IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

METLIFE, INC., Plaintiff, **v.** **FINANCIAL STABILITY OVERSIGHT COUNCIL,** Defendant.	)	**Civil Action No. 15-cv-00045 (RMC)**

BRIEF FOR THE CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE*
IN SUPPORT OF PLAINTIFF METLIFE, INC.

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GLOSSARY

ATF	Bureau of Alcohol, Tobacco, Firearms, and Explosives
FCC	Federal Communications Commission
FERC	Federal Energy Regulatory Commission
FSOC	Financial Stability Oversight Council
NORC	National Opinion Research Center
SIFI	Systemically Important Financial Institution

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the Nation's business community.

This case is particularly important to the Chamber's membership, which includes businesses subject to regulation under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank" or the "Dodd-Frank Act"), including some that might be subjected to designation by the Financial Stability Oversight Council ("Council" or "FSOC") as nonbank systemically important financial institutions ("SIFIs"). More broadly, the Chamber's membership includes businesses in a variety of industries subject to varying regulatory schemes and supervision. The unauthorized, overreaching approach that the Council has taken regarding the requirements to designate a company as a SIFI and the inadequate justification for the designation in this case are of great concern to many of the Chamber's members.

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[1] *Amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from amicus curiae, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

BACKGROUND

In response to the 2008 financial crisis, Dodd-Frank established FSOC to address the risk to U.S. financial stability posed by certain large, nonbank financial companies. *See generally* 12 U.S.C. § 5321. Dodd-Frank authorized the Council to designate a nonbank financial company as a SIFI where the Council determines that the company should be subject to "prudential standards" and supervision by the Board of Governors of the Federal Reserve System (the "Board").

The Council may make such a designation if it determines that either "[1] material financial distress at the U.S. nonbank financial company, or [2] the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of 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).

Congress mandated that "in making [either] determination" under Section 113(a), the Council "shall consider" ten specific factors. 12 U.S.C. § 5323(a)(2). Beyond the ten required considerations, the Council may consider "any other risk-related factors that [it] deems appropriate." 12 U.S.C. § 5323(a)(2)(K).

The Council published formal rules and informal "Interpretive Guidance" that set certain standards and parameters for the Council's designation process. This guidance defines certain of the key terms, explains that the Council distilled the ten required statutory factors into six similarly named categories, and identified three primary "channels" through which to analyze whether a company's "material financial distress" could threaten U.S. financial stability.

Three steps comprise the Council's process for preliminarily designating a company as a SIFI. At the time MetLife was going through this process, only at the third step was the company permitted to engage in the process. (The Council has since changed that approach, providing notice and an opportunity to be heard at an earlier stage in the process; but MetLife did not have that opportunity.) After a preliminary determination is made, the company may appeal and argue that designation would be inappropriate. But the appeal is heard by the Council itself—*i.e.*, the same group of individuals who had already investigated the company and determined that it should be designated as a SIFI.

After hearing its appeal from a preliminary determination, on December 18, 2014, FSOC informed MetLife that it had made a "final determination" (*i.e.*, a designation) that "MetLife shall be supervised by the [Board] and be subject to prudential standards."[2] The Council designated MetLife based on the "material financial distress" determination standard (the "First Determination Standard"). The Determination identified two "channels" as bases for its designation: (i) potential risks to counterparties and market participants that may arise from exposures to the company (the "Exposure Channel"); and (ii) the potential that a "fire sale" of the company's assets could disrupt financial markets (the "Asset Liquidation Channel"). The Determination makes clear that FSOC undertook no analysis to determine whether or how plausible it may be that MetLife could find itself in "material financial distress"—defined as "when a nonbank financial company is in imminent danger of insolvency or defaulting on its financial obligations."

SUMMARY OF ARGUMENT

A plain reading of Section 113(a) makes clear that this provision requires some threshold vulnerability analysis before FSOC may consider an entity for designation as a SIFI under *either*

[2] This brief cites a redacted, non-confidential version of the "Explanation of the Basis of the Financial Stability Oversight Council's Final Determination that Material Financial Distress at MetLife Could Pose a Threat to U.S. Financial Stability and that MetLife Should be Supervised by the Board of Governors of the Federal Reserve System and Be Subject to Prudential Standards" (hereinafter, the "Determination").

determination standard. To conclude otherwise would be to read certain of the mandatory factors listed in Section 113(a)(2) out of the statute. Furthermore, even if the Court finds that the statute is ambiguous on this point (which it is not), the Court does not owe *Chevron* deference to FSOC's approach to Section 113(a) premised upon its jarring assertion that it "is to assume material financial distress." This unfounded assumption marks a stark change in FSOC's own interpretation of the statute and was not the product of formal rulemaking. FSOC's original interpretation of Section 113(a)—which required a vulnerability analysis up front—was well reasoned and consistent with the text of the statute, and it would have been entitled at least to *Skidmore* deference. But FSOC's new, contrary interpretation is in error and is entitled to no deference. It is in error because it ignored statutory factors requiring that the Council first analyze *whether* there is the potential for material financial distress and because the implication of FSOC's interpretation leaves the sheer size of the entity and the extent of its corporate or customer relationships as the only meaningful factors in the SIFI determination, contradicting the balanced goals of the relevant provisions of the Dodd-Frank Act. Furthermore, FSOC's current position is entitled to no deference because it lacks the force of law and appeared for the first time in the present Determination, is unsupported by reasoning, and conflicts with FSOC's own prior interpretive guidance.

Even assuming that the Council properly read Section 113(a), this Court should nevertheless hold that the Council's conclusions in the Determination are arbitrary and capricious. The arbitrary and capricious standard requires that an agency take action only when it has sufficient facts to do so. Moreover, it requires that the agency act on the basis of those facts, and that it articulate its rationale for making its underlying decisions. Here, the analysis in FSOC's Determination substitutes conclusory statements for reasoning, insufficiently responds to contrary evidence in the record, and fails to consider certain historical realities of the insurance business, including MetLife's repeated success in weathering financial crises. The Council's collage of presumptions and speculation becomes only more problematic because FSOC had no basis to conclude that designation of MetLife would redress any of the imagined financial risks. Neither the Board nor FSOC has proposed or recommended any rules, regulations, or standards of any kind to delineate what the prudential standards will be for MetLife specifically or insurance companies in general. Making designations before those standards are established is nonsensical because FSOC cannot determine that the financial threat posed by a company will be reduced by a regulatory scheme that does not yet exist.

Moreover, FSOC's process was procedurally deficient in that the Council failed to consider the suggested alternative of recommending industry-wide regulation of certain insurance company *activities*, instead of singling and designating particular insurance *companies* for heightened SIFI regulation. FSOC's approach also deprives designated nonbank financial companies of an opportunity meaningfully to challenge the designation made by FSOC or to adjust their activities so that they will not pose threats to U.S. financial stability.

The Council's conclusory analysis and deficient process sets a dangerous precedent for future SIFI designations. This Court should reject this Determination as arbitrary, capricious, and contrary to law.

ARGUMENT

I. Section 113 Requires FSOC to Consider Whether MetLife Is Vulnerable to Material Financial Distress Before Designation.

Section 113(a) provides that FSOC may designate a U.S. nonbank financial company "if the Council determines that [1] material financial distress at the U.S. nonbank financial company, or [2] the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of 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). In making that determination, "the Council *shall* consider" ten specific factors. 12 U.S.C. § 5323(a)(2). FSOC must consider each of these factors, and it must do so regardless of whether it chooses to analyze the company under the first or second determination standard.

A. The Text of Section 113(a) Is Clear that a Vulnerability Analysis of the Company Is a Condition Precedent to Designation.

The first determination standard in Section 113(a)(1) plainly requires FSOC to analyze a nonbank financial company's vulnerability to material financial distress before it may consider a company for designation as a SIFI. FSOC must find a realistic, rather than speculative, threat to the financial system before it may select a particular nonbank financial company for SIFI designation.

In other words, the statute requires a reality-based, rather than a speculation-based, threshold before FSOC may select a particular nonbank financial company potential for SIFI designation.

The Supreme Court has made clear that courts should construe a statute on "the assumption that Congress intended each of its terms to have meaning." *Bailey v. United States*, 516 U.S. 137, 145 (1995). Indeed, the court "must give effect to every word that Congress used in the statute." *Lowe v. SEC*, 472 U.S. 181, 207 n.53 (1985). Section 113(a) should be no exception. It "should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)).

More than one of the required factors in Section 113(a)(2) contemplate an analysis of the plausibility of the company's susceptibility to material financial distress. For example, Section

113(a)(2) requires the Council, in determining whether to designate a nonbank financial company as a SIFI, to consider the following:

> **(A)** the extent of the leverage of the company;
>
> *   *   *
>
> **(H)** the degree to which the company is already regulated by 1 or more primary financial regulatory agencies;
>
> **(I)** the amount and nature of the financial assets of the company; and
>
> **(J)** the amount and types of the liabilities of the company, including the degree of reliance on short-term funding[.]

12 U.S.C. § 5323(a)(2). Each of these factors contemplates that something about the operations of "the company" may make it vulnerable to financial distress in a way that merits consideration for possible SIFI designation. And the consideration of each factor ultimately is meant to influence the Council's analysis of how likely it is that a company will fail.

Some of the Council's own commentary confirms the point. For instance, in its own interpretive guidance, FSOC distilled the ten statutory factors into its own six-category framework, and linked statutory factor (J), which demands an analysis of the "amount and types of the liabilities of the company," with a category it called "Liquidity Risk and Maturity Mismatch." Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 77 Fed. Reg. 21,637, 21,658 (Apr. 11, 2012). And in its first sentence explaining this category, FSOC's own guidance noted that "[l]iquidity risk generally refers to the risk that a company may not have sufficient funding to satisfy its short-term needs." *Id.* at 21,659; *see also id.* ("A maturity mismatch affects a company's ability to survive a period of stress."). Indeed, Congress clearly required FSOC to consider the "degree of [the company's] reliance on short-term funding," 12 U.S.C. § 5323(a)(2)(J), and not to assume the company was already in imminent danger of default.

Beyond these explicit statutory references to the company and the characteristic vulnerabilities of its internal operations, some of the ten statutory factors clearly include language directing the analysis outward to third parties and the broader markets. For example, one factor examines "the extent and nature of the transactions and relationships of the company with other significant nonbank financial companies and significant bank holding companies[.]" *Id.* § 5323(a)(2)(C); *see also id.* § 5323(a)(2)(G) (requiring FSOC to analyze the company's "interconnectedness"). Again, this factor requires FSOC to evaluate the potential systemic impact of the company's material financial distress. *Cf.* 77 Fed. Reg. at 21,658 (the Council's own informal guidance indicating that only some of the relevant factors "seek to assess the potential impact of the nonbank financial company's financial distress on the broader economy"). Hence, some of the ten factors specifically reference third parties; and some expressly do not. A reasonable reading of these listed factors is that Congress intended these differences in statutory language to have significance.

The analysis dictated by the statute necessarily requires the threshold consideration of factors related to the company's susceptibility to material financial distress. The First Determination Standard, regarding whether material financial distress of the company could pose a threat to the financial stability of the United States, must logically be based on whether the company is plausibly susceptible to financial distress in the first place. In other words, when read as a whole, Section 113(a) contemplates a threshold vulnerability analysis of the nonbank financial company, not the mere unsupported assumption of vulnerability.

In support of its designation of MetLife, the Council now takes a very different position. *See, e.g.*, Determination at 175 ("[U]nder the First Determination Standard, MetLife's material financial distress is assumed[.]"); FSOC Br. 31 ("[T]he Council properly assumed the existence of material financial distress[.]"). This current position is contrary to the interpretation adopted in the Council's own prior interpretive guidance, which read the statutory factors exactly as MetLife and the Chamber suggest. Indeed, in discussing the six analytical categories that the Council created as a way of applying the required factors, the Council explained:

> "[FSOC] incorporated the statutory considerations for evaluating whether a nonbank financial company meets either the First or Second Determination Standard into an analytic framework consisting of . . . six categories[.] Three . . . seek to assess the potential impact of a nonbank financial company's financial distress on the broader economy[.] The remaining three categories seek to assess the vulnerability of a nonbank financial company to financial distress: leverage, liquidity risk and maturity mismatch, and existing regulatory scrutiny."

77 Fed. Reg. at 21,641 (emphasis added); *cf. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 56 (1983) ("*State Farm*") ("While the agency is entitled to change its view . . . , it is obligated to explain its reasons for doing so.").

FSOC now interprets the statute to mean that the First Determination Standard allows it to assume away any analysis of the plausibility of MetLife's material financial distress. FSOC Br. 31. This interpretation fails to give meaning to (i) the mandatory factors for consideration that contemplate a vulnerability analysis of the company; and (ii) limiting language in other factors that direct the analysis to potential effects on other parties.

Under FSOC's reading, the third-party considerations in the statute would have the same meaning if they appeared without the qualifying language. Because FSOC's interpretation effectively reads words out of the statute, the Court should reject it.

B. Even if the Court Finds Section 113(a) Ambiguous, It Should Not Defer to the Council's Interpretation.

Even if the Court is not convinced that Section 113(a) must be read as described above, the Court should not accord *Chevron* deference to the Council's new, contrary interpretation.

FSOC's *current* position—that Section 113(a)'s First Determination Standard allows it to assume away any inquiry into the plausibility of a company's susceptibility to material financial distress—appears for the first time in the Determination. It fails to appear in the Council's formal rulemaking and is contrary to its own prior well-reasoned interpretive guidance. Therefore, this new position cannot qualify for *Chevron* deference. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *see United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); *see also* 77 Fed. Reg. at 21,647 (acknowledging the views of commenters who argued that Dodd-Frank did not give FSOC the authority to issue formal rules interpreting the Section 113(a) criteria).[3]

Nor should the Court grant *Skidmore* deference to the Council's current position that a company's potential financial vulnerability may be assumed without any threshold showing. The Council's prior interpretive guidance to the contrary was based on a well-reasoned and well-supported interpretation. Indeed, as discussed above, the Council's original guidance acknowledges that certain of its required Section 113(a)(2) considerations, as translated into its own framework of six criteria, direct it to analyze the company's vulnerability and susceptibility to material financial distress. Accordingly, when viewed in light of its previous and better-

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[3] Early on in the administrative process, several commenters questioned the Council's rulemaking authority. In the preamble to the adoption of certain procedural rules, the Council seemingly agreed with this conclusion and clarified that its guidance was not a substantive rule. 77 Fed. Reg. at 21,647. Without such authority, any unsupported positions that the Council takes regarding how it should interpret the Section 113(a) criteria do not carry the "force of law" and are not categorically entitled to any particular deference.

reasoned statutory analysis, the Council's new and unsupported assertion that the First Determination Standard allows it to assume a company's material financial distress is unpersuasive and is entitled to no deference. *See Mead Corp.*, 533 U.S. at 228, 236 (observing that an informal agency interpretation may be entitled to respect where it has the power to persuade, based on, *inter alia*, the "thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements") (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

C. The Council's Reading of Section 113(a) Is Unpersuasive Because It Ignores the Broader Context and Purpose of the Statute.

Even beyond the flaws in the Council's textual analysis, the Council's interpretation effectively construes Dodd-Frank as ceding power to a regulator in a way that Congress never intended. Indeed, giving force to this interpretation would read the word "could" in Section 113(a)(1) far too broadly. The overall statutory scheme indicates that Congress intended the word "could" to be read narrowly.

FSOC's reading of the statute would effectively mean that if a company is engaged in financial activities and large enough to be on the Council's radar, on those bases alone it may be subjected to the gauntlet of potential SIFI designation. If material financial distress of any large company with extensive financial or customer relationships can simply be assumed in support of a SIFI designation, and the only other qualification for SIFI status is to be engaged in financial activities, Section 113 would mark a sea change in financial regulation—one that Congress did not intend. The Council's interpretation is especially problematic with respect to entities whose business models are not particularly susceptible to market distress, such as traditional insurance companies. Therefore, the requirement of a threshold vulnerability analysis represents a critical limiting principle in this statutory structure. Without it, we are left with the result that—at

FSOC's discretion—even the healthiest, most stable large American businesses with sufficiently sizable financial components could become strapped with the burdensome SIFI process and its onerous regulations and prudential standards. *Cf. Yates v. United States*, 135 S. Ct. 1074, 1081 (2015) (plurality) (rejecting an "unconstrained reading" of the Sarbanes-Oxley Act and limiting the interpretation of a statutory term to one that conforms to the Act's broader context).

The broader context of the enactment of Dodd-Frank confirms that FSOC's interpretation of Section 113(a) exceeds its intended scope. This provision was enacted to address companies that were particularly susceptible to distress (*e.g.*, Lehman Brothers). It was never intended to apply broadly to traditional companies that happen to be large—without any inquiry into the plausibility of that company's experiencing material financial distress. *See* 156 Cong. Rec. S5903 (Sen. Kerry) (July 15, 2010) ("The fact that a company is large or is significantly involved in financial services does not mean that it poses significant risks to the financial stability of the United States."); *accord id.* (Chairman Dodd confirming Sen. Kerry's interpretation and noting that "[t]he Banking Committee intends that only a limited number of high-risk, nonbank financial companies would join large bank holding companies in being regulated and supervised by the Federal Reserve"); *see also id.* at S5902 (Sen. Collins) ("I would not ordinarily expect insurance companies engaged in traditional insurance company activities to be designated by the council based on those activities alone.").

FSOC's response is to assert that "[t]here is . . . no basis for MetLife's worry that the Council will (or could) designate for supervision 'every large financial institution.'" FSOC Br. 35 (quoting Compl. ¶ 96). But the problem is that FSOC's latest reading of the statute sets a standard that would permit the Council to do just that at its whim. *See* 156 Cong. Rec. S5902

(Sen. Dodd) (confirming for Sen. Collins that "[t]he size of a financial company should not by itself be determinative.")

D. A Proper Reading of Section 113(a) Preserves the Statute's Effectiveness and Protects the Balance Struck by Congress.

Requiring some reasonableness check on the plausibility of a large nonbank financial company's failure is essential to advancing the congressional purpose behind Section 113(a). Large, systemically interconnected nonbank financial companies that exhibit some threshold vulnerability to financial distress are the only type of businesses that Congress intended for FSOC to consider for potential designation. Indeed, an analysis of companies that were the locus of financial instability in 2008 would have shown a high concentration of business lines that required the constant regeneration of short-term liquidity. And it would have shown that those business lines were so pervasive and interconnected into the economy that they merited special supervision.

The same cannot be said here. MetLife, a traditional insurance business, is not such a company.

II. The Council's Designation of MetLife Was Arbitrary, Capricious, and Procedurally Deficient.

Section 113(h) authorizes this Court to review the Council's Determination to gauge whether it was "arbitrary and capricious." 12 U.S.C. § 5323(h). Well-established standards for agency actions require the Council to "examine the relevant data and articulate a satisfactory explanation for its action[.]" *State Farm*, 463 U.S. at 43. This standard includes articulating "a rational connection between the facts found and the choice made." *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 707 (D.C. Cir. 2014) ("*Sorenson*"); *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 90 (D.C. Cir. 2010) ("*Int'l Union*"). The agency must examine the record and include a reasoned explanation for rejecting any conflicting evidence. *State Farm*, 626 F.3d at 43.

Under this standard, a reviewing court "must 'determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.'" *Bluewater Network v. Salazar*, 721 F. Supp. 2d 7, 15 (D.D.C. 2010). An agency's action is arbitrary and capricious where it draws a conclusion that is "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Int'l Union*, 626 F.3d at 90 (quoting *State Farm,* 463 U.S. at 43). In addition, an agency action is "arbitrary or capricious [where it] has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or has] offered an explanation for its decision that runs counter to the evidence before the agency." *Sorenson Commc'ns Inc.*, 755 F.3d at 707 (quoting *State Farm*, 463 U.S. at 43).

Here, the arbitrary and capricious standard of review is not the rubber stamp the Council suggests. This standard of review is higher than, for instance, the "minimum rationality" standard that courts use to analyze a statute's permissibility under the Due Process Clause. *State Farm*, 463 U.S. at 44 n.9. And even though the Court may owe some deference to the agency action, "[the] deferential standard cannot be used to shield the agency's decision from undergoing a 'thorough, probing, in-depth review' by the Court." *Bluewater Network*, 721 F. Supp. 2d at 15.

A. The Council's Determination Fails the *State Farm* Standard.

At critical junctures in the Determination that MetLife posed a "threat to the financial stability of the United States," the Council substitutes speculation and conclusion for reasoned analysis. Since "[t]he agency must explain the evidence . . . and must offer a 'rational connection between the facts found and the choice made[,]'" *State Farm*, 463 U.S. at 52, the Court should find the designation of MetLife as a SIFI arbitrary and capricious.

1. FSOC Fails to Articulate Whether the Impacts Identified in the Exposure or Asset Liquidation Channels May Result in "Significant Damage to the Broader Economy."

Section 113(a) requires the Council to determine whether the collapse of a nonbank financial company that is vulnerable to financial distress could pose a threat to the financial stability of the United States. The Council's own standards provide that such a threat exists where (i) "there would be an impairment of financial intermediation or of financial market functioning"; and (ii) where this impairment "would be sufficiently severe to inflict significant damage on the *broader* economy." 77 Fed. Reg. at 21,657 (emphasis added). The Council generally concludes that MetLife's (assumed) "material financial distress could lead to an impairment of financial intermediation or of financial market functioning that would be sufficiently severe to inflict significant damage on the broader economy." Determination at 3. But FSOC offers no analysis or relevant empirical data in the available administrative record to back up this claim.

For example, in discussing the Asset Liquidation channel, the Council asserts that the "forced" liquidation of MetLife's assets "*could*" cause disruption that "*could* be amplified by the fact that the investments of many large financial intermediaries are also composed similarly, which *could* cause significant losses for those firms." It continues with the unsupported assertion that "[t]he resulting erosion of capital and potential de-leveraging by market participants *could* result in asset fire sales that *could* disrupt financial market functioning and that *could* ultimately damage the broader economy." Determination at 146 (failing to categorize the possible damage as significant) (emphases added); *see also* Determination at 147 (without explaining how or to what degree, noting that "[p]rice dislocations in [certain] debt markets *could* cause significant disruptions in the availability of funding for the broader economy.") (emphases added).

South Dakota Insurance Commissioner Adam Hamm, the State Insurance Commissioner Representative to the Council, objected to these speculative assertions.[4] Determination at 304. He explained that while the Council claimed that retail policyholders or corporate customers would suffer losses as a result of material financial distress at MetLife, the Council did not identify "how those losses translate into [impairment] 'that would be sufficiently severe to inflict significant damage to the broader economy.'" *Id*. He highlighted that "[u]nsubstantiated qualitative statements describing 'concerns,' or 'potential negative effects,' should not be a substitute for robust quantitative analytics that demonstrate scenarios that MetLife's material financial distress could have substantial impacts[.]" *Id.* ("Saying it does not make it so."); *see also id.* (commenting that his predecessor on the Council had identified similar issues when MetLife's designation was proposed, and noting that he was "particularly troubled that . . . issues [that were previously identified by his predecessor] ha[d] not been fully addressed in the [Determination]").

The Council failed to set any standards to determine what levels of market or intermediation impairment would constitute "significant damage to the broader economy." *Innovator Enterprises, Inc. v. Jones*, 28 F. Supp. 3d 14, 26 (D.D.C. 2014) (finding that the ATF failed to "articulate a satisfactory explanation" under the *State Farm* standard, where, *inter alia*, it designated a developer's new device a firearm silencer, but "the agency d[id] not even have a

[4] Commissioner Hamm is a past President of the National Association of Insurance Commissioners and was selected by the state insurance commissioners to represent the regulatory interests of the states on the Council. He serves as a non-voting member, but wrote separately to dissent from the Council's designation of MetLife. Notably, S. Roy Woodall, Jr., the only insurance expert among the Council's voting members and a presidential appointee with over fifty years of insurance sector experience, also dissented. Determination at 298–304.

clear position on what characteristics [we]re common to known silencers"). Instead, it asserted that, because certain scenarios would tend to cause harm to the economy generally, they necessarily met the standard. Such a conclusion is arbitrary and capricious because the Council did not have, or at least failed to articulate, any supporting facts or reasoned basis for arriving at this conclusion. *See Bluewater Network*, 721 F. Supp. 2d at 30 ("There is no specific and detailed explanation as to how it arrived at that conclusion; without such an explanation, there is no rational connection between the facts found (quantitative data) and the final conclusions reached.").

2. The Council Failed To Rebut the Reasoned Analysis Offered by MetLife's Analytics Consultant.

Oliver Wyman, a consulting and analytics firm, analyzed MetLife's asset and liability positions in several distress scenarios to determine whether elevated surrenders by policyholders and other liability demands could "force" MetLife to liquidate assets rapidly in quantities sufficiently large that the sales would cause a meaningful disruption to any asset market. Determination at 147. Oliver Wyman concluded that there was no reasonable basis or evidentiary support for the proposition that material financial distress at MetLife would lead to asset sales that could have systemic effects. The Council disagreed, but it failed to explain sufficiently why it discredited the report and conclusion. The Council responded with the following conclusory statement:

> While there may be certain scenarios in which MetLife's asset liquidation would not disrupt key markets, there is a wide range of plausible alternative assumptions with respect to several of the key variables. The 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, particularly in the context of material financial distress at MetLife and overall stress in the financial services industry. The extent of these potential effects shows that MetLife's materials [sic] financial distress could pose a threat to U.S. financial stability through the asset liquidation transmission channel.

Id. FSOC also asserted that even accepting Oliver Wyman's assumptions, "some of the price impacts generated in the [its] analysis *could be* large enough to significantly disrupt key . . . markets[.]" *Id.* at 147-48.

Again, FSOC substituted conclusion for analysis. It posited that there were other, undisclosed assumptions that MetLife's model could have used and that were just as plausible. But it failed to explain *why* Oliver Wyman's assumptions were inadequate to reach its conclusion and did not specifically identify a single alternative plausible assumption. "Conclusory explanations for matters involving a central factual dispute where there is considerable evidence in conflict do not suffice to meet the deferential standards of [the Court's] review." *AT&T Wireless Servs., Inc. v. FCC*, 270 F.3d 959, 968 (D.C. Cir. 2001) (reviewing an FCC action and finding that its "succinct statement"—that a proposed spectrum threshold was "too conservative" and another FCC-preferred threshold was "more realistic"—"fail[ed] to provide a reasoned justification for rejecting the [proposed] threshold, much less a defense of [the FCC-preferred] threshold . . . as being 'more realistic'"); *id*. (faulting the FCC for failing to indicate that it was relying on "any rules or standards" regarding the spectrum threshold determination); *see also Greater Yellowstone Coal. v. Kempthorne*, 577 F. Supp. 2d 183, 210 (D.D.C. 2008) (noting that the agency established "no rational connection between the facts found and the choice made[,]" and concluding that, "[w]hile the Court will defer to an agency's exercise of expertise, the 'Court will not defer to the agency's conclusory or unsupported assertions'").

In addition, in coming to its own conclusion on the Asset Liquidation issue, the Council claimed without substantiation that it used the analytics firm's model, changed its assumptions, and re-ran the model to arrive at different conclusions. It purported to support its own conclusions using this altered model. Determination at 221. In analogous situations, Court have been skeptical of agencies that purport to rely on expert authorities that urge differing conclusions. *See Humana of Aurora, Inc. v. Heckler*, 753 F.2d 1579, 1583 (10th Cir. 1985) (finding an agency's reliance on an expert report arbitrary where, *inter alia*, the report was "never designed or intended by its makers to answer the questions or support the propositions the [agency] wished"); *see also Almay, Inc. v. Califano*, 569 F.2d 674, 682 (D.C. Cir. 1977) (finding agency action arbitrary and capricious where an agency created a definition based on sources that ultimately supported different conclusions). The Court should give effect to the same healthy skepticism here by rejecting this reasoning as arbitrary and capricious.

3. The Council's Determination Contains Inconsistencies and Unsupported Claims Regarding the Insurance Market.

MetLife is engaged in a traditional insurance business. As of June 2013, MetLife's regulated insurance companies generated 95 percent of its total consolidated revenues and made up 98 percent of its assets and 96 percent of its liabilities. Determination at 44. This profile underscores the importance of the Council's analysis related to the company's core insurance businesses (and the regulatory schemes in which the company has safely and successfully operated for decades). Unfortunately, however, the Council's analysis contains significant inconsistencies and unsupported claims regarding the insurance market that render the Council's Determination arbitrary and capricious.

At the outset, with regard to traditional insurance products, the Council reasoned that "the portion of the company's retail insurance and annuity products that can be surrendered or withdrawn for cash" creates the potential for liquidity strains so significant that it could "cause or contribute to" a fire sale—which would depress asset prices enough to cause significant damage to the broader economy. This chain of reasoning rests on two unsupportable and incorrect assumptions: (i) that insurance policyholders would break with current and historical data and seek to redeem their policies *en masse*; and (ii) that MetLife would not exercise provisions that it has included in its contracts to protect itself from exactly this kind of sudden liquidity event.[5]

First, the data on insurance policyholder behavior—including MetLife's own experiences in crisis conditions—does not support the Council's notion that a widespread, virtually universal policyholder run on the insurance company's assets is plausible. It was, therefore, arbitrary and capricious for the Council to conclude, without more, that the insurance policyholders would suddenly behave differently than they do now or ever have before.

Oliver Wyman's contagion study is illustrative. This study demonstrated that, in the context of past significant insurance company failures, retail policyholders respond at lower levels than would institutional policyholders. Compl. ¶ 56. It also rebutted the notion that a policy redemption run at MetLife would spill over into the broader industry. Determination at 140.

Furthermore, MetLife's own historical data from the two worst financial crises in American history confirm that traditional insurance customers simply do not behave this way. Indeed, even though MetLife, like most financial companies, was affected by the 2008 financial crisis, the Council does not contend that it experienced a significant liquidity strain driven by large-scale policyholder withdrawals. *See* Determination at 71–74 ("MetLife During the Recent Financial Crisis"). Even in 1930 during the Great Depression, "the surrender rate for [MetLife's predecessor entity] reached a high of 8 percent[.]"[6] Determination at 175 (emphasis added); *see*

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5 In addition, assuming it became necessary to intervene, state insurance regulatory bodies have certain mechanisms that "may impose temporary stays on policyholder withdrawals and surrenders from the general account[.]" Determination at 138.

6 Notably, in 1930 when it insured one in five people in the U.S. and Canadian markets, the company "honored all requests for surrenders[] and had sufficient income to pay all requests without having to sell any securities held in its portfolio." *Id*. But—reiterating its incorrect

also, *e.g.*, Compl. ¶ 17 (highlighting Board Governor Tarullo's testimony to the Senate Banking Committee that there was a "pretty strong presumption" that "traditional insurance activities" are not systemically important because they do not implicate "runnability").

Likewise, a study commissioned by MetLife indicates that today's consumers would conform to this historical norm. When the National Opinion Research Center ("NORC") at the University of Chicago conducted this study, it that found that "[a] large majority of owners indicated they would keep their policy even if the issuer experiences financial distress" and that "there is a low probability of contagion" across life insurers.[7] Determination at 171.

To the extent that the Council rests its Asset Liquidation theories on the premise of these runs of policyholders in MetLife's traditional insurance businesses, those theories are wholly unsupported by any facts and are contradicted by the evidence in the available record. Therefore, they are arbitrary and capricious.

Second, even if policyholders suddenly broke with historical precedent and sought to redeem policies *en masse*, the company has contractual rights in place to protect itself from an overwhelming, sudden demand of liquidity. In particular, "MetLife's insurance company subsidiaries have the contractual right to defer payouts for up to six months on the immediately payable cash surrender values associated with many of their products[.]" Determination at 145. But the Council speculates that these subsidiaries "could have *disincentives* to invoke this option

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reading of Section 113(a)(1)—the Council found it irrelevant that MetLife did not experience material financial distress during the great depression.

[7] The Determination makes arguments (unsupported by any data or statistical analysis) that question the predictive ability of the NORC survey. Determination at 173. But, as MetLife highlighted in pre-final determination response to the Council, in the majority of research examining consumer behavior related to undesirable financial contexts, survey data is the preferred method. In fact, NORC collects the Survey of Consumer Finances for the Federal Reserve Board. *Id.* at 174.

because of the negative signal that such action could send to counterparties, policyholders, and investors." *Id.* (emphasis added).

An agency's conclusion is arbitrary and capricious where, as here, it draws on faulty reasoning. *See Greater Yellowstone Coal.*, 577 F. Supp. 2d at 210. MetLife's contractual deferral rights would allow the company to avoid incurring immediate liabilities if the company were in "material financial distress," operating in a period of stress in the industry, and experiencing a sudden run on assets. The Council suggests that this fear of signaling the markets would be so strong as to make default a more appealing choice than exercising a contractual right —which, in this manufactured situation would logically be a life-or-death safety net for the company. There is no (and the Council offered no) historical basis for that counterintuitive hypothetical. In addition to ignoring the company's primary interest in self-preservation, the Council's suggested hypothetical scenario overlooks management's fiduciary duties, which may well take this "option" of foregoing contractual deferrals off the table. Moreover, the Council's irrational suggestion ignores the fact that the same markets that would be signaled by this behavior can already access regularly updated financial information from MetLife's public filings.

Because the Council's reasoning relies on unsupported assumptions that are contrary to common-sense realities regarding a sophisticated leading insurance company, which will act rationally when faced with the choice of deferring its redemption liabilities, the Court should reject FSOC's conclusory asset liquidation analysis as arbitrary and capricious.

* * *

Given its critical gaps in reasoning and logic, the Council's designation of MetLife as a SIFI cannot survive arbitrary and capricious review. MetLife's designation reflects an arbitrary and capricious exercise in speculation, not the reasoned inquiry into each of ten enumerated statutory factors and concrete evidence that Congress intended. *See Sorenson*, 755 F.3d at 708 (noting that agency judgments "must be based on some logic and evidence, not sheer speculation" and finding fault with [explain] because the agency's "rule relie[d] on one unsubstantiated conclusion heaped on top of another"); *see also City of Centralia v. FERC*, 213 F.3d 742, 749 (D.C. Cir. 2000) (when an agency's "conclusion is based on sheer speculation . . . it cannot be said that there is substantial evidence" supporting the challenged action). Moreover, by suddenly altering the legal standards FSOC had said it would apply under Section 113(a), and repeatedly giving decisive weight to speculation rather than to actual evidence in the record applied to some analytical framework, the Council denied MetLife a full and fair opportunity to present its position, in violation of the basic requirements of due process.

B. The Council Improperly Failed to Consider an Activities-Based Approach for Enhanced Regulation of Insurance Companies as an Alternative to SIFI Designation.

In addition to its review of the Council's substantive designation, this Court should also meaningfully review the reasonableness of the procedures the Council employed in making that decision. Any discretion to which the Council is entitled "is . . . bounded by the requirements of reasoned decisionmaking." *Am. Gas Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010). "[W]here parties raise reasonable alternatives to the [Council's] position, [this Circuit] ha[s] held that reasoned decisionmaking requires considering those alternatives." *Id*.

Here, despite MetLife's pleas to the contrary, the Council failed to consider adopting an activities-based approach to enhanced regulation of the insurance business, as opposed to making insurance company-specific SIFI designations. Determination at 31, 280; MetLife Br. at 57. Because MetLife raised a "facially reasonable alternative[,] . . . the [the Council was required] either [to] consider th[e] alternative[] or give some reason . . . for declining to do so." *See Laclede Gas Co. v. FERC*, 873 F.2d 1494, 1498 (D.C. Cir. 1989).

In this setting, an "activities-based approach" would mean recommending the enhanced regulation of any inherently risky activities in a given industry, as opposed to the singling out of a particular insurance company for SIFI designation and wholesale regulation of that single company's entire range of operations (regardless of how little risk some of those operations may pose). The Council was well aware of this alternative approach to risk mitigation, and that it would not require a SIFI designation of MetLife. In fact, around the same time of MetLife's designation, the Council publicly announced that it was considering this very type of activities-based approach with regard to asset managers. Notice Seeking Comment on Asset Management Products and Activities, 79 Fed. Reg. 77,488, 77,489 (Dec. 24, 2014) (notice of FSOC "seeking public comment in order to understand whether and how certain asset management products and activities could pose potential risks to U.S. financial stability"); *see also* Minutes of the Financial Stability Oversight Council, Executive Session, Asset Management Update (Jul. 31, 2014) (recounting the Council's direction for its staff to "undertake a more focused analysis of industry-wide products and activities to assess potential risks associated with the asset management industry").

The Council's Determination, however, failed to explain why an activities-based approach would be appropriate for the asset-management industry but not for the insurance industry. FSOC's decision to entertain activities-based designations for one industry (*i.e.*, asset managers), but not another (*i.e.*, insurers), demonstrates its awareness of this approach and makes clear that this approach was indeed something that should have been considered or at least addressed in FSOC's Determination. But the Council did neither.

The Council's Determination reasons only that "[c]onducting or considering an industry-wide, activities-based analysis is not one of the statutory considerations, nor is it a prerequisite to a determination." Determination at 31. That might be true, but the question is not whether the Council is statutorily compelled to consider the activities-based approach; it is why it should not pursue that approach instead. Under the basic APA requirement of reasoned decisionmaking, an agency is also required to consider reasonable alternatives presented to it in the course of the administrative proceeding to explain why it is not adopting those alternatives. *See, e.g.*, *Am. Gas Ass'n*, 593 F.3d at 19 (reviewing the sufficiency of FERC's consideration of reasonable alternatives because doing so is a requirement of the agency's obligation to engage in reasoned decisionmaking); *see also* MetLife Br. at 58 (examining other Dodd-Frank provisions that offer alternatives to a SIFI designation).

Because FSOC ignored a meaningful alternative that MetLife urged, and because that alternative was reasonable as evidenced by the Council's own reliance on it in approaching the regulation of potential systemic risk in another financial industry, the Determination fails to comport with the APA's requirement for reasoned decisionmaking.

CONCLUSION

For all of the foregoing reasons, the Chamber urges the Court to grant Plaintiff MetLife's cross-motion for summary judgment and to deny the Defendant's motions to dismiss and for summary judgment.

Respectfully submitted,

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