as financial in nature, regardless of where the subsidiary is located or conducts its activities. FSOC Br. 54–55. MetLife's subsidiary ALICO is a Delaware-chartered insurance company whose investments in foreign subsidiaries were made "in accordance with" Delaware law—thus clearly meeting the requirement under Section 4(k)(4)(I)(iii) that the investment be made in accordance with the relevant state law. ML Br. 22 n.8. Accordingly, the Council argued in its opening brief that "[u]nless MetLife is now suggesting that ALICO's investments in its foreign subsidiaries are made in violation of Delaware law, it is not clear how [Section 4(k)(4)(I)(iii)] helps MetLife." FSOC Br. 55.

Understandably eager to avoid this conclusion, MetLife abandons its farfetched position that its subsidiaries' insurance activities must be conducted in the United States to qualify as "financial in nature" under Section 4(k)(4)(I); importantly, MetLife now admits that ALICO "holds investments in non-U.S. insurance companies 'in accordance with relevant State law.'" ML Br. 22 n.8. This admission is dispositive: As the Council has explained, ALICO owns significant foreign insurance subsidiaries, including MetLife's large Japanese subsidiary. FSOC Br. 54 n.37 (citing AR 403-04, 635). ALICO's investments in those foreign subsidiaries are "financial in nature" because they satisfy the four-part test under Section 4(k)(4)(I). FSOC Br. 53–54 (citing AR 397–98). When the assets related to, and revenues derived from, ALICO's foreign subsidiaries are included in the calculation, MetLife is predominantly engaged in financial activities. *See* FSOC Br. 54 n.37.

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In a half-hearted final attempt to save its claim, MetLife makes a vague reference to "the other conditions in Section 4(k)(4)(I)." ML Br. 22 n.8. MetLife develops no clear argument concerning "the other conditions"; rather, in a single footnote in its brief, MetLife appears to propose a distinction (found nowhere in the BHCA or Dodd–Frank) between ALICO's strategic and portfolio investments. Specifically, MetLife states that it routinely manages and operates ALICO's subsidiaries through the use of interlocking (overlapping) directors, common corporate policies, and corporate reporting lines. *Id.* As an initial matter, Congress clearly contemplated that this type of involvement would not disqualify the investment as being financial in nature under the BHCA.[52]

But in any event, MetLife's vague theory concerning ALICO's investments improperly seeks to raise a new and independent ground for its challenge, for which the Council never had notice—if MetLife now contends that its foreign insurance subsidiaries do not satisfy the "other conditions" of Section 4(k)(4)(I), it has forfeited that argument. "It is a hard and fast rule of administrative law, rooted in simple fairness, that issues not raised before an agency are waived and will not be considered by a court on review." *Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1231 (D.C. Cir. 2007); *id.* (providing that arguments are forfeited unless raised "with reasonable specificity" before the agency, and stating that "[o]bjections must be prominent and clear enough to place the agency 'on notice,' for [the agency] is not required 'to . . . answer all of the possible implied arguments'").

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[52] H.R. Rep. No. 106–434 at 155 (1999) (Conf. Rep.) ("To the extent [a parent company] participates in the management or operation of a portfolio company, such participation would ordinarily be for the purpose of safeguarding the investment of the insurance company in accordance with the applicable requirements of state insurance law. This is irrespective of any overlap between board members and officers of the [parent company] and the portfolio company.").

Despite its attempts to discount its own previous concessions and raise vague factual or legal questions for the first time,[53] MetLife is unable to show that the Council's conclusion under Section 4(k)(4)(I) was arbitrary or capricious. *See Public Citizen v. FAA*, 988 F.2d 186, 196–97 (D.C. Cir. 1993) (subjecting agency's mixed question of law and fact to review under the arbitrary and capricious standard); *Dillmon v. Nat'l Transp. Safety Bd.*, 588 F.3d 1085, 1089 (D.C. Cir. 2009) (explaining that a court must "defer to the wisdom of the agency, provided its decision is reasoned and rational"). 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.

VI. The Council's Structure Is Consistent with the Separation of Powers.

MetLife does not assert that the Council intruded on any core power of the legislative or judicial branches—the "basic principle" underlying the separation of powers doctrine. *Loving v. United States*, 517 U.S. 748, 757 (1996). Instead, it argues that Congress vested the Council with a "blend" of executive, legislative, and adjudicative functions that "cannot be reconciled" with separation of powers principles. Compl. ¶ 136; ML Br. 67–68. But such a "blend" of functions has long been a feature of the administrative process, *see* FSOC Br. 56, and is understood to be an exercise of "'executive Power,'" *City of Arlington v. FCC*, 133 S. Ct. 1863,

[53] MetLife's footnote succeeds only in revealing that the company has changed yet another position, now with respect to its relationship with its own subsidiaries. In contrast to MetLife's new claim that its parent company, MetLife, Inc., "routinely manages and operates" its foreign insurance subsidiaries, ML Br. 22 n.8, MetLife submitted that AR 398 n.158. Regardless, neither the Council nor the company has ever before claimed that the extent of inter-affiliate relationships is part of the analysis under Section 4(k)(4)(I), so MetLife's new position on this issue is irrelevant for this purpose.

1873 n.4 (2013) (citation omitted). MetLife points to no case—*ever*—holding that a "blending" of functions contravenes the separation of powers.

MetLife does not dispute that the only case cited in its Complaint to support its novel theory—*Elliot v. SEC*, 36 F.3d 86 (11th Cir. 1994) (cited in Compl. ¶¶ 136, 144)—did not even raise a separation of powers claim. *See* FSOC Br. 56. Neither does the principal case cited in its opening brief, *Stevenson v. Willis*, 579 F. Supp. 2d 913 (N.D. Ohio 2008) (cited in ML Br. 68). There, the plaintiff alleged that a county housing authority violated her due process rights by terminating her housing assistance without a fair hearing. *Id*. at 915–16, 919–20. But while the court declined to dismiss the due process claim, no separation of powers claim was raised, let alone decided. *Id*. at 920.[54]

MetLife's reliance on an asserted violation of 5 U.S.C. § 554(d) is even more puzzling. ML Br. 68 n.25. As an initial matter, it is unclear why a statutory violation, even if established, would raise a constitutional concern. And if MetLife is seeking to raise a separate statutory claim—one neither raised in the Complaint, *see* Compl. ¶¶ 136, 142–45, nor fairly presented in the proceedings before the Council—it cannot do so now by way of a footnote in its motion papers. *See, e.g.*, *Kingman Park Civic Ass'n v. Gray*, 27 F. Supp. 3d 142, 160 n.7 (D.D.C. 2014); *Nat'l Ass'n of Clean Air Agencies*, 489 F.3d at 1231.

[54] As noted in *Stevenson*, the Sixth Circuit has stated that a due process violation might lie under certain circumstances where "'the decisionmaker was engaged in both adjudicative and executive functions in violation of the principle of separation of powers.'" *Stevenson*, 579 F. Supp. 2d at 920 (quoting *Hammond v. Baldwin*, 866 F.2d 172, 177 (6th Cir. 1988)). However, for that statement, *Hammond*—which was a due process case, not a separation of powers case—relied on two other due process cases, neither of which even mentions the separation of powers. 866 F.2d at 177 (citing *Ward v. Monroeville*, 409 U.S. 57 (1972), and *Meyer v. Niles Township*, 477 F. Supp. 357 (N.D. Ill. 1979)). The government is not aware of *any* case holding that a "blending" of functions violates the separation of powers.

In any event, 5 U.S.C. § 554(d) has no application here. That provision states that an employee "engaged in the performance of investigative or prosecuting functions" generally may not "participate or advise in the decision" in the same case, and was intended "to curtail . . . the practice of embodying in one person or agency the duties of prosecutor and judge," *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41 (1950). But, by its own terms, § 554 applies only to formal adjudications—that is, where an "adjudication [is] required by statute to be determined *on the record* after opportunity for an agency hearing." 5 U.S.C. § 554(d) (emphasis added). It does not apply to informal adjudications, such as Council designations, where the statute provides for a hearing but does not use the words "on the record." *See, e.g.*, *Duquesne Light Co. v. EPA*, 698 F.2d 456, 482 (D.C. Cir. 1983) ("The statute omits the key words triggering formal adjudication: the stipulation that the hearing be 'on the record.'"); *Ass'n of Private Sector Colls.*, 2015 WL 3866659, at *12 ("'reasonable notice and opportunity for hearing' . . . are not the magic words that trigger the APA's formal adjudication provisions"); *cf.* 12 U.S.C. § 5323(e)(2) (permitting company to "request . . . an opportunity for a written or oral hearing . . . to contest the proposed determination," at which it "may . . . submit written materials . . . or, at the sole discretion of the Council, oral testimony and oral argument"); Council Hearing Procedures § 1(b) (AR 27).

Moreover, § 554(d) "does not apply . . . to the agency or a member or members of the body comprising the agency," such as the members of the Council here. 5 U.S.C. § 554(d)(C). Congress understood "this exemption [to be] . . . 'required by the very nature of administrative agencies, where the same authority is responsible for both the investigation–prosecution and the hearing and decision of cases.'" U.S. Dep't of Justice, *Attorney General's Manual on the APA*, at 58 (1947) (quoting S. Rep. No. 79–752, at 18 (1945); H.R. Rep. No. 79–1980, at 30 (1945)),

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available at http://goo.gl/AtDjUl.[55] Thus, even where a member of a "Commission actively participates in or directs the investigation of an adjudicatory case, he will not be precluded from participating with his colleagues in the decision of that case" under § 554(d). *Id.* (citing S. Rep. No. 79–752, at 41).

Given that so many other executive agencies are also headed by presidentially appointed, multimember commissions, MetLife's suggestion that the composition of the Council is meaningfully different is difficult to fathom. ML Br. 69.[56] Regardless, "[o]ur constitutional principles of separated powers are not violated . . . by mere anomaly or innovation." *Mistretta v. United States*, 488 U.S. 361, 385 (1989). Even if MetLife were correct that some of the Council's activities "take 'legislative' and 'judicial' forms, . . . they are exercises of . . . the 'executive Power,'" *City of Arlington*, 133 S. Ct. at 1873 n.4 (citation omitted), and thus raise no separation of powers concerns. MetLife identifies no court reaching a contrary result.[57] This Court should not be the first.

[55] The Attorney General's Manual "is entitled to considerable weight because of the very active role that the Attorney General played in the formulation and enactment of the APA." *Pacific Gas & Electric Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 n.17 (D.C. Cir. 1974); *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 218 (1988) (Scalia, J., concurring) (Attorney General's Manual is the "Government's own most authoritative interpretation of the APA," which the Supreme Court has "repeatedly given great weight").

[56] MetLife's passing reference to "the constitutionality of proceedings before the SEC" is a red herring. ML Br. 69–70. The holding in the case it cites has nothing to do with any "blending" of functions, but rather rested on separation of powers concerns regarding the President's appointment powers with respect to administrative law judges. *See Hill v. SEC*, No. 15–1801, 2015 U.S. Dist. LEXIS 74822, at *42–43 (N.D. Ga. June 8, 2015), *appeal pending*, No. 15–12831 (11th Cir.).

[57] Neither of the other two cases cited by MetLife even mentions the separation of powers. In *Withrow v. Larkin*, 421 U.S. 35 (1975) (cited in ML Br. 69 n.26), the Court rejected a due process claim, noting that "the combination of investigative functions does not, without more, constitute a due process violation." *Id.* at 58. And in *FTC v. Atl. Richfield Co.*, 567 F.2d 96

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

MetLife's due process claim is equally meritless. The company abandons its principal argument—that a blending of functions "also resulted in a violation of . . . due process," Compl. ¶ 137; *see* FSOC Br. 58–59—and instead focuses on the notion that it received constitutionally inadequate access to the administrative record before its designation, ML Br. 62–66. While that is mistaken, this claim fails for a more basic reason: MetLife still fails to identify a protected liberty or property interest of which it was deprived by its designation, as is necessary to invoke the protections of due process. *See* FSOC Br. 57 (citing, *inter alia*, *Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972)); *see also New Vision Photography Program, Inc. v. Dist. of Columbia*, 54 F. Supp. 3d 12, 28 (D.D.C. 2014). Designation under Section 113 imposes no penalty, and MetLife has no liberty or property interest in never being designated.

Even if MetLife could establish an entitlement to due process protections, its assertion that it was entitled to the complete administrative record before the Council issued its final decision, ML Br. 63, fails. The process prescribed by Congress in Section 113—the Council's issuance of a basis for its proposed determination and the opportunity for a hearing—fully satisfies the Constitution. Due process requires only notice of the bases for a proposed action that is sufficient to enable a meaningful opportunity to be heard, which is satisfied if an agency provides "an opportunity, in substance" to rebut the evidence in the administrative record. *Kadi v. Geithner*, 42 F. Supp. 3d 1, 29 (D.D.C. 2012). Due process does not mandate production of the full administrative record before an agency makes its final decision. *Id.* at 29. Here, there can be no serious doubt that the Council provided MetLife with sufficient information about its

(D.C Cir. 1977) (cited in ML Br. 69), the court considered various due process issues but identified no violation.

proposed designation to enable the company "to be heard at a meaningful time and in a meaningful manner," *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 209 (D.C. Cir. 2001), and to respond to the substance of the evidence in the administrative record. Given the extensive engagement with MetLife during the 17-month designation process—set forth at length in the Council's opening brief, s*ee* FSOC Br. 10–13, 57—the notion that the company "lacked a meaningful opportunity to respond," ML Br. 65, has no basis.

National Council of Resistance of Iran is not to the contrary, as it involved vastly different circumstances. There, the D.C. Circuit required the Secretary of State to provide notice and the unclassified evidence supporting her decision before imposing economic sanctions on the National Council of Resistance of Iran ("NCRI"). 251 F.3d at 209. But that case involved the designation of the group as a "foreign terrorist organization" under the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. § 1189, which resulted in the freezing of funds located in the United States and the barring of certain members and representatives of the organization from entering the United States. *Id.* at 196 (internal citations omitted). Thus, not only was a protected property interest, and arguably a liberty interest, at stake, *id*. at 204–05, but the court found the consequences of NCRI's designation as a foreign terrorist organization to be "dire," *id*. at 209. Here, in contrast, the immediate consequence of MetLife's designation is that it becomes subject to certain additional regulation. Even the Federal Reserve's future prudential standards (which have not yet been specified) would not impose consequences anything like those imposed on NCRI as a result of its designation as a foreign terrorist organization.

MetLife's remaining arguments also lack merit. First, it is well established that an administrative record need not include confidential information—such as the relatively small number of documents withheld at the request of MetLife's New York and Connecticut

regulators—where privileged or protected by statute.[58] *Cf.* ML Br. 64–65. The same is true of communications among Council members and staff, which are properly withheld as internal agency deliberations.[59] *Cf. id.* at 64. It cannot be that, in permitting such redactions, courts are routinely condoning due process violations.

MetLife's invocation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), underscores the weakness of its argument, as "*Brady* does not apply in civil cases except in rare situations, such as when a person's liberty is at stake." *Brodie v. HHS*, 951 F. Supp. 2d 108, 118 (D.D.C. 2013) (Collyer, J.). In any event, MetLife has separately challenged the withholding of these documents. *See* Mot. to Compel, ECF 50. Thus, even if their withholding somehow constitutes a due process violation, if the Court grants MetLife's motion to compel and orders their production, MetLife's due process claim based on their withholding in this action would be moot.[60]

Second, MetLife argues that the Council violated due process by including two items in the final basis that were not in the proposed designation—(1) the Monte Carlo analysis used to

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[58] *See, e.g.*, *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 574-76 (D.C. Cir. 2002) (confidential business information); *MD Pharm., Inc. v. DEA*, 133 F.3d 8, 13 (D.C. Cir. 1998) (trade secrets); *Serono Labs., Inc. v. Shalala*, 35 F. Supp. 2d 1, 3 (D.D.C. 1999) (competing need for trade secrets to be kept confidential trumped need for disclosure).

[59] *See, e.g.*, *San Luis Obispo Mothers for Peace v. U.S. Nuclear Reg. Comm'n*, 789 F.2d 26, 44 (D.C. Cir. 1986) (en banc) (deliberative materials are properly excluded from administrative record absent a strong showing of bad faith or improper behavior).

[60] Notably, in its reply in support of its motion to compel, MetLife asserts that the existing protective order is sufficient to address any privilege or confidentiality interests that the states have in the withheld records, but stops short of declaring that the company will abandon its plan to modify the protective order to permit certain MetLife employees to view the withheld documents. *See* ML Reply Br., ECF 56. MetLife's "reservation of rights" on this point is a significant one for the state regulators, and although the concession is entirely in MetLife's control, the company is unwilling to make it.

evaluate the Oliver Wyman study, and (2) a new estimate of losses arising from the 1991 failure of the insurance company Executive Life, ML Br. 66—both of which were included to respond to MetLife's own arguments.[61] But the Council's 270-page notice of the basis for its proposed designation, along with the written and oral hearing provided to MetLife, were more than sufficient to afford the company a meaningful opportunity to be heard, and fully satisfied due process. *See, e.g.*, *Elkins v. Dist. of Columbia*, 527 F. Supp. 2d 36, 48 (D.D.C. 2007) (Collyer, J.). Further, there is nothing unusual about a final agency decision that contains evidence or analysis that was not contained in an earlier proposed decision. For example, agencies often issue final rules that differ somewhat from proposed rules, both in terms of content and reasoning, and the same is true in adjudications. It stands to reason that a final determination would be more extensive than a proposed determination, particularly where, as here, it follows a hearing and submission of additional materials, *see* 12 C.F.R. § 1310.21(a)(2). In the rulemaking context, even where formal procedures are required by statute, a final rule need not be identical to a proposed rule; it need only be a "logical outgrowth" of the agency's notice of proposed rulemaking. *See Agape Church*, 738 F.3d at 411–12; *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1080 (D.C. Cir. 2009). Here, no such formal procedures were required, but in any event the Council's final basis would satisfy the "logical outgrowth" test. *See CSX Transp.*, 584 F.3d at 1080 (final rule fails the "logical outgrowth" test only where "interested parties

[61] The Monte Carlo analysis was included in response to specific arguments that MetLife raised, after the proposed designation, regarding how the order of MetLife's asset sales could affect the fire sale analysis. *See supra* at Part I(E), at 34. An estimate (based on a public report) of the loss rate arising from Executive Life's failure was included after MetLife argued, in its written hearing submission after the proposed designation, that the "standard loss rate" is low and that the Executive Life failure was a relevant precedent for the Council to consider. *See* AR 2346–50.

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would have had to divine the agency's unspoken thoughts, because the final rule was surprisingly distant from the proposed rule").

Finally, MetLife's unconstitutional vagueness argument should be rejected out of hand. MetLife offers no response to the argument that the void-for-vagueness doctrine simply does not apply to civil statutes like Section 113 that neither impose a penalty nor forbid conduct, and thus concedes the point. *See* FSOC Br. 59 (citing, *inter alia*, *Hodges v. Dist. of Columbia*, 975 F. Supp. 2d 33, 52–53 (D.D.C. 2013)). Even if the doctrine could be applied here, MetLife also ignores the forgiving standard of review for vagueness challenges in the civil context, where a statute will be voided only if "'so vague and indefinite as really to be no rule or standard at all.'" *Id*. (citing, *inter alia*, *Advance Pharm., Inc. v. United States*, 391 F.3d 377, 396 (2d. Cir. 2004)); *see also Hoffman Estates v. Flipside*, 455 U.S. 489, 498 (1982) ("economic regulation" subject to "less strict vagueness test"). Section 113, particularly as clarified by the Council's interpretive guidance, easily passes this test. Indeed, MetLife concedes that Congress created "clear statutory standards" for designation. ML Br. 1. And contrary to the company's suggestion, *id*. at 67, the Council's guidance sets forth explicit standards that govern Section 113 designations, including quantitative thresholds for identifying companies for evaluation for potential designation, 77 Fed. Reg. at 21,641–47 (AR 5-11); FSOC Br. 9–10.[62] Section 113 is not impermissibly vague, and MetLife's due process claim fails.[63]

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[62] MetLife's complaint about not having access to the Council's nonpublic final bases for designating other nonbank financial companies, ML Br. 67, is misplaced. *Cf. Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (APA review is based on "the full administrative record that was before the [agency] at the time [it] made [its] decision"). In any case, as MetLife has noted, it had access to the public explanations of the bases for the Council's previous designations, which explain the Council's reasons for designating those companies and omit confidential business and supervisory information. ML Br. 9; *see* Nonbank Financial

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

MetLife concedes—by not arguing otherwise—that its "claim" for injunctive relief does not state a separate cause of action and therefore must be dismissed. *See* FSOC Br. 60. It likewise concedes that, should the Court find a violation of Dodd–Frank or the APA, the appropriate remedy is rescission. *See id.* at 60–61. MetLife's only remaining argument is that, should the Court find a constitutional violation, it retains the inherent authority to issue injunctive relief. But injunctive relief is an "extraordinary remedy" that may not be granted as a matter of course. *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 312 (1982). MetLife's perfunctory discussion of the prerequisites for such relief falls far short of its burden. *See eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006) (reciting standard).

First, despite MetLife's assertions, "[c]onstitutional harm is not necessarily synonymous with . . . irreparable harm." *Hohe v. Casey*, 868 F.2d 69, 73 (3d Cir. 1989); *accord Siegel v. LePore*, 234 F.3d 1163, 1177 (11th Cir. 2000). At least two courts of appeals have declined to find per se irreparable injury for due process claims such as MetLife's. *E.g.*, *Pub. Serv. Co. of N.H. v. Town of W. Newbury*, 835 F.2d 380, 382 (1st Cir. 1987); *Morton v. Beyer*, 822 F.2d 364, 372 (3d Cir. 1987). Second, MetLife has not shown that a "less drastic remedy," such as a declaratory judgment, would be inadequate to vindicate its claims; thus, "no recourse to the additional and extraordinary relief of an injunction [is] warranted." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010). Indeed, there is a longstanding presumption that a

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Company Designations, U.S. Department of The Treasury, http://www.treasury.gov/initiatives/fsoc/designations/Pages/default.aspx.

[63] Astonishingly, MetLife repeats its erroneous assertion that the Government Accountability Office criticized the Council's designation process for lacking a "systematic and comprehensive approach." ML Br. 10. The Council previously corrected MetLife's error by noting that the language quoted by MetLife was not addressing Council designations. FSOC Br. 41–42 n.27.

declaratory judgment provides adequate relief against executive officers, as it will not be presumed that they will ignore the judgment of the Court after appellate review is exhausted. *See Comm. on Judiciary of U.S. House of Reps. v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008).

Finally, the balance of harms and the public interest counsel against issuance of an injunction. "The public interest may be declared in the form of a statute," *Golden Gate Rest. Ass'n v. City & Cnty. of San Francisco*, 512 F.3d 1112, 1127 (9th Cir. 2008), and "a court sitting in equity cannot ignore the judgment of Congress, deliberately expressed in legislation," *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001). Here, in the wake of the most severe recession since the Great Depression, Congress determined that the public interest lay in promoting financial stability through a new agency with a broad, interagency perspective over the entire financial system, and the authority to respond to potential threats to financial stability posed by nonbank financial companies. This Court should not disregard that judgment, even if MetLife had offered any comparable harm on the other side of the scale.

CONCLUSION

For the foregoing reasons, the Court should grant Defendant's Motion to Dismiss or, in the alternative, for Summary Judgment, and deny MetLife's Cross-Motion.

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Respectfully submitted,

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