ORAL ARGUMENT NOT SCHEDULED
No. 16-5086

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

METLIFE, INC.,
Plaintiff-Appellee,

v.

FINANCIAL STABILITY OVERSIGHT COUNCIL,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Columbia

BRIEF OF PROFESSORS OF ADMINISTRATIVE LAW AND FINANCIAL REGULATION AS *AMICI CURIAE* SUPPORTING APPELLANT

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Dated: June 23, 2016

STATEMENT REGARDING CONSENT TO FILE, SEPARATE BRIEFING, AUTHORSHIP AND MONETARY CONTRIBUTIONS

All parties have consented to the filing of this brief. *Amici curiae* filed notice of intent to participate on June 21, 2016.

Pursuant to Rule 29(c) of the Federal Rules of Appellate Procedure, *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

Pursuant to D.C. Circuit Rule 29(d), counsel for *amici curiae* certifies that no other *amicus* brief of which they are aware is addressing the District Court's interpretation of the governing statute and the Financial Stability Oversight Board's regulatory guidance from the perspective of experts in administrative law and financial regulation.

To the best of the knowledge of *amici curiae*, there will be five other *amicus curiae* briefs supporting the Appellant. *Amici curiae* believe that the brief of Better Markets, Inc. will also focus on the district court's analysis of the FSOC's regulatory guidance, but from the perspective of market functioning, and particularly from the perspective of institutional and individual investors. *Amici curiae* believe the brief of Insurance Scholars will focus on the effects of MetLife's distress on insurance markets and insurance regulation, and the ability of such

regulation to fully address the effects of MetLife's distress on financial stability. *Amici Curiae* believe that the Brief of Viral Acharya et al. will focus on presenting evidence from financial markets of the significant effects that material distress at MetLife would have on financial stability. *Amici curiae* believe that the Brief of Current and Former Members of Congress will emphasize the unique perspective of those involved in the legislative process on the policy objectives that Congress sought to achieve in the Dodd-Frank Act. Finally, *amici curiae* believe that the Brief of Ben S. Bernanke and Paul A. Volcker will discuss the harmful effect that the District Court's decision would have on the designation process from the experience of leading national federal financial regulators.

In light of the different subject matter presented by those briefs, and the importance and complexity of the issues presented in this case, counsel for *amici curiae* certifies that filing a joint brief is not practicable and that it is necessary to submit separate briefs.

___*s/ Gillian E. Metzger*_______
Gillian E. Metzger

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and Amici

All parties and *amici* in the proceeding below are listed in the Brief of Appellant.

B. Rulings Under Review

References to the ruling at issue appear in the Brief for Appellant.

C. Related Cases

Amici curiae adopt the statement of related cases presented in the Brief for Appellant.

s/ Gillian E. Metzger
Gillian E. Metzger

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GLOSSARY

AIG .... American International Group

EPA .... Environmental Protection Agency

FSOC .... Financial Stability Oversight Council

STATEMENT OF INTEREST

Amici are 23 professors of administrative law and financial regulation. *Amici*'s research and teaching focus on the issues presented in this case, including the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd–Frank"), Pub. L. No. 111-203, 124 Stat. 1376 (2010), judicial review of agency action, and the appropriate use of cost-benefit analysis in financial regulation. *Amici* submit this brief in the hope that its analysis of these issues will be of assistance to the Court.[1]

SUMMARY OF ARGUMENT

The financial crisis of 2008, and the deep and long recession that followed, were the most serious economic calamities to befall the Nation since the Great Depression. The crisis shuttered American businesses, cost millions of Americans their jobs, and wiped out billions in home values and retirement savings. S. Rep. No. 111-176, at 39 (2010); *see also* Fin. Crisis Inquiry Comm'n, The Financial Crisis Inquiry Report xv–xvi (2011). The crisis arose, in part, from the activities of firms that were outside the formal banking system but nevertheless engaged in extensive financial activities, including American Insurance Group (AIG) and Lehman Brothers. S. Rep. No. 111-176, at 40, 43. These firms effectively engaged in similar activities to bank holding companies but escaped meaningful,

[1] A list of *amici*—and their institutional affiliations, provided for identification purposes only—is included in the Appendix.

consolidated federal regulation and supervision by the Federal Reserve Board. When asset prices plummeted and the short-term funding markets that these firms relied upon dried up, their distress fanned a panic that nearly destroyed the global financial system.

Congress's response to the crisis was the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd–Frank"), Pub. L. No. 111-203, 124 Stat. 1376 (2010). To address the dangerous regulatory gaps that allowed firms such as AIG and Lehman Brothers to endanger our economy, and to protect the country against future crises, Dodd–Frank created a unique regulatory entity, the Financial Stability Oversight Council ("FSOC" or "Council"). Comprised of the heads of the Nation's leading financial regulators and independent nonvoting members, Congress charged the FSOC with responsibility for identifying and guarding against future threats to our financial system.

Among the FSOC's central powers is the authority to designate nonbank financial companies as systemically important financial institutions ("SIFIs") and therefore subject these firms to supervision by the Federal Reserve.[2] Designation is the key mechanism for ensuring that major market participants with the potential to wreak havoc on the U.S. economy are no longer able to evade effective federal

[2] Although Dodd–Frank uses different language to describe companies designated by the FSOC for Federal Reserve supervision, throughout this brief we adopt the common convention of referring to such firms as SIFIs.

oversight. Congress carefully designed the FSOC's structure and process to ensure that SIFI designations would derive from expert and deliberate judgments, recognizing that designations would entail highly complex predictive determinations. Underscoring the broad discretion it intended the FSOC to exercise, Congress expressly limited judicial review of FSOC's designations to the highly deferential arbitrary and capricious standard.

The FSOC has undertaken its statutory responsibilities with care, providing multiple opportunities for public input, meeting repeatedly with firms under review, and issuing detailed analyses supporting its designation determinations, such as the determination under review here. *See* Gov't Br. at 39–50. Nonetheless, in the decision below, the District Court ruled that the FSOC acted arbitrarily and capriciously in designating MetLife as a SIFI. *MetLife, Inc. v. Fin. Stability Oversight Council*, No. 15-0045(RMC), 2016 WL 1391569, *7 (D.D.C. Mar. 30, 2016). According to the District Court, Dodd–Frank and *Michigan v. EPA*, 135 S. Ct. 2699 (2015), required the FSOC to consider the costs that MetLife would suffer from designation, and the agency acted arbitrarily in refusing to do so. *MetLife*, 2016 WL 1391569, at *14–*17. The District Court further faulted the FSOC for not precisely identifying the financial impact of MetLife's distress in a financial crisis on particular firms and for purportedly failing to follow the analytical

framework the agency had laid out in its interpretive guidance. *Id.* at *10–*11, *13–*14.

The District Court's decision is fundamentally flawed and, if affirmed, will significantly undermine Dodd–Frank's protections against a future financial crisis. *First*, the District Court's requirement that FSOC assess the costs of designating MetLife a SIFI ignores both the text of the statute and Congress's policy choices. None of the ten mandatory factors that Dodd–Frank requires the FSOC to consider in making a SIFI determination makes any reference to regulatory costs. The statute's catch-all language granting the FSOC authority to consider "any other risk-related factors [the FSOC] deems appropriate," 12 U.S.C. § 5323(a)(2)(K) (2012), represents a broad grant of discretion *to the agency* and offers no basis for the District Court's requirement that the FSOC consider costs. Moreover, *Michigan v. EPA* involved a dramatically different statutory provision and emphasized the importance of attending to statutory language; it therefore offers no support for the District Court's view. By latching onto the single word "appropriate" and ignoring both legislative text and Congress's policy choices, the District Court failed to heed the Supreme Court's recent insistence that courts must read statutory words in context with "a fair understanding of the legislative plan." *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015).

Second, the District Court required a degree of precision in assessing the systemic effects of MetLife's distress that is impossible for the FSOC to meet and completely implausible as a matter of statutory text and legislative intent. The FSOC's designation of MetLife also reflected a reasonable interpretation of its regulatory guidance on the SIFI designation process (the "Guidance")—an interpretation to which the District Court failed to defer. The District Court's contrary reading of the Guidance would require the FSOC to ignore relevant statutory factors regarding both vulnerability to distress and its effects. It also reveals a lack of understanding of basic principles of financial regulation and the core purposes underlying designation. And the District Court's suggestion that the Guidance became a legislative rule because the FSOC subjected it to notice and comment is irreconcilable with the Administrative Procedure Act (APA) and recent Supreme Court precedent.

ARGUMENT

I. THE DISTRICT COURT FUNDAMENTALLY MISREAD DODD–FRANK AND *MICHIGAN V. EPA* IN REQUIRING THE FSOC TO CONSIDER THE COSTS ON METLIFE BEFORE DESIGNATING THE FIRM AS A SIFI.

The District Court's insistence that Dodd–Frank requires the FSOC to consider the costs of designation on MetLife cannot be sustained. This holding ignores the governing statutory language and lacks any basis in *Michigan v. EPA*.

If affirmed, it would significantly undermine the legislative policy Congress has enacted to protect our economy against future financial crises.

Dodd–Frank requires the FSOC to consider ten mandatory statutory factors in making a SIFI determination. All of these focus on the risks that the company could present to the financial system and national economy in the event of its material financial distress during a financial crisis; not one instructs the FSOC to assess the costs to the company from regulation. *See* 12 U.S.C. § 5323(a)(2) (2012). Yet the District Court held that FSOC must examine those costs before making a SIFI designation because § 5323 ends with a catch-all provision instructing the FSOC to consider "any other risk-related factors that the Council deems appropriate." *Id.* § 5323(a)(2)(K); *MetLife*, 2016 WL 1391569, at *16. Relying on the Supreme Court's decision last Term in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), the District Court ruled that § 5323(a)(2)(K)'s reference to "appropriate" served to "require FSOC to consider the cost of designating a company for enhanced supervision." *MetLife*, 2016 WL 1391569, at *16.

Despite the District Court's heavy reliance on *Michigan v. EPA*, that decision offers no support for requiring a cost assessment here. The Clean Air Act (CAA) provision at issue in *Michigan* is dramatically different from § 5323. The CAA provision instructed EPA to perform a study of public health hazards from power plant emissions, report to Congress, and "regulate [power plants] under this

section, if the Administrator finds such regulation is appropriate and necessary after considering the results of the study." 42 U.S.C. § 7412(n)(1)(A) (2012). "Read naturally *in the present [statutory] context*," the *Michigan* Court concluded, "'appropriate and necessary' requires at least some attention to cost." 135 S. Ct. at 2707 (emphasis added).[3] Ignoring the Supreme Court's emphasis on statutory context, the District Court here essentially read *Michigan* to adopt a categorical rule that statutory inclusion of the term "appropriate" mandates assessment of regulatory costs. *MetLife*, 2016 WL 1391569, at *16.

The statute at issue here is a far cry from the CAA provision challenged in *Michigan.* Instead of a general instruction to study an issue and regulate only if the agency deems regulation "appropriate and necessary," § 5323 mandates that the FSOC consider ten detailed factors in deciding whether to designate a firm as a SIFI. All of these factors focus on the risks a nonbank financial company may pose to financial stability, making no mention of the costs of designation. 12 U.S.C. § 5323(a)(2); *cf. Michigan*, 135 S. Ct. at 2709 (stating that costs are ordinarily not an appropriate factor where the statutory text "expressly directs [an agency] to regulate on the basis of a factor that on its face does not include cost").

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[3] This emphasis on statutory context was central to the *Michigan* Court's reaffirmance of prior decisions rejecting consideration of costs by agencies. *See Michigan*, 135 S. Ct. at 2709 (reaffirming *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 467 (2001)).

The term "appropriate" only appears in the statute at the end, in § 5323(a)(2)(K)'s requirement that the FSOC consider "*any other* risk-related factors that *the Council deems* appropriate." (emphases added). This is a statutory catch-all intended to make clear that the FSOC is free to consider other risk-related considerations beyond those provided in the statute, not require it to do so. Put simply, it is for the FSOC, not a reviewing court, to determine which factors are "appropriate." This Court's precedent leaves little doubt that § 5323(a)(2)(K)'s use of the phrase "the Council deems" should be read as a broad delegation of discretion" to the FSOC. *Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1224 (D.C. Cir. 1993). Indeed, the Supreme Court has held that similar language authorizing the CIA Director to fire a CIA employee whenever the Director "'shall deem such termination necessary or advisable in the interests of the United States' fairly exudes deference" to such a degree that it precluded judicial review altogether. *Webster v. Doe*, 486 U.S. 592, 600 (1988).[4]

Finally, by latching onto the single word "appropriate" in this fashion, the District Court failed to follow the Supreme Court's admonition that courts should determine the meaning of statutory terms in context with "a fair understanding of

[4] Moreover, unlike in *Michigan*, here Congress modified the statutory term "appropriate" to refer only to "risk-related" factors. 12 U.S.C. § 5323(a)(2)(K). The District Court's use of an implausible reading of the Guidance to conclude that costs are a "risk-related" factor, *MetLife*, 2016 WL 1391569, at *16, further underscores the Court's failure to give the agency the deference that this statutory language requires.

the legislative plan." *King*, 135 S. Ct. at 2496. As explained above, in the wake of the financial crisis, Congress made the clear choice to address the risks to the national economy posed by the next AIG or Lehman by subjecting them to Federal Reserve oversight—notwithstanding the costs to designated firms of such regulation. The District Court's approach would erect substantial obstacles to designation, fundamentally thwarting "the legislative plan" of Dodd–Frank.

A significant and growing group of legal scholars agree that existing regulatory tools for cost-benefit analysis are an exceptionally poor fit for the SIFI designation process. One prominent article, for example, recently examined several case studies involving financial-regulation cost-benefit analysis, identifying significant problems with data limitations, causal inference, macroeconomic modeling, and political economy. John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 Yale L.J. 882, 997 & tbl.5 (2015). Assessing the costs of SIFI designation for designated firms would require dynamic evaluation of: the regulatory costs themselves, which will necessarily change over time; the firm's and financial markets' various responses to those regulations (including, for example, changes in the composition of the firm's balance sheet and risk-adjusted cost of debt and equity as a result of its supervision); and regulators' and our political system's reactions to market

responses.[5] The District Court's repeated references to MetLife's bare allegations that designation would "impos[e] billions of dollars in cost" on the company, *MetLife*, 2016 WL 1391569, at *16, as if these claims offer any meaningful analysis of the costs or benefits of SIFI designation, reveal the District Court's troubling lack of understanding of the realities of financial regulation. Delaying designation until the FSOC estimates costs on designated firms in the manner the District Court required would make it impossible for FSOC to achieve the task Congress charged it with: eradicating the regulatory gaps that contributed to the last financial crisis in order to protect our economy from the next one.

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[5] *See* Jeffrey N. Gordon, *The Empty Call for Cost-Benefit Analysis in Financial Regulation*, 43 J. Legal Stud. 351, 352–53 (2014). Although some scholars have argued that cost-benefit methodologies better attuned to macroeconomic analysis can be devised, Eric A. Posner & E. Glen Weyl, *Benefit-Cost Paradigms in Financial Regulation* 4–5 (U. Chi. Coase-Sandor Inst. for L. & Econ. Research Paper No. 660, 2014), http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1647&context=law_and_economics; Richard L. Revesz, *Cost-Benefit Analysis and the Structure of the Administrative State: The Case of Financial Services Regulation* 13 (N.Y.U. Law Sch. Pub. Law & Legal Theory Working Paper No. 16-07, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2733713, they acknowledge that such methodologies do not currently exist. *See* Posner & Weyl, *supra,* at 1 ("[M]any valuations for BCA of financial regulation do not yet exist . . . ."); Revesz, *supra*, at 50 ("[T]he valuation techniques for ascertaining the benefits of financial regulation are very much in their infancy.").

II. THE DECISION BELOW IGNORED DODD–FRANK'S STATUTORY DESIGN, FSOC'S EXPERT EXECUTION OF ITS TASK, AND BASIC PRECEPTS OF BOTH FINANCIAL REGULATION AND ADMINISTRATIVE LAW.

With the Nation's experience with AIG and Lehman Brothers firmly in mind, in Dodd–Frank Congress empowered the FSOC to subject SIFIs to Federal Reserve supervision. Recognizing the importance of that authority, Congress carefully designed the FSOC to ensure that SIFI designations would be the product of an expert, informed, and deliberative process. Congress's goal was to secure federal supervision of financial firms that could threaten the financial system and the national economy *before* problems arose, so it instructed FSOC to designate as SIFIs nonbank financial companies that "*could* pose a threat to the financial stability of the United States." 12 U.S.C. § 5323(a)(1) (2012) (emphasis added).

A. Congress Designed the FSOC to Ensure that SIFI Designations Derive from Expert, Predictive Judgments About the Financial System, and FSOC's Regulatory Guidance and SIFI Designations Reflect the Sound Execution of that Statutory Design.

While debating and enacting Dodd–Frank, Members of Congress repeatedly acknowledged the complexity of analyzing systemic risk—and identifying future sources of such risk. *Modernizing Bank Supervision and Regulation—Part 1: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs*, S. Hrg. No. 111-109, 111th Cong. 2 (2009) (statement of Sen. Dodd). Congress's response to this complexity was to create the FSOC, a uniquely expert body chaired by the

Secretary of the Treasury, whose voting members include all of the Nation's top financial regulators as well as an independent member with insurance expertise. 12 U.S.C. § 5321(b)(1) (2012). This structure builds into the FSOC a deep knowledge of financial firms and regulatory institutions—as well as competing viewpoints. *See* Jacob E. Gersen, *Administrative Law Goes to Wall Street: The New Administrative Process*, 65 Admin. L. Rev. 689, 693–702 (2013).

Recognizing the importance of the designation authority, Congress required "a vote of not fewer than 2/3 of the voting members then serving," 12 U.S.C. § 5323(a)(1), before FSOC could designate a SIFI—requiring near consensus among a group of financial regulators and experts with an unprecedented diversity of perspectives as a prerequisite to using the designation authority. Congress also imposed notice and hearing requirements on SIFI designations, 12 U.S.C. § 5323(e) (2012), required the FSOC to consult with an entity's prudential regulator prior to designation, 12 U.S.C. § 5323(g) (2012), and required FSOC to annually reevaluate any designation, 12 U.S.C. § 5323(d) (2012). Finally, as discussed above, Congress mandated that FSOC consider ten factors when making SIFI designations, as well as "any other risk-related factors that [it] deems appropriate." 12 U.S.C. §§ 5323(a)(2)(A)–(K) (2012).

Congress intended that the FSOC's structure and procedures would ensure that designation decisions were expert, informed, and deliberative, and limited

judicial review in this area to "whether the final determination [of SIFI designation] . . . was arbitrary and capricious." 12 U.S.C. § 5323(h) (2012). And it required FSOC to engage in predictive judgments. *Id.* § 5323(a)(1) (requiring FSOC to designate any firm that "*could* pose a threat to the financial stability of the United States") (emphasis added). Both the Supreme Court and this Court have long emphasized that arbitrary-and-capricious review is especially deferential where an agency's work requires expert predictions about the future. *See, e.g.*, *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983) ("A reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, . . . a reviewing court must generally be at its most deferential."); *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009) ("In circumstances involving agency predictions of uncertain future events, complete factual support in the record for the [agency's] judgment or prediction is not possible or required . . . ." (quoting *Melcher v. FCC*, 134 F.3d 1143, 1151 (D.C. Cir. 1998) (internal quotation marks omitted)).

FSOC's execution of its statutory mandate reflects the significant expertise that Congress correctly concluded the Council would need. After issuing three notices of proposed rulemaking that attracted extensive commentary from the public, *see* 75 Fed. Reg. 61,653 (proposed Oct. 6, 2010); 76 Fed. Reg. 4,555

(proposed Jan. 26, 2011); 76 Fed. Reg. 64,264 (proposed Oct. 18, 2011), the FSOC published a final rule governing SIFI designations that set forth a multi-stage process requiring extensive analysis, 12 C.F.R. § 1310 (2016), along with the Guidance which described in detail the process and analytical frameworks FSOC intended to use in making SIFI designations, 12 C.F.R. pt. 1310, App. A (2016). The Guidance indicated that the FSOC intended to consider the ten statutory SIFI designation factors in six analytical categories—size, interconnectedness, substitutability, leverage, liquidity risk and maturity mismatch, and existing regulatory scrutiny—but that "the Council's ultimate determination decision . . . will not be based on a formulaic application of the six categories." 12 C.F.R. pt. 1310, App. A, § II(d)(1).

Since issuing the Guidance, the FSOC has designated four firms as SIFIs: AIG, General Electric Capital Corporation, Prudential Financial, and MetLife. To support MetLife's designation, FSOC issued a 341-page analysis describing the devastating consequences that MetLife's distress could inflict on the economy. *See* Notice of Final Determination and Statement of the Basis for Financial Stability Oversight Council's Final Determination Regarding MetLife, Inc. (Dec. 18, 2014) [hereinafter Final Determination] [JA 361–778]. The FSOC showed, for example, that MetLife's financial distress could endanger institutional investors, such as the sixty-five money market funds that could "break the buck" in the event of a

MetLife default. *Id.* at 111 & fig. 6 [JA 472–73]; *see also* Gov't Br. at 42. The distress of just one money market fund after Lehman's failure caused a massive run on the entire $3 trillion money market fund sector. Fin. Crisis Inquiry Comm'n, Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States 356–357 (2011). The agency also explained how distress at MetLife could affect MetLife's 50 million U.S. customers and overwhelm the state-based associations that ensure the payment of certain insurance policies. Final Determination at 94–95 [JA 456–57].

B. The Decision Below Disregarded Congress's Statutory Design and Foundational Principles of Financial Regulation and Administrative Law.

In overturning MetLife's SIFI designation, the District Court ignored Congress's carefully constructed statutory scheme. As noted above, Dodd–Frank granted FSOC broad discretion to act prophylactically in order to protect the nation's financial system, subject to minimal judicial review. And FSOC has executed that authority in a fashion fully consonant with Congress's vision, rendering detailed judgments that demand extensive expertise. Yet the District Court repeatedly substituted its own judgment for that of Congress and the agency, in the process providing a textbook illustration of the institutional rationale for judicial deference to agency expertise.

First, the District Court demanded that the FSOC quantify the losses that MetLife's distress would inflict on particular firms and the economy as a whole, an analysis that the agency and financial-regulation scholars agree is both impractical and unhelpful in pursuing the agency's statutory mandate. *Second*, the District Court failed to defer to the FSOC's reasonable interpretation of its Guidance, despite well-established doctrine granting agencies broad deference in interpreting their regulations. And *third*, the District Court's suggestion that subjecting guidance to notice and comment transforms it into a legislative rule is at odds with the APA and governing precedent.

1. The District Court's Requirement that the FSOC Quantify Losses Caused by MetLife's Distress Reflects a Fundamental Lack of Understanding of the Task Congress Charged the FSOC to Perform.

The District Court concluded that MetLife's SIFI designation could not stand because FSOC failed to quantify the impact that its material financial distress would have on other market participants and the broader economy:

> FSOC never projected *what* the losses would be, *which* financial institutions would have to actively manage their balance sheets, or *how* the market would destabilize as a result [of MetLife's material financial distress].

MetLife, 2016 WL 1391569, at *13 (emphasis in original). The District Court's analysis reveals a lack of understanding of the nature of financial markets.

The precise quantification that the District Court demanded is simply not possible in the context of predicting potential systemic financial risk. Assessing the

systemic effects of distress at large financial firms requires regulators to forecast how millions of market participants might respond to the news that a major institution can no longer meet its obligations. The agency must then in turn predict how market participants might respond to *other participants'* reactions to this information. Moreover, the regulator must conduct this assessment for a broad range of potential states of the world: those where the institution's failure leads to cascading failures of other institutions, for example, as contrasted with those where the institution's failure stands alone. All of these outcomes must be predicted in a virtually infinite number of potential scenarios. That is why a wide range of scholars agrees that predicting such outcomes with precision is neither possible nor productive. Examining a series of attempts to quantify such matters, one scholar recently concluded that quantification in this area reflects mere "guesstimate[s]" rather than science. *See* Coates, *supra*, at 997. As another of our colleagues has remarked, "the desire to ground decisions on that which can be quantified is a self-deceptive conceit in the financial regulatory area that obscures more than it illuminates." Gordon, *supra*, at 354.

The District Court was correct to observe that "[i]t was not by accident or oversight that FSOC refused" to quantify losses to MetLife counterparties. *MetLife*, 2016 WL 1391569, at *14. Instead, it was the agency's expert judgment —reflected consistently in both the Guidance and the Final Determination—that

given the limits of quantitative analysis of the effects of systemic risk, such analysis, standing alone, should not dictate the SIFI designation process. *Compare* 12 C.F.R. pt. 1310, App. A, §§ II(d)(1), III, III(b) (noting, on four different occasions, that designations will be based on "quantitative and qualitative" information) *with* Final Determination at 9 [JA 371] ("[FSOC's] analysis is based on extensive qualitative and quantitative analyses regarding MetLife . . . ."). That judgment is consistent with the widespread view among scholars in the field that precise quantitative estimates in this area are rarely feasible and often fail to capture considerations that are critical to financial regulators' statutory mission. This is a judgment to which the District Court should have deferred—not a basis for invalidating the FSOC's action. As this Court has stated, "[w]here existing methodology or research in a new area of regulation is deficient, the agency necessarily enjoys broad discretion to attempt to formulate a solution to the best of its ability on the basis of available information." *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 611 (D.C. Cir. 2015) (quoting *California* ex rel. *Brown v. Watt*, 712 F.2d 584, 600 (D.C. Cir. 1983)). This Court has recently reiterated this point in the financial-regulation context. *See Lindeen v. Sec. & Exch. Comm'n*, No. 15-1149, 2016 WL 3254610, at *9 (D.C. Cir. June 14, 2016) (explaining that where the Securities and Exchange Commission does "not have the data necessary to quantify precisely" a particular regulatory cost, "[w]e do not require the

Commission to measure the immeasurable") (internal citations and quotations omitted).

2. The District Court Should Have Deferred to the FSOC's Reasonable and Consistent Interpretation of Its Own Guidance.

The District Court ruled that the FSOC acted arbitrarily by deviating from this Guidance by refusing to (1) conduct separate inquiries into MetLife's vulnerability to material financial distress and the effects of any such distress on financial stability and (2) determine the likelihood that MetLife would experience material financial distress. Neither criticism has merit. Instead, the District Court should have deferred to the FSOC's reasonable and consistent interpretations of its own Guidance and the statute it is charged with implementing.[6]

[6] As the FSOC has consistently adhered to the analytic approach it followed below, there is no need to address the District Court's additional conclusion that the FSOC acted arbitrarily by not stating it had changed its approach. *See Metlife*, 2016 WL 1391569, at *11–*13; *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515–16 (2009)). Nonetheless, it is worth noting that this case is diametrically different from instances in which an agency changed its approach without explanation or where serious reliance interests were at stake. *See, e.g., Encino Motorcars, LLC. v. Navarro*, No. 15-415, slip op. at 9 (Sup. Ct., Jun. 20, 2016). MetLife cannot legitimately claim reliance in light of the FSOC's longstanding statement that designation decisions would ultimately be made on a case-by-case basis. *See* FSOC, Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 77 Fed. Reg. 21637, 21639, 21641 (Apr. 11, 2012). Moreover, the FSOC's lengthy Proposed Determination gave MetLife ample notice of its approach and opportunity to object, and the FSOC justified its approach in response to MetLife's complaints. *See* Final Determination at 26–31 [JA 388–93].

In the Guidance, the FSOC noted that 12 U.S.C. § 5323 "requires the Council to consider 10 considerations . . . when evaluating the potential of a nonbank financial company to pose a threat to U.S. financial stability." 12 C.F.R. pt. 1310, App. A, § II(d)(1). The FSOC further stated that it had "developed an analytic framework that groups all relevant factors, including the 10 statutory considerations and any additional risk-related factors, into six categories: size, interconnectedness, substitutability, leverage, liquidity risk and maturity mismatch, and existing regulatory scrutiny." *Id.* Seizing on FSOC's discussion in the Guidance of this six-category framework, the District Court concluded that "FSOC intended the [latter three] analytical categories to assess a company before it became distressed and the first [three] to assess the impact of such distress on national financial stability." *MetLife*, 2016 WL 1391569, at *10, *12. The Court insisted that the Guidance imposed a strict separation among the six categories, and held that the FSOC had arbitrarily deviated from the Guidance when it considered all six categories in determining the potential systemic effects of material financial distress at MetLife. *Id.*

At the outset, it is important to recognize that the District Court's reading of the Guidance is implausible and deeply at odds with the reality of financial regulation. No serious student of financial regulation would argue that an entity's leverage, liquidity risk, or maturity mismatch is relevant only "before it bec[omes]

distressed," *MetLife*, 2016 WL 1391569, at *10, and not to the "impact of such distress on national financial stability," *id.* at *12.[7] Nor would any expert in the field contend that an entity's size, substitutability, or interconnectedness is unimportant to whether "it bec[omes] distressed," *MetLife*, 2016 WL 1391569, at *10, and matters only to the "impact of such distress on national financial stability," *id.* at *12.[8] All six of these categories are relevant, to varying degrees, to *both* the entity's vulnerability to distress *and* the effects of that distress on the economy.[9]

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[7] *See, e.g.*, Tobias Adrian, et al., Fed. Reserve Bank of N. Y., Staff Report No. 601, Financial Stability Monitoring 4 (2014), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr601.pdf (explaining that "leverage and maturity transformation . . . will tend to . . . amplify large shocks [to the financial system] through direct exposures, fire sales, or contagion").

[8] *See, e.g.*, Prasanna Gai & Sujit Kapadia, *Contagion in Financial Networks* 12 (Bank of Eng. Working Paper No. 383, Mar. 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1577043 (explaining that "[t]he vulnerability of a bank clearly depends on its in-degree," that is, its interconnectedness with other banks).

[9] It is unclear whether the District Court further read the Guidance as mandating a sequential consideration of the categories—that is, as requiring the FSOC to first assess a company's vulnerability to material financial distress and, only upon finding that the company was sufficiently vulnerable, proceed to considering the effects of such distress. This staged approach is one MetLife urged in its briefs below. Complaint at 4, *MetLife, Inc. v. Fin. Stability Oversight Council,* No. 15-0045(RMC), 2016 WL 1391569 (D.D.C. Mar. 30, 2016), 2015 WL 4064567 ("FSOC failed to conduct any threshold inquiry into MetLife's vulnerability to material financial distress."). If so, the District Court's reading of the Guidance would suffer an additional major flaw: it would put the Guidance in conflict with the governing statute and regulations, as it would prevent the FSOC from considering seven of the ten statutory considerations — those that were grouped

The FSOC's approach avoids this conflict with basic financial reality. In its Final Determination, the FSOC explained why the categories of leverage, liquidity risk and maturity mismatch, and existing regulatory scrutiny affect not only MetLife's vulnerability to material financial distress, but also how MetLife might respond to such distress. Final Determination at 28 [JA 390]. And, FSOC explained, because MetLife's responses will have implications for other market participants, examining those categories is relevant to the ultimate question of the effect of MetLife's vulnerability on the wider economy. *Id.*; *see also* Gov't Br. at 29. As important, the FSOC has consistently adhered to this position. For example, the Guidance expressly states that leverage can both "amplif[y]a company's risk of financial distress" *and* "amplify the impact of a company's distress on other companies," 12 C.F.R. pt. 1310, App. A, § II(d)(2) —a statement directly at odds with the District Court's conclusion that the Guidance limited consideration of leverage to determining if a company was vulnerable to material financial distress. *MetLife*, 2016 WL 1391569, at *10.

The Guidance also repeatedly makes clear that the focus of all six of the categories is on the ultimate question of the risk the company poses to financial

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under size, substitutability, and interconnectedness, 12 C.F.R. pt. 1310, App. A, § II(d)(1) (categorizing 12 U.S.C. §§ 5323(a)(2)(B)–(G), (I)), — unless and until it determined, based only on the three remaining considerations, that the company was vulnerable. Dodd–Frank and the FSOC's regulations make clear that *all* ten of the statutory considerations are mandatory. *See* 12 U.S.C. § 5323(a)(2); 12 C.F.R. § 1310.11 (2012).

stability. *See* 12 C.F.R. pt. 1310, App. A § II(d)(1) ("Each of the six categories reflects a different dimension of a nonbank financial company's potential to pose a threat to U.S. financial stability."). And, as noted above, the three categories relating to determining a firm's vulnerability also relate to how the firm might respond to its vulnerability—and, in turn, the threat the firm poses to the economy. The FSOC's focus on the ultimate issue of systemic threat, rather than a sharp division among the categories, is further evident in the Guidance's statement that "the Council's ultimate determination decision regarding a nonbank financial company will not be based on a formulaic application of the six categories. Rather, the Council intends to analyze a nonbank financial company using . . . data relevant to each of the six categories, as the Council determines is appropriate." *Id.* Strikingly, moreover, Dodd–Frank itself makes no distinction among the considerations applicable to determinations of a company's vulnerability to material financial distress and assessments of the systemic effects of such distress. Instead, it simply states that FSOC must assess all ten considerations in making a designation decision. 12 U.S.C. § 5323(a) (2012).

The District Court's conclusion that the Guidance requires the FSOC to assess the likelihood of material financial distress at a company before designating it as a SIFI is similarly flawed. Again, this reading is inconsistent with the text of the Guidance, which makes clear that the relevant statutory inquiry is to assess a

company's vulnerability to financial distress *and* the systemic impact of such distress were it to occur. *See* 12 C.F.R. pt. 1310, App. A, § II(a) ("[T]he 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 . . . ."); *id*. § II(b) ("[T]he Council may subject a nonbank financial company to supervision . . . if the Council determines that 'material financial distress' at the nonbank financial company could pose a threat to U.S. financial stability.")

Moreover, the District Court's reading would put the Guidance in tension with the governing statute. Section 5323(a) directs the FSOC to designate a firm "if the Council determines that material financial distress at the U.S. nonbank financial company . . . *could* pose a threat to the financial stability of the United States." 12 U.S.C. § 5323(a)(1) (emphasis added). Notably, Congress did not require the FSOC to show that a designated firm's distress *would* pose, or *is likely to* pose, a threat to financial stability, although Congress did impose that evidentiary burden as a condition for other regulatory actions authorized by Dodd–Frank.[10] More generally, Congress elsewhere described the duties of the Council to include "requir[ing] supervision . . . for nonbank financial companies that *may*

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[10] *See, e.g.*, Dodd–Frank § 722(h), 7 U.S.C. § 1b (2012) (amending the Commodity Exchange Act to permit the Secretary of the Treasury to exempt foreign exchange contracts from Dodd–Frank's swaps-clearing mandate only after the Secretary considers, *inter alia*, "whether the required trading and clearing of [those contracts] *would* create systemic risk . . . or threaten the financial stability of the United States" (emphasis added)).

pose risks to the financial stability of the United States." 12 U.S.C. § 5322(a)(2)(H) (2012) (emphasis added).

All of this suggests that the FSOC's approach represented the best interpretation of the Guidance. At a minimum, it shows that the Guidance is far more ambiguous than the District Court allowed, and that the FSOC's interpretation was a reasonable reading to which the District Court should have deferred. Under well-established doctrine, an agency's interpretation of its own regulation is "controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)); *see also In re Sealed Case*, 237 F.3d 657, 667 (D.C. Cir. 2001) (explaining that a court must "review an agency's interpretation of its own regulations with 'substantial deference.") (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)).[11]

The *Auer/Seminole Rock* framework is generally invoked with respect to an agency's interpretations of its regulations, but at least the same level of deference should apply when an agency is interpreting its guidance. *But see Elgin Nursing &*

[11] Although in recent years some Justices have questioned the constitutionality and desirability of *Auer/Seminole Rock* deference, *see, e.g., Perez v. Mortg. Bankers Ass'n,* 135 S. Ct. 1199, 1210–1213, 1217–22 (2015) (opinions of Justices Alito, Scalia, and Thomas), to date those views have not secured majority support. As a result*, Auer/Seminole Rock* deference remains good law and continues to govern, as this Court has recognized. *See, e.g., United States Telecom Assn v. FCC*, No. 15-1063, 2016 WL 3251234, at *32 (D.C. Cir., June 14, 2016) (applying *Auer*); *Flytenow, Inc. v. F.A.A.*, 808 F.3d 882, 889–90 (D.C. Cir. 2015) (same).

Rehab. Ctr. v. HHS, 718 F.3d 488, 493–94 (5th Cir. 2013) (refusing to apply *Auer/Seminole Rock* to agency interpretations of guidance). Not only are agencies similarly best positioned to provide expert interpretations of guidance they drafted, but they are free to change their guidance without even the notice-and-comment procedures that apply to changing regulations. *Perez v. Mortg. Bankers Ass'n,* 135 S. Ct. 1199, 1205–07 (2015); *see also Thomas Jefferson Univ.,* 512 U.S. at 512.[12] Nonetheless, in faulting the FSOC for deviating from its Guidance, the District Court never cited the *Auer/Seminole Rock* deference framework, even to explain why it did not apply here. This failure to engage with governing administrative law doctrine is a surprising omission that on its own calls the District Court's conclusion into question.

3. Under Well-Established Administrative Law Doctrine, Notice and Comment Cannot Transform Guidance into a Legislative Rule.

Lastly, the District Court further erred in stating that because the "FSOC engaged in notice-and-comment procedures before issuing its Guidance," the Guidance should be "treat[ed] as resulting from formal rulemaking." *MetLife*, 2016 WL 1391569, at *4 n.6. This suggestion that an agency must use notice-and-comment procedures to alter interpretive guidance if the guidance was subject to

[12] As a result, the Fifth Circuit's suggestion that deferring to agencies' interpretations of guidance would significantly expand agencies' powers, *see Elgin Nursing*, 718 F.3d at 493–94, is misplaced. Agencies already enjoy broad freedom to replace interpretive guidance—and thus have no need to rely on interpretive deference to avoid procedural constraints.

notice and comment when issued is simply wrong as a matter of governing administrative law. As the Supreme Court held just last Term, the APA exempts interpretive guidance from notice-and-comment requirements. *Perez*, 135 S. Ct at 1206–07. And the Court has repeatedly "reiterated that the APA 'sets forth the full extent of judicial authority to review executive agency action for procedural correctness.'" *Id.* at 1207 (quoting *Fox Television Stations, Inc.*, 556 U.S. at 513); *see also Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978) (holding that courts lack authority to impose procedural obligations on agencies beyond the "maximum procedural requirements" specified in the APA).

The fact that the FSOC subjected the Guidance to notice and comment is irrelevant to assessing the Guidance's status. As the Court made clear nearly forty years ago in *Vermont Yankee*, it is up to agencies—not reviewing courts—to determine when to use procedures beyond the APA's minimum requirements. 435 U.S. at 543, 546. Indeed, holding that an agency transforms its interpretive guidance into a binding legislative rule simply by submitting it for notice and comment would have perverse consequences. It would punish agencies for voluntarily seeking public input on guidance and deter such actions in the future at a time when many are urging greater transparency and public participation in agency guidance. *See, e.g.,* Office of Mgmt. & Budget, Final Bulletin for Agency

Good Guidance Practices*,* 72 Fed. Reg. 3432–40 (Jan. 25, 2007); Recommendations of the Admin. Conf. of the United States, 41 Fed. Reg. 56769 (Dec. 30, 1976); Nina A. Mendelson, Regulatory Beneficiaries and Informal Agency Policymaking, 92 Cornell L. Rev. 397, 401–02 (2007).[13]

It is unclear what weight the District Court actually put on its claim that the Guidance was transformed into a legislative rule through notice-and-comment procedures.[14] However, this Court should still reverse the District Court on this point to ensure that the District Court's erroneous holding is not considered good law going forward. As a result, the FSOC should be free to issue new or additional Guidance describing its approach toward designation without being subject to notice-and-comment procedural requirements.

[13] What determines whether a rule must undergo notice and comment is instead the effect it has: "Interpretive rules 'do not have the force and effect of law and are not accorded that weight in the adjudicatory process.'" *Perez*, 135 S. Ct. at 1204 (quoting *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995)).

[14] The District Court's criticism of the FSOC for failing to state that it was deviating from the Guidance in the Final Determination is inconsistent with the District Court's statement that the Guidance is a notice-and-comment rule. If the Guidance were such a rule, it would govern SIFI determinations until changed through a new round of notice-and-comment rulemaking. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265–268 (1954).

CONCLUSION

For all of the foregoing reasons, the judgment of the district court should be reversed.

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CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Rule 32(a)(7), Federal Rules of Appellate Procedure, I certify that the accompanying Brief for Amici Curiae in this case contains 6,932 words.

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CERTIFICATE OF SERVICE

I certify that on June 23, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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