NOT YET SCHEDULED FOR ORAL ARGUMENT

United States Court of Appeals for the District of Columbia Circuit

No. 16-5086

METLIFE, INC.,

Plaintiff-Appellee,

v.

FINANCIAL STABILITY OVERSIGHT COUNCIL,

Defendant-Appellant.

On Appeal from the United States District Court for the District of Columbia in Case No. 1:15-CV-00045-RMC, Rosemary M. Collyer, Senior Judge

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND INVESTMENT COMPANY INSTITUTE IN SUPPORT OF APPELLEE

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIRCUIT RULE 28(A)(1)

A. Parties and Amici. Except for the following, all parties, intervenors, and amici appearing in this Court are listed in the briefs for the Appellant and Appellee: The Chamber of Commerce of the United States of America and the Investment Company Institute appear as amici curiae in this Court.

B. Ruling Under Review. References to the rulings at issue appear in the Brief for the Appellee.

C. Related Cases. To the best of the amici's knowledge, the Certificate of Related Cases in the Brief for the Appellee is accurate.

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America (the "Chamber") has no parent corporation. No publicly held company has ten percent or greater ownership in the Chamber.

The Investment Company Institute ("ICI") has no parent corporation. No publicly held company has ten percent or greater ownership in ICI.

STATEMENT REGARDING CONSENT TO FILE

All parties have consented to the filing of this brief. The Chamber and ICI filed a notice of intent to participate in this case as amici curiae on August 19, 2016.

CERTIFICATE ON NEED FOR SEPARATE BRIEF

Pursuant to Circuit Rule 29(d), the Chamber and ICI certify that a separate brief is necessary to provide the perspective of the businesses and investment companies that the Chamber and ICI represent. This case is particularly important to the members of the Chamber and ICI, which include businesses that may be subject to regulation under the Dodd-Frank Wall Street Reform and Consumer Protection Act, and some that could be considered for designation by the Financial Stability Oversight Council as nonbank systemically important financial institutions. The Chamber submitted an amicus brief on the same issue presented here in the District Court.

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GLOSSARY

APA	Administrative Procedure Act
ATF	Bureau of Alcohol, Tobacco, Firearms, and Explosives
FCC	Federal Communications Commission
FD	Final Determination
FERC	Federal Energy Regulatory Commission
FSOC	Financial Stability Oversight Council
ICI	Investment Company Institute
RIC	Registered Investment Company
SIFI	Systemically Important Financial Institution

RELEVANT STATUTES AND REGULATIONS

All applicable statutes and regulatory materials, except for 12 U.S.C. § 5326, are contained in the Brief for the Appellant or the Brief for the Appellee. Section 5326 is reproduced in the Addendum to this brief.

INTEREST OF AMICI 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.

The Investment Company Institute ("ICI") is the national association of registered investment companies ("RICs") in the United States. ICI's members include mutual funds and other investment companies that collectively account for 97 percent of the approximately $18 trillion in assets currently held by RICs in the United States. As part of its mission, ICI pursues an extensive research program and is the primary source of aggregate industry data about RICs relied on by

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than amici curiae, their members, and their counsel contributed funds toward the preparation or submission of this brief.

government regulators, industry participants, and independent observers. ICI frequently participates in court actions that affect the interests of RICs and their shareholders, directors, and investment advisers.

This case is particularly important to the members of the Chamber and ICI, which include businesses that may be subject to regulation under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), and some that could be considered for designation by the Financial Stability Oversight Council ("Council" or "FSOC") as nonbank systemically important financial institutions ("SIFIs"). The unauthorized, overreaching approach that FSOC 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 and ICI's members.

SUMMARY OF ARGUMENT

The District Court correctly set aside the Council's determination that MetLife is a SIFI because the Council committed "fundamental violations of established administrative law." *Metlife, Inc. v. Fin. Stability Oversight Council*, No. CV 15-0045 (RMC), 2016 WL 1391569, at *17 (D.D.C. Mar. 30, 2016).[2] The

[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" or "FD").

Council had designated MetLife based on the "material financial distress" determination standard (the "First Determination Standard"), identifying two potential "channels" for material financial distress: (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").

FSOC's decision to forgo *any* threshold analysis of MetLife's supposed vulnerability to financial collapse and instead to "assume material financial distress" in considering MetLife for SIFI designation was inconsistent with the analysis clearly contemplated in the terms and structure of Section 113(a) of the Dodd-Frank Act. FSOC's approach leaves the sheer size of an entity and the extent of its corporate or customer relationships as the only meaningful factors in a SIFI determination, and that arbitrary result is incompatible with the balanced goals of the Dodd-Frank Act.

The District Court also correctly determined that FSOC's assumption of vulnerability violated the most basic requirements of reasoned decisionmaking because it represents a stark and unacknowledged change from FSOC's original interpretation of the statute, which required a threshold vulnerability analysis. In addition, the Council's designation of MetLife is arbitrary and capricious because

the analysis in its Determination substituted conclusory statements for reasoning, insufficiently responded to contrary evidence, and failed to consider historical realities of the insurance business, including MetLife's well-documented ability to weather crises. Furthermore, FSOC's process was procedurally deficient because it failed to consider the regulatory consequences of this SIFI designation. Accordingly, the Council could not consider whether its designation would do more harm than good to the broader financial system.

Moreover, the Council's assumptions, speculation, and failure to consider important aspects of designation becomes only more problematic because FSOC also had no basis to conclude that designation of MetLife as a SIFI would redress any of the imagined financial risks. When MetLife was designated, the Board had not issued any proposed or final rules or standards of any kind to delineate what prudential standards would apply to insurance company SIFIs. Making designations before those standards are established is inherently arbitrary because FSOC cannot determine that the financial threat posed by a company will be reduced by a regulatory scheme that has not yet been established.

For all of these reasons, FSOC's designation of MetLife departed from well-established standards of administrative law. This Court should affirm the district court's judgment.

ARGUMENT

I. FSOC Must Consider Whether MetLife Is Vulnerable to Material Financial Distress.

Section 113(a)(1) of the Dodd-Frank Act 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 enumerated factors. *Id.* § 5323(a)(2) (emphasis added). FSOC must consider these factors under either determination standard.

A. The Text of Section 113(a) Clearly Contemplates a Vulnerability Analysis of the Company as a Condition Precedent to Designation.

The First Determination standard in Section 113(a) clearly contemplates that FSOC will analyze a nonbank financial company's vulnerability to material financial distress when considering the company for designation as a SIFI. FSOC must find a realistic, rather than speculative, threat to the financial system before subjecting a nonbank company to a SIFI designation.

Multiple factors in Section 113(a)(2) contemplate an analysis of the plausibility of the company's susceptibility to material financial distress. Indeed, the statutory requirement to evaluate based on the following statutory factors

logically implies that the Council must evaluate the company's vulnerability to financial distress:

> (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.

Id. § 5323(a)(2) (emphases added). Each of these factors contemplates an analysis as to whether something about the existing operations of "the company" makes it vulnerable to financial distress.

FSOC's interpretive guidance on Section 113(a) confirms this point. In its guidance, FSOC distilled the enumerated statutory factors into its own six-category framework, and it 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). 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. 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 the explicit statutory references to "the company" and the particular vulnerabilities of its internal operations, other statutory factors include language directing the analysis outward to 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"); *accord* 77 Fed. Reg. at 21,658 (FSOC's own guidance indicating that *only some* of the factors "seek to assess the . . . impact of the nonbank financial company's financial distress on the broader economy"). Hence, some of the statutory factors specifically reference potential impacts on third parties, while others focus on the company itself. The contrasting language among factors makes clear that Congress contemplated a consideration of *both* parts of the problem—*i.e.*, whether the company was vulnerable to material financial distress and, if so, whether that distress could pose a threat to U.S. financial stability.

The Council took a very different position in support of its designation of MetLife. In applying the First Determination Standard, it assumed away any

analysis of the plausibility of MetLife's material financial distress. FD at 175 ("[U]nder the First Determination Standard, MetLife's material financial distress is assumed."). The Determination therefore fails to apply meaningfully the statutory factors that contemplate a vulnerability analysis of *the company*, including leverage, existing regulatory scrutiny, and assets and liabilities, and the language in other factors that direct the analysis to impacts on other parties. Under FSOC's approach here, all of the factors compel an *outward*-looking analysis. Thus, FSOC's action in this case effectively reads the words out of the statute. *See Lowe v. SEC*, 472 U.S. 181, 207 n.53 (1985) (noting that courts "must give effect to every word that Congress used in the statute").

B. The Council's Application of Section 113(a) Ignores the Broader Context and Purpose of the Statute.

Even beyond the flaws in the Council's textual analysis, its designation of MetLife applies the Dodd-Frank Act in a way that arrogates far more power to the Council than Congress ever intended.

The Dodd-Frank's broader context confirms that this application of Section 113(a) exceeds its intended scope. FSOC's approach to the statute effectively means that if a company is engaged in financial activities and is large enough to be on the Council's radar, on those bases alone it may be subjected to the economic and regulatory burdens resulting from SIFI designation. Had Congress intended for size to be the sole threshold for SIFI status, it would not have conditioned

designation on an eleven-factor analysis. *Compare* 12 U.S.C. § 5323(a)(2) (authorizing SIFI designations based on a multifactor analysis), *with id.* § 5326(a) (authorizing enhanced regulatory requirements for any "bank holding company with total consolidated assets of $50,000,000,000 or greater").

The requirement of a threshold vulnerability analysis represents a critical limiting principle in this statutory structure. Without it, even the healthiest, most stable large American businesses could end up strapped with the burdensome SIFI process and its onerous regulations, unprecedented prudential standards, and enormous costs. Indeed, these prudential standards have the unprecedented effect of subjecting nonbanks to highly intrusive bank-like regulation. If hypothetical financial distress of any large company with extensive financial or customer relationships can simply be assumed, and the only other qualification for SIFI status is that the company is engaged in financial activities, Section 113 would mark a sea change in financial regulation—one that Congress did not intend.

Indeed, the contemporaneous legislative record confirms this point. This provision was never intended to apply broadly to financial companies that happen to be large. *See, e.g.*, 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* 156 Cong. Rec. S5902 (Sen. Dodd) (confirming for Sen. Collins that "[t]he size of a financial company should not by itself be determinative").

Requiring some reasonableness check on the plausibility of a large nonbank financial company's failure is essential to advancing the purpose behind Section 113(a). Large, systemically interconnected nonbank financial companies that exhibit some degree of vulnerability to financial distress that would imperil the financial system at large are the only type of businesses that Congress intended FSOC to consider for potential designation. *See* 156 Cong. Rec. S5902 (Chairman Dodd confirming 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.").

II. The District Court Correctly Held that the Council Abandoned Its Own Guidance and Departed from a Reasoned Analytical Approach.

The District Court properly concluded that the Council's Determination was arbitrary and capricious under well-established principles of administrative law applicable to the Council, 12 U.S.C. § 5323(h). Under the APA's well-established arbitrary and capricious standard of review, "[a]n agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."

FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009). Furthermore, an agency must "examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*"). That explanation must include "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. In addition, agency action is "arbitrary or capricious [where it] has . . . 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*, 755 F.3d at 707 (quoting *State Farm*, 463 U.S. at 43).

A. The Council Abandoned Its Prior Interpretation of the Statute Without Acknowledgment or Explanation.

The Council's original guidance acknowledged that Section 113(a) directs the Council to analyze the company's vulnerability to material financial distress. In discussing its framework, 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*.

77 Fed. Reg. at 21,641 (emphasis added).

The Council's Determination here abandoned that approach. FD at 175 ("[U]nder the First Determination Standard, MetLife's material financial distress is assumed."). Indeed, FSOC now asserts that the First Determination Standard permits FSOC to assume away any analysis of the plausibility of MetLife's material financial distress. FSOC Dist. Ct. Br. 31 ("[FSOC] properly assumed the existence of material financial distress.").

If this were the approach FSOC intended in its original guidance, the point would have been prominently featured. But the Council did not *at all* mention in its guidance that material financial distress would be assumed. Nonetheless, FSOC made this assumption a centerpiece of the Determination, thereby abandoning its prior focus on "vulnerability" without explanation. *See State Farm*, 463 U.S. at 56 ("While the agency is entitled to change its view . . . , it is obligated to explain its reasons for doing so."). Because FSOC departed from its original interpretation without acknowledging or explaining the contradiction, the District Court appropriately vacated the designation as arbitrary and capricious.

B. FSOC's Procedure and Analysis Departed from the Well-Established Bounds of Reasoned Decisionmaking and Fail the *State Farm* Standard.

At critical junctures in the Determination, FSOC substituted speculation for reasoned analysis in concluding that MetLife could pose a "threat to the financial stability of the United States." For example, in discussing the Asset Liquidation channel, FSOC asserted 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." FD at 6 (emphasis added). It continued 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." FD at 146 (emphases added); *see also id*. 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.") (emphasis added); *see also Metlife*, 2016 WL 1391569 at *13 (observing that these assumptions pervade the Determination).

The District Court concluded that it could not affirm a finding that MetLife's distress would cause severe impairment of financial intermediation or market functioning—"when FSOC refused to undertake that analysis itself." *Id.* Notably,

this was not a novel criticism. In fact, the State Insurance Commissioner Representative to the Council objected based on this very issue when the Council voted in favor of the designation.[3] FD at 304 (explaining that the Council failed to identify "how those losses translate into [impairment] 'that would be sufficiently severe to inflict significant damage to the broader economy'"); *id.* (voicing concern 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").

Here, FSOC failed to set standards to determine what levels of market 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 *State Farm*, where the ATF designated a developer's new device a firearm silencer, but "the agency d[id] not even have a clear position on what characteristics [we]re common to known silencers"). Rather, FSOC relied on the notion that certain scenarios *would tend to cause harm generally*. This fails even arbitrary and capricious review. *See Bluewater Network*, 721 F. Supp. 2d at 30 ("There is no specific and

[3] The designated insurance expert among FSOC's voting members, a presidential appointee with over fifty years of insurance experience, dissented. FD at 298–304.

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.").

III. The District Court Correctly Held that FSOC's Failure to Consider the Consequences of Designation Was Contrary to Law.

The Court also should affirm the District Court's conclusion that it was arbitrary and capricious for FSOC not to consider the consequences that a SIFI designation would have for MetLife as well for the financial and insurance systems as a whole. Although MetLife contended that FSOC "must consider [the] effects of a final determination . . . including potential costs to the company that could result," the Council replied only that "[t]here is no requirement under [Dodd-Frank] for the Council to conduct [a] cost-benefit analysis." FD at 29 (citing 77 Fed. Reg. at 21,640).

But long-standing principles of administrative law that forbid an agency like the FSOC from turning a blind eye to relevant considerations, such as the economic consequences of regulatory action. That is, it is the APA that provides the statutory foundation the Government mistakenly claims is lacking.

First, it is well-established that "agency action is lawful only if it rests 'on a consideration of the relevant factors.'" *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) (quoting *State Farm*, 463 U.S. at 43). The consequences of a regulatory action are certainly a "relevant" factor that every agency must consider. *See id.* at

2707-08. Indeed, as the Supreme Court recently explained "[a]gencies have long treated cost as a centrally relevant factor when deciding whether to regulate. Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions." *Id*.; *see Competitive Enter. Inst. v. NHTSA*, 956 F.2d 321, 323 (D.C. Cir. 1992) (holding that automobile fuel efficiency rulemaking was not "reasoned" where the agency focused on the environmental risks of fuel use but failed to consider countervailing safety risks posed by smaller vehicles). And for decades—across administrations of both parties—the executive branch has generally expected agencies to consider both the costs and benefits of agency action (and inaction) in the rulemaking process. *See, e.g.*, Exec. Order No. 12,866, 46 Fed. Reg. 513193 (Feb. 17, 1981); *accord* Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011); Exec. Order No. 12,866, 76 Fed. Reg. 51735 (Sept. 30, 1993); *see generally* Paul Rose & Christopher Walker, *The Importance of Cost-Benefit Analysis in Financial Regulation* (2013), http://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/CBA-Report-3.10.13.pdf.

Nothing about the Dodd-Frank Act suggests that Congress intended any departure from these established principles of sound administration of the

regulatory state. Although *Michigan v. EPA* did not involve financial services regulation, there is no "financial services exception" to the APA.

Second, even if agencies need not always consider costs and other consequences, they must clearly do so where, as here, the statute mandates a consideration of "appropriate" factors. *See Michigan*, 135 S. Ct. at 2707 (confirming the basic administrative law premise that "[n]o regulation is 'appropriate' if it does significantly more harm than good"); *cf. id.* at 2711 ("The Agency must consider cost—including, most importantly, cost of compliance—before deciding whether regulation is appropriate and necessary."). As in *Michigan*, here the "[s]tatutory context reinforces the relevance of cost." *Id.* at 2708. Tellingly, while Section 113 directs the Council to consider appropriate risk-related factors in the designation process, 12 U.S.C. § 5323(a)(2)(K), Section 112 authorizes the Council to collect information from its member agencies, including the most prominent financial regulators in the nation, as well as the Office of Financial Research, *id.* § 5322(a)(2). Therefore, Congress ensured that the Council was well equipped to analyze the consequences of its decisions, particularly in the face of a claim that massive compliance costs could actually make the company more vulnerable to material financial distress.

Congress surely did not intend for the Council to ignore the impact of billions of dollars in compliance costs. Yet FSOC contends that the statutory

framework defers *exclusively* to the agency to consider only those factors that it "deems appropriate." FSOC Br. at 52. This argument "puts too much emphasis on the word 'deem.'" *Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1224 (D.C. Cir. 1993). As this Court has made clear, the word "deem" does not typically give an agency unlimited, unreviewable discretion. The agency remains subject to the bounds of reasoned decisionmaking. *See id*; *see also* 12 U.S.C. § 5323(h) (expressly authorizing judicial review to determine whether FSOC analysis in making SIFI designation was "arbitrary and capricious").

Further, FSOC's position ignores the statute's command that the Council "*shall*" consider other risk-related factors that FSOC deems appropriate. In other words, FSOC was required to analyze whether a consideration of costs was "appropriate." Nevertheless, the record reveals the Council dismissed out of hand the argument that it should consider the economic consequences of designation, stating that it believed it had "no obligation" to do so. FD at 29. Accordingly, the Council failed to consider in any respect whether it should deem the consequences of designation an "appropriate risk-based factor." *See Marshall Cty. Health Care Auth.*, 988 F.2d at 1225 n.2 ("[T]he use of the mandatory 'shall,' in the statute . . . might be thought to add at least some obligation to consider exceptions."); *see also Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1221 (5th Cir. 1991) (holding that the failure to consider certain facts "deprives [the EPA's] order of a reasonable

basis" and explaining that "the EPA cannot say with any assurance that its regulation will increase workplace safety when it refuses to evaluate the harm that will result from the increased use of substitute products").

As Cass Sunstein, former administrator of the Office of Information and Regulatory Affairs during the Obama Administration has explained, "[w]ithout some sense of both costs and benefits—both nonmonetized and monetized—regulators will be making a stab in the dark." Cass R. Sunstein, *Cost–Benefit Analysis and the Environment*, 115 ETHICS 351, 354 (2005). "[A]ny reasonable judgment will ordinarily be based on some kind of weighing of costs and benefits, not on an inquiry into benefits alone . . . . If there is not, the agency's interpretations should be declared unreasonable." Cass R. Sunstein, *Cost–Benefit Default Principles*, 99 MICH. L. REV. 1651, 1694 (2001). That principle is squarely applicable here.

IV. Many Other Aspects of FSOC's Analysis Further Illustrate that MetLife's Designation Was Arbitrary and Capricious.

Even beyond FSOC's departure from its own guidance and failure to apply its own standards and its failure to consider important considerations, the Council's approach was critically flawed. Several additional aspects of the Council's determination similarly support the district court's conclusion that the Council's designation of MetLife violated well-established administrative law standards.

A. The Council Failed to Offer a Reasoned Explanation to Reject MetLife's Quantitative Asset-Sales Analysis.

MetLife engaged Oliver Wyman, a consulting and analytics firm, to analyze its asset and liability positions under several distress scenarios and to offer a quantitative alternative to FSOC's conclusory approach. Oliver Wyman sought 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. FD at 147. It concluded that there was no 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. It merely posited that there were other—undisclosed—assumptions that MetLife's model could have used, which were just as plausible. Again, FSOC substituted conclusion for analysis. It failed to explain *why* Oliver Wyman's assumptions were inadequate and did not specifically identify a single alternative plausible assumption. As this Court has made clear, "[c]onclusory 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) (concluding that FCC's "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); *see also Greater Yellowstone Coal. v. Kempthorne*, 577 F. Supp. 2d 183, 210 (D.D.C. 2008) ("[T]he 'Court will not defer to the agency's conclusory or unsupported assertions.'").

B. The Council's Analysis Depended Upon Unsubstantiated and Unrealistic Assumptions Regarding the Insurance Market.

FSOC essentially concluded that MetLife could face a wide-scale run on its traditional insurance policies, which could send the company into a tailspin. It reasoned that because a "portion of the company's retail insurance and annuity products can be surrendered or withdrawn for cash," a liquidity strain on the company could "cause or contribute to" a fire sale—which would depress asset prices and significantly damage the economy. FD at 15, 143-45.

This parade of horribles ignores the historical behavior of insurance markets and the safeguards that MetLife has in place to prevent this very occurrence. FSOC's analysis of insurance-market behavior violated the rule that agency judgments "must be based on some logic and evidence, not sheer speculation." *Sorenson*, 755 F.3d at 708.

First, the data on insurance policyholder behavior does not support FSOC's notion that a virtually universal policyholder run on the insurance company's assets is plausible. Absent some data to the contrary, it was arbitrary and

capricious for FSOC to conclude that insurance policyholders would suddenly behave differently than they have before.[4] Importantly, Oliver Wyman's contagion study demonstrated that, historically, retail policyholders respond at lower levels than institutional policyholders. FD at 212. Moreover, MetLife's own experience during past financial crises confirms that traditional insurance customers do not behave as FSOC describes. Indeed, while the 2008 financial crisis certainly impacted MetLife, MetLife did not experience large-scale policyholder withdrawals. *Id.* at 71–74. Even in 1930 during the Great Depression, "the surrender rate for [MetLife's predecessor entity] reached a high of 8 percent." *Id.* at 175.

Second, even if policyholders suddenly broke with precedent and sought to redeem policies *en masse*, "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." *Id.* at 145.

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[4] FSOC's assertions regarding an unprecedented run by MetLife policyholders are not dissimilar to the Council's assertions regarding "run risk" in mutual funds, despite its acknowledgement of modest investor redemptions from stock and bond funds even in times of market stress. *See, e.g.*, FSOC, Update on Review of Asset Management Products and Activities (Apr. 18, 2016). ICI has provided FSOC with considerable data and analysis demonstrating that there are compelling and enduring reasons for mutual funds' long history of success in meeting investor redemptions and the circumstances that contribute to that record of success. *See, e.g.*, Paul Schott Stevens, ICI, Letter to FSOC (July 18, 2016), https://www.ici.org/pdf/16_ici_fsoc_ltr.pdf; Paul Schott Stevens, ICI, Letter to FSOC (Mar. 25, 2015), https://www.ici.org/pdf/15_ici_fsoc_ltr.pdf.

MetLife's deferral rights would allow it to avoid incurring immediate liabilities if there were a sudden run on insurance assets.

FSOC, however, disregarded the protection that these rights provide. Indeed, it speculated that MetLife "could have *disincentives* to invoke this option because of the negative signal that such action could send to counterparties, policyholders, and investors." *Id.* (emphasis added). Strangely, the Council suggested that a fear of signaling the markets would be so strong as to make a default more appealing than exercising a contractual right—which, in this manufactured situation, would serve as a life-or-death safety net. *Id.* at 16-17, 145, 165.

There is no (and the Council offered no) historical basis for that counterintuitive hypothetical. FSOC's suggestion overlooks the board of directors' and management's fiduciary duties, which would likely compel the use of this safety net in FSOC's imagined scenario. Moreover, FSOC's hypothesis ignores the fact that the markets would already have been "signaled" about MetLife's distress; it defies reason that individual MetLife policyholders would be in a collective "run" on the company, but sophisticated financial markets would be unaware of the company's troubles. *See Int'l Union*, 626 F.3d at 90 (agency 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").

Because the Council's reasoning relies on unsupported assumptions and ignores common-sense realities, FSOC's asset liquidation analysis was arbitrary and capricious. *See Sorenson*, 755 F.3d at 708 (faulting an agency that "relie[d] on one unsubstantiated conclusion heaped on top of another").

C. The Council Improperly Failed to Consider an Activities-Based Approach for Enhanced Regulation as an Alternative to SIFI Designation.

During the designation process, MetLife asked FSOC to consider enhancing regulation for all insurance companies through an activities-based approach, rather than singling out MetLife for a SIFI designation. FSOC has acknowledged that a focus on activities may be viable in the asset-management industry. *Notice Seeking Comment on Asset Management Products and Activities*, 79 Fed. Reg. 77,488, 77,489 (Dec. 24, 2014); *see also* FSOC, Minutes of the Council, Executive Session, Asset Management Update (July 31, 2014) (recounting FSOC's direction to its staff to "undertake a more focused analysis of industry-wide products and activities to assess potential risks associated with the asset management industry"). And although the Council has not taken potential SIFI designations of asset managers off the table, it has treated the activities-based approach as a potentially reasonable alternative worthy of consideration.

In response to MetLife's request to consider the same approach for the insurance industry, however, the Council stated 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." FD at 31.

That was insufficient. "[W]here parties raise reasonable alternatives to [an agency's] position, [this Court] ha[s] held that reasoned decisionmaking requires considering those alternatives." *Am. Gas Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010). Because MetLife raised a "facially reasonable alternative," the Council was required "either [to] consider th[e] alternative[] or give some reason . . . for declining to do so." *Laclede Gas Co. v. FERC*, 873 F.2d 1494, 1498 (D.C. Cir. 1989). The Council did not explain why an activities-based approach is not a proper alternative; it stated only that an activities-based approach is not a requirement for designation. That is entirely nonresponsive. FSOC's failure to address that alternative fails to comport with the APA's requirement for reasoned decisionmaking. *See id.*

CONCLUSION

For all of the foregoing reasons, the Chamber and ICI urge the Court to affirm the District Court's judgment.

Respectfully submitted,

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August 22, 2016

ADDENDUM

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12 U.S.C. §5326. Reports

(a) In general

Subject to subsection (b), the Council, acting through the Office of Financial Research, may require a bank holding company with total consolidated assets of $50,000,000,000 or greater or a nonbank financial company supervised by the Board of Governors, and any subsidiary thereof, to submit certified reports to keep the Council informed as to—

(1) the financial condition of the company;

(2) systems for monitoring and controlling financial, operating, and other risks;

(3) transactions with any subsidiary that is a depository institution; and

(4) the extent to which the activities and operations of the company and any subsidiary thereof, could, under adverse circumstances, have the potential to disrupt financial markets or affect the overall financial stability of the United States.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel for amici curiae the Chamber of Commerce of the United States of America and the Investment Company Institute certified that this brief:

(i) complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 5,605 words, including footnotes and excluding the parts of this brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1); and

(ii) complies with the typeface requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Times New Roman font in a size equivalent to 14 points or larger.

/s/ Steven G. Bradbury
Steven G. Bradbury

Dated: August 22, 2016

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2016, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

/s/ Steven G. Bradbury
Steven G. Bradbury

Dated: August 22, 2016