Gaining and Shedding Dodd-Frank's Systemically Important Financial Institution (SIFI) Label

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Note: A version of this paper appeared in Stuart Weinstein and Charles Wild, editors, Legal Risk Management, Governance and Compliance (Surrey, UK: Globe Law and Business 2016).

I. Introduction

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank)[1] creates a new set of regulatory uncertainties for financial companies. Chief among these new worries is the possibility of being designated systemically important by the Financial Stability Oversight Council (FSOC). With that designation comes a new regulator—the Board of Governors of the Federal Reserve System (Federal Reserve)—operating under a mandate to provide enhanced, company-specific regulatory requirements and supervision for the designated company. The designation, however, may also serve as an implicit promise of government support should the stringent regulatory regime fail to keep a designated company out of trouble. For this reason, FSOC designations also matter to competitors, customers, and counterparties of designated companies and to United States taxpayers.

This essay describes the systemic designation framework, the procedural opportunities to resist and reverse designation, and the broader financial stability implications of designation. This essay argues that the FSOC designation, as it has been implemented, runs afoul of the very logic that underlies it. Rather than encouraging companies to manage their risks carefully, FSOC uses the systemic risk label to shift risk management from private companies and state regulators to federal regulators. Companies, by contesting their designations and seeking to make the procedures for applying and revisiting their systemic labels more open and rigorous, may marginally improve the process. Real change, however, will require policymakers to reconsider the effectiveness of designation in its current form as a financial stability-enhancing tool.

The essay starts with a description of what a designation under Title I of Dodd-Frank means. Section II discusses how it is applied. The third part briefly outlines each nonbank financial institution designation to date and the company's response, with a particular emphasis on the most recent designation (MetLife). The fourth section examines responding to a SIFI designation. The fifth section looks at what insights other companies, the public, regulators, and policymakers can glean from the designations that have been made. Section VI discusses potential changes to the designation process and argues that real change will require a fundamental revisiting of the objective of FSOC designations. Section VII concludes.

II. Why SIFI Designations Matter

A central focus of Dodd-Frank is the mitigation of systemic risk. Mitigating systemic risk is difficult, particularly because the term not defined in the statute and there is little academic consensus about what it means or how it should be measured.[2] Among the key statutory methods for mitigating systemic risk is the designation of certain systemically important financial

[1] Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[2] For an insightful discussion of definitions and ways of measuring systemic risk, *see* David VanHoose, *Systemic Risks and Macroprudential Regulation: A Critical Appraisal* (Networks Financial Institute Policy Brief No. 2011-PB-04 April 2011).

institutions (SIFIs)[3] for an extra layer of regulation and supervision by the Federal Reserve.[4] The statute automatically designates all bank holding companies with more than $50 billion in assets,[5] and allows FSOC to designate nonbank financial institutions[6] that may be a source of financial instability.[7] Designated companies also join the ranks of companies that fund FSOC and the Office of Financial Research.[8] Finally, SIFIs will be subject to early remediation measures in the event they are "experiencing increased financial distress."[9]

The net effect of being designated is difficult to measure. On the one hand, the designated company joins an elite class of companies that enjoys an implicit public government endorsement as being too important to the financial system to be permitted to fail. A SIFI may find it easier to attract capital, customers, and other counterparties. Life insurance companies, for which longevity is such an important characteristic, may particularly benefit from the label. The additional government oversight that comes with designation can also be a selling point.[10]

On the other hand, the potential competitive advantages associated with the label come at an intentionally large regulatory cost, perhaps large enough to offset or overwhelm the advantages. Dodd-Frank mandates more stringent regulation for designated companies.[11] Included in this regulation are risk-based capital requirements, leverage limits, liquidity requirements, risk

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[3] Although not actually used in the statutory text, this term is commonly applied to entities designated by or pursuant to Dodd-Frank.

[4] Arguably, under the statute, the decision to designate is separate from the decision to subject a company to supervision by the Federal Reserve, but in practice the two decisions have been merged. Dodd-Frank § 113(a)(1) [12 U.S.C. § 5323(a)(1)].

[5] *See* Dodd-Frank § 165(a) [12 U.S.C. § 5365(a)] (directing the Federal Reserve to impose heightened prudential standards on "bank holding companies with consolidated assets of equal to or greater than $50,000,000,000).

[6] A nonbank financial institution that either derives 85 percent or more of its consolidated annual gross revenues from or has 85 percent or more of its assets associated with financial activities or insured depository institutions is generally eligible for designation. *See* Dodd-Frank § 102(a) [12 U.S.C. § 5311(a)] (defining "nonbank financial company" and "predominantly engaged"). Dodd-Frank empowers the Federal Reserve to determine if a company satisfies either the revenue or assets test. *See* Dodd-Frank § 102(b). Under this authority, the Federal Reserve has pursued an approach that sweeps a broad swath of companies into the group eligible for designation. *See generally* Debevoise & Plimpton, Client Update: Federal Reserve Adopts Key Dodd-Frank Act Definitions (Apr. 9, 2013); Morrison Foerster, Federal Reserve Approves Final Rules Defining When Significant Nonbank Firms Are "Predominantly Engaged in Financial Activities," (Apr. 4, 2013). Nonfinancial companies may also be reached through Dodd-Frank's anti-evasion clause, which allows FSOC to designate a company that otherwise fits the statutory criteria, but "is organized or operates in such a manner as to evade the application of this title." Dodd-Frank § 113(c) [12 U.S.C. § 5323(c)].

[7] Dodd-Frank § 113(a)(1) [12 U.S.C. § 5323(a)(1)].

[8] Dodd-Frank § 155(d) [12 U.S.C. § 5345(d)]. In addition, if a company is resolved under Title II of Dodd-Frank, designated nonbank financial companies may be charged an assessment to help to cover resolution costs. Dodd-Frank § 210(o) [12 U.S.C. § 5390(o)].

[9] Dodd-Frank § 166 [12 U.S.C. § 5366].

[10] *See, e.g.*, Stephen Foley, *Prudential Investment Management Changes Name to Drum Up Business*, FINANCIAL TIMES (Nov. 10, 2015), available at http://www.ft.com/intl/cms/s/0/2c0c87f4-8174-11e5-8095-ed1a37d1e096.html#axzz3yYqmWM6T (reporting that David Hunt, chief executive, Prudential Investment Management, in response to a question about the effect of Prudential SIFI designation on Prudential's asset management business, responded: "Clients are rather liking it. . . . It is not a bad thing to know that somebody else has been through and kicked the tires and feels that you really do have a risk management system, that your model risks have all been tested and that you have been through the cyber security hoops the Fed wants you to go through.").

[11] Dodd-Frank § 165(a)(1)(A) [12 U.S.C. § 5365(a)(1)(A)] (directing the Federal Reserve to "establish prudential standards [for SIFIs] more stringent than the standards and requirements applicable" to other companies).

management requirements, and concentration limits.[12] The Federal Reserve additionally may impose contingent capital requirements, public disclosure requirements, limits on short-term debt, and other prudential standards that the Federal Reserve or FSOC believe to be appropriate.[13] In addition, each SIFI must periodically submit a credit exposure report and resolution plan.[14] A company that fails to timely submit a resolution plan acceptable to the regulators may face even stricter regulation or forced divestitures.[15] Costs will also come from the burden and distraction associated with enhanced engagement with regulators.[16]

Complicating the assessment of the costs of designation is Dodd-Frank's provision for each designated firm to be regulated according to a tailor-made plan.[17] The statute directs the Federal Reserve to develop prudential standards that are tailored according to a company's "capital structure, riskiness, complexity, financial activities (including the financial activities of [its] subsidiaries), size, and any other risk-related factors that the [Federal Reserve] deems appropriate."[18] This handcrafted regulatory approach allows for accommodation of a firm's unique aspects, but, as this description from former Federal Reserve Chairman Ben Bernanke reveals, it also introduces a great deal of uncertainty into a firm's regulatory future:

> We . . . want to design a regime that is appropriate for the business model of the particular firm. But our other objective, and what makes designation by the FSOC particularly noteworthy, is that the primary goal of the consolidated supervision by the Fed is to make sure that the firms—the firm doesn't in any way endanger the stability of the broad financial system. So we'll be looking at not just the usual safety and soundness type matters or supervision, which both can be, again, tailored to the types of assets and liabilities that the firm has, but also we're going to want to focus on things like resolution authority, practices relating to derivatives and other exposures, interconnectedness, et cetera, to make sure that the firm in its structure and in its operations doesn't pose a threat to the wider system. And that's what is going to be distinctive about our oversight …[19]

Capital requirements have drawn the greatest concern, particularly for insurance SIFIs.[20] Insurance capital standards differ from bank capital standards. If designated insurance companies

[12] Dodd-Frank § 165(b)(1)(A) [12 U.S.C. § 5365(b)(1)(A)].
[13] Dodd-Frank § 165(b)(1)(B) [12 U.S.C. § 5365(b)(1)(B)].
[14] Dodd-Frank § 165(d) [12 U.S.C. § 5365(d)].
[15] Dodd-Frank § 165(d)(5) [12 U.S.C. § 5365(d)(5)].
[16] Some companies take a more positive view of engagement with regulators. *See, e.g.*, American International Group, Strategic Actions to Maximize Shareholder Value, at 22 (Jan. 26, 2016), *available at* http://www.aig.com/Chartis/internet/US/en/Investor%20Update%20Presentation%201.26.16_tcm3171-713944.pdf [**hereinafter AIG Strategic Presentation**] (noting regulators' "important role [in] ensuring companies prudently manage risk on behalf of policyholders," such as their "[a]bility to veto strategies that endanger policyholders, including limiting dividends from regulated insurance companies."
[17] Dodd-Frank § 165(a)(2) [12 U.S.C. § 5365(a)(2)] (allowing the Federal Reserve to "differentiate among companies on an individual basis or by category … ");Dodd-Frank § 165(b)(3) [12 U.S.C. § 5365(b)(3)] (directing Federal Reserve to "take into account differences among nonbank financial companies … and bank holding companies" and "adapt the required standards as appropriate in light of any predominant line of business").
[18] Dodd-Frank § 165(a)(2)(A) [12 U.S.C. § 5365(a)(2)(A)].
[19] Ben Bernanke, Chairman, Board of Governors of the Federal Reserve System, Transcript of Press Conference, at 21-2 (Sept. 18, 2013), *available at* http://www.federalreserve.gov/mediacenter/files/FOMCpresconf20130918.pdf.
[20] *See, e.g.*, Transcript of Nonbank Financial Company Hearing Before the Financial Stability Oversight Council, at 106 (Nov. 3, 2014) (statement of Steven Kandarian, Chairman, President, and CEO, MetLife) ("The biggest issue will be what the capital rules will be. So, if the capital rules are extremely harsh from our perspective and makes [*sic*] us uncompetitive in certain lines of business, then we will have to exit those businesses in some form.").

were forced to conform to bank capital standards, they would be at a competitive disadvantage.[21] Legislation that exempted designated insurance companies from the so-called "Collins Amendment" provision in Dodd-Frank alleviated some of the concern by allowing the Federal Reserve new flexibility to tailor capital requirements for insurance companies.[22] Even with this change, Dodd-Frank allows the Federal Reserve to subject SIFIs to particularly stringent risk-based capital requirements and leverage limits, a possibility that will remain a concern for companies and their investors.[23]

Many observers assume that these regulatory costs outweigh the competitive benefits of being designated, but the balance may be company-specific and may shift over time. The pressure to improve the designation process to allow potential designees more opportunities to argue against designation is indicative of a fear that the costs outweigh the benefits. The designation process is the subject to which this essay now turns.

III. How a SIFI Comes To Be

The designator of nonbank financial institutions is FSOC. FSOC is an awkward regulatory creation of Dodd-Frank that brings together the heads of federal financial regulatory agencies, representatives of the state financial regulators, and an independent member with insurance expertise.[24] Of the fifteen members, only ten are voting members. Dodd-Frank empowers FSOC, by a vote of 2/3 of its members including an affirmative vote by the Treasury secretary, to "require supervision by the Board of Governors for nonbank financial companies that may pose risks to the financial stability of the United States."[25] Although FSOC's members vote on the designation, much of the work is done by staff from the members' agencies. Staff of the Federal

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[21] *See, e.g.*, Dirk A. Kempthorne, President & CEO, American Council of Life Insurers, *Designating Life Insurers as SIFIs Creates Uneven Playing Field*, POLITCO.COM (Sept. 15, 2014), *available at* http://politico.com/sponsor-content/2014/09/designating-life-insurers-as-sifis/#ixzz3zIFR9XEk ("Should a life insurer be incorrectly designated as a SIFI subject to higher prudential standards than its peers, it likely would lead to competitive disadvantages. Imposing new, unnecessary and unreasonable capital requirements on life insurers will directly affect the products that life insurers provide. To respond to the pressure on capital, consumer benefits may be reduced, prices may be increased, and some products may no longer be available.").

[22] Insurance Capital Standards Clarification Act of 2014, Pub. L. 113-270, 128 Stat. 3017 (Dec. 18, 2014). *See also* Sutherland, Asbill & Brennan, LLP, *Legal Alert: President Signs Changes to Collins Amendment Favorable to Insurers* (Sept. 19, 2014), *available at* http://www.sutherland.com/NewsCommentary/Legal-Alerts/169217/Legal-Alert-President-Signs-Changes-to-Collins-Amendment-Favorable-to-Insurers.

[23] *See, e.g.*, Rachel Louise Ensign and David Benoit, *Fund Joins Push to Break Up CIT*, WALL STREET JOURNAL, at C1 (Feb. 2, 2016) (reporting that activist investors "have looked to companies [including small SIFI banks] that have a realistic expectation of becoming less regulated and having more lenient capital rules, which could boost profitability").

[24] FSOC's voting members are: (1) the Treasury Secretary; (2) the Chairman of the Board of Governors of the Federal Reserve System, (3) the Comptroller of the Currency, (4) the Director of the Bureau of Consumer Financial Protection, (5) the Chairperson of the Securities and Exchange Commission, (6) the Chairperson of the Federal Deposit Insurance Corporation, (7) the Chairperson of the Commodity Futures Trading Commission, (8) the Director of the Federal Housing Finance Agency, (9) the Chairperson of the National Credit Union Administration Board, and (10) a presidentially appointed, Senate confirmed insurance expert. The nonvoting members are: (1) the Director of the Office of Financial Research, (2) the Director of the Federal Insurance Office, (3) a state insurance commissioner, (4) a state banking supervisor, and (5) a state securities commissioner. Dodd-Frank § 111(b) [12 U.S.C. 5321(b)].

[25] Dodd-Frank §§ 112(a)(2)(H) [12 U.S.C. § 5322(a)(2)(H)] and 113(a) [12 U.S.C. § 5323(a)].

Reserve, which may have an interest in expanding the Federal Reserve's regulatory jurisdiction, play a predominate role in FSOC's designation work.[26]

The statutory criteria for designation afford FSOC broad discretion. A designation must be based on one of two determination standards: (1) "material financial distress" at the company or (2) "the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities" of the company "could pose a threat to the financial stability of the United States."[27] To date, FSOC has used only the first determination standard. This standard is broad in its potential reach. As Peter Wallison notes, "because the key terms the FSOC must apply in order to take jurisdiction over any particular firm—'financial distress' and 'market instability'—have no clear meaning, and because both involve predictions about the future, they amount to an enormous grant of discretionary power."[28]

Even when taking into account the statutory list of factors for FSOC to consider in making determinations, Dodd-Frank provides neither FSOC nor market participants a clear idea about which companies might be subject to designation. The factors relate not only to risk to the financial system, but to the role the company plays in serving consumers, businesses, the government, other significant financial institutions, and low-income, minority, or underserved communities.[29] Risk-related factors include leverage, off-balance sheet exposures, the mix of the company's activities, the company's regulatory status, and the amount of the company's assets and liabilities.[30] A final catch-all consideration allows FSOC to consider "any other risk-related factors that the Council deems appropriate."[31] Hoover Institution Fellow Adam White points out that this final prong makes the statutory designation framework "completely malleable."[32]

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[26] *See* Government Accountability Office, Report No. 15-51: Financial Stability Oversight Council: Further Actions Could Improve the Nonbank Designation Process, p. 20 (Nov. 2014) [**hereinafter GAO Report 15-51**] ("All FSOC member agencies have contributed staff to evaluations, but the extent of participation and leadership varied by member agency—with the Federal Reserve often at the forefront."). *See also id.* at Table 1 (detailing number of staffers from each agency that participated in designation work).

[27] Dodd-Frank§ 113(a) [12 U.S.C. § 5323(a)]. Dodd-Frank also empowers FSOC to issue recommendations to other regulators calling "for more stringent regulation" of "any financial activity" if "the conduct, scope, nature, size, scale, concentration, or interconnectedness of such activity or practice could create or increase the risk of significant liquidity, credit, or other problems spreading among bank holding companies and nonbank financial companies, financial markets of the United States, or low-income, minority, or underserved communities." Dodd-Frank § 120 [12 U.S.C. § 5330]. Many industry representatives and outside observers prefer this approach to the designation of particular companies. *See, e.g.*, Letter from Ricardo A. Anzaluda, Executive Vice President and General Counsel, MetLife, to Patrick Pinschmidt, Deputy Assistant Secretary, Financial Stability Oversight Council (Aug. 6, 2014) (asking FSOC to take an activities-based approach to addressing any systemic risk in the insurance industry, as FSOC has done with respect to the asset-management industry). It is not clear how such a recommendation would work with respect to activities conducted by insurance companies regulated by state regulators.

[28] Peter J. Wallison, *The Authority of the FSOC and the FSB to Designate SIFIs: Implications for the Regulation of Insurers in the United States after the Prudential Decision*, at 2 (Networks Financial Institute Policy Brief 2014-PB-02 2014).

[29] Dodd-Frank § 113(a)(2)(C)-(E) [12 U.S.C. § 5323(a)(2)(C)-(E)].

[30] Dodd-Frank § 113(a)(2)(A), (B), (F)-(J) [12 U.S.C. § 5323(a)(2)(A), (B), (F)-(J)].

[31] Dodd-Frank § 113(a)(2)(K) [12 U.S.C. § 5323(a)(2)(K)].

[32] Oversight of the Financial Stability Oversight Council; Due Process and Transparency in Non-Bank SIFI Designations, Hearing before the Subcommittee on Oversight and Investigations of the Financial Services Committee of the House of Representatives (Nov. 19, 2015) (written testimony of Adam White) [**hereinafter White Testimony**].

FSOC promulgated a rule and accompanying interpretive guidance to explain its approach to designation.[33] FSOC considers six categories of factors drawn from the statutorily prescribed considerations: size, interconnectedness, substitutability, leverage, liquidity risk and maturity mismatch, and existing regulatory scrutiny. The overarching theme seems to be size.[34] FSOC also identifies three "transmission channels" by which troubles at one company could pose a problem for the financial system —*exposure* of the company's creditors, counterparties, investors, or other market participants ; *asset liquidation*, which could cause prices to fall and affect other companies holding or trading those assets; and a *critical function or service*, which the company might stop offering.[35] FSOC centers its analysis in its public justifications of its designations around these transmission channels, rather than the statutory list of factors or its six-category condensation of those factors.[36]

The designation process occurs in stages.[37] In an initial screening process, FSOC uses data that is available publicly or through regulators to look at the company's size, notional outstanding credit default swaps, derivative liabilities, debt outstanding, leverage ratio, and short-term debt ratio.[38] In the second stage, FSOC generally analyzes companies that meet or exceed two or more of the first-stage thresholds.[39] However, it reserves the right to consider other companies too.[40] In response to concerns about the designation process, FSOC notifies and engages with companies if they are under active consideration in Stage 2.[41] The second stage is a quantitative and qualitative review according to the six categories of statutory factors. Five companies that have been considered in Stage 2 have not made it to Stage 3.[42] FSOC notifies these companies, but leaves open the possibility of subsequent reconsideration.[43] FSOC notifies the companies it has

[33] Financial Stability Oversight Council, Authority to Require Supervision and Regulation of Certain nonbank Financial Companies, 77 Fed. Reg. 21637 (Apr. 11, 2012).
[34] *See* Christopher Hughes, *Note: The Federal Government's Reaction to a Worldwide Banking Crisis Included Regulating Insurers: How Can Insurance Companies Shape the Emerging Policy and Mount Challenges to a Bank-Centric Designation?*, 12 RUTGERS J.L. & PUB. POL'Y 252, 277 (2015) (concluding that FSOC's designation regulations "appear designed to subvert the statutory intent" by overlaying size on many of the criteria).
[35] 77 Fed. Reg. 21637, 21657 (Apr. 11, 2012).
[36] Jacob Wimberly, *Note: SIFI Designation of Insurance Companies—How Game Theory Illustrates the FSOC's Faulty Conception of Systemic Risk*, 34 REV. BANKING & FIN. L. 337, 347-48 (2014) (observing that the Prudential basis "never once mentions the six categories in which the statutory considerations are grouped in the interpretive guidance, likely reflecting the redundancy found between the statutory considerations, the six categories, and the three transmission channels.").
[37] Much of this discussion is based on GAO Report 15-51 (describing the designation process).
[38] *See* FSOC, Staff Guidance: Methodologies Related to Stage 1 Thresholds, pp.2-3 (June 8, 2015).
[39] Martin J. Gruenberg, Oversight of the Financial Stability Oversight Council, Written Testimony before the Committee on Financial Services of the House of Representatives, p. 8 (Dec. 8, 2015).
[40] *See* FSOC, Staff Guidance: Methodologies Related to Stage 1 Thresholds, p.2 (June 8, 2015) ("The Council retains the discretion to consider in Stage 2 a nonbank financial company not identified by the Stage 1 thresholds if further analysis is warranted to determine if the company could pose a threat to U.S. financial stability").
[41] Financial Stability Oversight Council, Supplemental Procedures Relating to Nonbank Financial Company Determinations, at 2 (Feb. 4, 2015), *available at* https://www.treasury.gov/initiatives/fsoc/designations/Documents/Supplemental%20Procedures%20Related%20to%20Nonbank%20Financial%20Company%20Determinations%20-%20February%202015.pdf [**hereinafter FSOC Supplemental Procedures**] ("The Council now will notify a nonbank financial company within 30 days after the Deputies Committee instructs the Nonbank Designations Committee to form an analytical team to commence an active review of the company in Stage 2.").
[42] FSOC, Annual Report 2015, p. 101 , *available at* https://www.treasury.gov/initiatives/fsoc/studies-reports/Documents/2015%20FSOC%20Annual%20Report.pdf.
[43] FSOC Supplemental Procedures at 2.

selected to move to Stage 3 that they are under consideration for a proposed determination.[44] In the third stage, FSOC collects information through the Office of Financial Research and from the company under consideration.[45] FSOC notifies the company when the evidentiary record is complete, from which time FSOC has 180 days to make a proposed determination. The company has thirty days after receiving notice of the proposed determination to request a hearing to challenge the proposed determination.[46] In response to concerns about the hearing process,[47] FSOC stated its intention, despite the discretion afforded it by statute, "to grant any timely request for an oral hearing from a company subject to a proposed determination, and for any such hearing to be conducted by the Council members."[48] A hearing is not an opportunity for dialogue between the company and FSOC; it is a session at which the company makes a presentation and FSOC members ask questions of the company.[49] Within sixty days of the hearing, FSOC must notify the company of its determination and the basis for that determination.[50] FSOC has not changed its determination with respect to any company that has made it to the hearing stage.[51] Once FSOC's process is complete, a company has thirty days to challenge its designation in federal district court.[52]

Dodd-Frank provides for reevaluation of the designation annually.[53] FSOC provides little detail about what these reevaluations entail.[54] FSOC has promised that before it reevaluates a company, "the company will be provided an opportunity to meet with staff on the Nonbank Designations Committee to discuss the scope and process for the review and to present information regarding any change that may be relevant to the threat the company could pose to financial stability,

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[44] 77 Fed. Reg. at 21660.

[45] These interactions can include meetings with staff of FSOC members' agencies and document submissions. In one instance, a company made 200 document submissions. GAO Report 15-51 at 31. The number of agencies, principals, and staffers involved in the process makes it harder for the company to know what is driving FSOC decisions. For a discussion of some of the concerns raised by companies that have been in the designation process, *see* GAO Report 15-51 at 31-35.

[46] Dodd-Frank § 113(e)(2) [12 U.S.C. § 5323(e)(2)].

[47] For a helpful analysis of some of the drawbacks in the hearing process from the perspective of the company under consideration, *see* William M. Butler, *Note & Comment: Falling on Deaf Ears: The FSOC's Evidentiary Hearing Provides Little Opportunity to Challenge a Nonbank SIFI Designation*, 18 N.C. BANKING INST. 663, 672-90 (2014).

[48] FSOC Supplemental Procedures at 3.

[49] Transcript of Nonbank Financial Company Hearing Before the Financial Stability Oversight Council, at 22 (Nov. 3, 2014) (statement of Jacob Lew, Chairman, Financial Stability Oversight Council), *available at* http://static.politico.com/3e/18/4fb79d1a4de8b09393a7aa4e03f3/fsoc-metlife-hearing-november-2014.pdf ("Because the purpose of the hearing is to allow MetLife to present its views to the Council, we will ask questions, but we will not get into a dialog about the Council's analysis.").

[50] Dodd-Frank § 113(e)(3) [12 U.S.C. § 5323(e)(3)].

[51] Butler points out that companies should nevertheless request a hearing and use it as an opportunity to shape the regulations that will be crafted for them. *Id*. at 690 ("Although the hearing is intended to allow a company to contest its designation, it may also present an opportunity to communicate the standards by which it should be regulated, if regulated at all." (footnote omitted).

[52] Dodd-Frank § 113(h) [12 U.S.C. § 5323(h)].

[53] Dodd-Frank § 113(d). [12 U.S.C. § 5323(d)].

[54] *See, e.g.*, Financial Stability Oversight Council, Resolution Regarding Reevaluation Determination Regarding Prudential Financial, Inc. (Dec. 17, 2015), available at https://www.treasury.gov/initiatives/fsoc/council-meetings/Documents/December%2017,%202015,%20Notational%20Vote.pdf (reporting that FSOC" considered a broad range of information available through existing public and regulatory sources, as well as information submitted to the Council by Prudential" and concluded, over the dissenting vote of FSOC's insurance expert, not to rescind its determination).

including a company restructuring, regulatory developments, market changes, or other factors."[55] FSOC only votes on whether to rescind the designation if the company contests its determination.[56] The company is entitled to an oral hearing on de-designation once every five years.[57]

The procedures outlined by FSOC make the process appear more scientific than it is in practice. The statute invites an art-not-science approach by allowing FSOC to designate any nonbank financial company that "*could* pose a threat to the financial stability of the United States"[58] and by using an open-ended set of designation criteria. FSOC's designations—even though the products of multiple stages of review—nevertheless carry with them an air of inevitability. A brief review of these designations follows in the next section.

IV. Responding to a SIFI Designation

As other large nonbank financial companies decide how to prepare for or fend off a possible future designation, they are likely looking to the first batch of designees for guidance on how to respond. So far, FSOC has designated four nonbank financial companies: American International Group (AIG), General Electric Capital Corporation (GECC), Prudential Financial (Prudential), and MetLife.[59] These companies have responded in different ways, and their responses are evolving over time. In crafting a response, companies must consider, in addition to the potential costs and benefits of designation, how efforts to resist a designation will sit with a regulator with broad discretion to tailor a SIFI's regulatory program.

A. American International Group

In July 2013, FSOC designated AIG a systemically important nonbank financial company. Although acknowledging that AIG had "changed greatly since the financial crisis," FSOC concluded that "material financial distress at AIG could cause an impairment of financial intermediation or of financial market functioning that would be sufficiently severe to inflict significant damage on the broader economy."[60] FSOC based this conclusion on the exposure of other companies and retail customers to AIG through its insurance and retirement products and its capital markets activities; the potential for policyholder runs through withdrawals, surrenders, and loans against their policies; and AIG's critical role in commercial insurance underwriting.[61] FSOC opined that the supervisory framework for designated companies under Dodd-Frank offers

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[55] FSOC Supplemental Procedures at 4.
[56] FSOC Supplemental Procedures at 4.
[57] FSOC Supplemental Procedures at 4.
[58] Dodd-Frank § 113(a) (emphasis added).
[59] *See* FSOC, Nonbank Financial Company Designations, *available at* https://www.treasury.gov/initiatives/fsoc/designations/Pages/default.aspx#nonbank. In addition, FSOC also has designated eight "financial market utilities" under different Dodd-Frank authority. *See* FSOC, Financial Market Utility Designations, https://www.treasury.gov/initiatives/fsoc/designations/Pages/default.aspx#FMU. These designations are outside the scope of this essay.
[60] Financial Stability Oversight Council, Basis of the Financial Stability Oversight Council's Final Determination Regarding American International Group, Inc., at 2-3 (July 8, 2013), *available at* https://www.treasury.gov/initiatives/fsoc/designations/Documents/Basis%20of%20Final%20Determination%20Regarding%20American%20International%20Group,%20Inc.pdf [**hereinafter AIG Public Basis**].
[61] AIG Public Basis at 6-9.

features superior to those available to AIG's many insurance supervisors and the Federal Reserve as savings-and-loan holding company supervisor.[62]

AIG responded warmly by emphasizing that it "did not contest this designation and welcomes it."[63] Notorious for being a near-casualty of the financial crisis and a major bailout recipient, AIG may have viewed the designation as a way to restore its reputation as a well-run and well-regulated company.

AIG has subsequently come under pressure to make strategic changes in response to its designation. Prominent AIG shareholders, including Carl Icahn, have urged the company to break itself up partly to avoid "an increasingly onerous regulatory burden which will only further erode its competitive position."[64] Icahn specifically called on the company to make changes that would enable it to apply for release from its SIFI designation.[65]

AIG, however, has not pursued organizational changes designed to get it out from under its SIFI designation. In a January 26, 2015, investor call, the company announced significant changes, including the planned sale of its advisory unit.[66] That change came in part in response to regulatory concerns about a forthcoming Department of Labor regulation, not from concerns about its SIFI designation.[67] This move fell short of Icahn's more far-reaching recommendation to "[p]ursue tax free separations of both its life and mortgage insurance subsidiaries to create three independent public companies, [each of which] would be small enough to mitigate and avert the [SIFI] designation."[68] AIG contends that the SIFI label is not a major consideration for AIG, "does not impose significant incremental compliance costs," and pales in significance compared to other considerations.[69] AIG maintains, it is different from other nonbank SIFIs, which have not yet made the types of changes likely to be required under Federal Reserve rules for nonbank SIFIs.[70] AIG's relative indifference to its SIFI label is perhaps not surprising

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[62] AIG Public Basis at 9-11.

[63] American International Group, Inc., AIG Statement on Financial Stability Oversight Council (FSOC) Final Determination (Jul. 9, 2013).

[64] Letter from Carl C. Icahn to Peter Hancock, Chief Executive Office of AIG (Oct. 28, 2015), *available at* http://carlicahn.com/aig-ceo-letter/.

[65] Letter from Carl C. Icahn to American International Group, Inc. (Jan. 19, 2016), *available at* http://carlicahn.com/open-letter-to-aig-board/ (calling on the company to "[c]ommit to streamline operations and focus on transforming the company into a competitive, pure play P&C insurer by committing to sell, spin, or otherwise separate non-core operations to de-conglomerate and apply to de-SIFI").

[66] AIG Strategic Presentation at 4.

[67] American International Group, AIG Strategy Update Conference Call, at approximately 33:40 minutes (Jan. 26, 2016), *available at* http://edge.media-server.com/m/p/29z948yj [**hereinafter AIG Strategy Conference Call**] (comments of Peter Hancock, CEO, AIG).

[68] Letter from Carl C. Icahn to Peter Hancock, Chief Executive Office of AIG (Oct. 28, 2015), *available at* http://carlicahn.com/aig-ceo-letter/.

[69] AIG Strategic Presentation at 11.

[70] AIG Strategy Conference Call at approximately 1:13. Peter Hancock, CEO, AIG, in response to a question from analyst Josh Stirling of Sanford C. Bernstein & Co. about why the company does not "want to take advantage of the window that is open—or seems to be open—to pursue a plan to de-SIFI," responded that:

> . . . . We absolutely do not hold more capital because of the Fed. . . . [T]he Fed has not been a binding constraint to date, and nor do we anticipate it being a binding constraint over the next two years. If two years down the road, SIFI regulations become extremely onerous . . . [w]e think we're exceptionally well-prepared already. We took actions long ago, back in 2011, to delever the company, eliminate the derivative exposures, get rid of the short-term funding risk that still plagues the balance sheets of the other SIFIs. . . . We had to deal upfront with these issues in order to unlock the Fed backstop at the end of 2010. So we

because it has spent the years since the crisis under close supervision by the Federal Reserve.[71] Nevertheless, AIG's decision to live with its SIFI label is likely to be controversial.[72]

B. GE Capital

On the same day FSOC designated AIG, it also designated GECC.[73] Applying the first determination standard, FSOC pointed to the exposure other companies have to GECC through the commercial paper markets, the potential for large bank holding companies with portfolios similar to GECC to be harmed by GECC asset sales, and the potential damage a pullback by GECC could inflict on credit markets—particularly aviation finance and middle-market commercial lending and leasing.[74]

GE Capital approached its designation with a sense of resignation:

> On July 8, 2013, as expected, the U.S. Financial Stability Oversight Council designated GECC as a nonbank systemically important financial institution (nonbank SIFI) under the Dodd Frank Act (DFA). While rulemakings for supervision of nonbank SIFIs are not final and therefore the exact impact and implementation date remain uncertain. [*sic*] However, GECC has been planning for nonbank SIFI designation and the enhanced prudential standards that will apply to nonbank SIFIs since the passage of the DFA.[75]

After less than two years as a SIFI, however, GECC announced a plan to "create a simpler, more valuable company by reducing the size of its financial businesses through the sale of most GE Capital assets."[76] According to company officials, the new regulatory environment played a

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> managed to get a jump on the whole process of shaping up our balance sheet for sustainability in this new regulatory environment. And let's not forget, you exit SIFI, you've still got the European regulators that require a global, enterprise-wide regulator if you want to operate in the EU. We have all of the states, and so we have a multi-dimensional and highly regulated industry, and we care about all the regulators. And right now the Fed is a complete red herring. So I think that using the SIFI issue as a driver of strategic decisions, when we have all of these other important strategic factors, it's maybe issue number fifteen on a list, a long list, of important things we need to add value to our shareholders. . . .

[71] *See, e.g.* Federal Reserve Bank of New York, Press Release: Sarah Dahlgren to Head New York Fed Bank Supervision; Roseann Stichnoth to Replace Dahlgren as Head of Special Investments Management Group (July 23, 2010), *available at* https://www.newyorkfed.org/newsevents/news/aboutthefed/2010/oa100723 (describing the Federal Reserve Bank of New York's "AIG monitoring team," which "reviews AIG's financial condition, monitors the use of cash and exercises the New York Fed's contractual consent rights over decisions that may impact the company's ability to repay its loan [and], in coordination with the Treasury, works with AIG management in ongoing efforts to implement the company's business and repayment strategy").

[72] *See, e.g.*, Tom DiChristopher, Investors Like AIG's Alternative to AIG Plan: CEO, CNBC.com (Feb. 3, 2016), *available at* http://www.cnbc.com/2016/02/03/investors-like-aigs-alternative-to-icahn-plan-ceo.html (reporting that AIG's CEO has heard positive feedback to the plan from shareholders, but that "Icahn called AIG's alternative proposal inadequate and said he is moving forward with plans to assemble a number of directors he would like to place on its board").

[73] Financial Stability Oversight Council, Basis of the Financial Stability Oversight Council's Final Determination Regarding General Electric Capital Corporation, Inc. (July 8, 2013), *available at* https://www.treasury.gov/initiatives/fsoc/designations/Documents/Basis%20of%20Final%20Determination%20Regarding%20General%20Electric%20Capital%20Corporation,%20Inc.pdf [**hereinafter Public GECC Basis**].

[74] Public GECC Basis at 6-9.

[75] Vikas Anand, Deputy Treasurer, Investor Relations, General Electric, Fixed Income Investor Relations Update for the Second Quarter of 2013 (July 23, 2013), *available at* https://www.ge.com/sites/default/files/ge_fi_update_2q13.pdf.

[76] General Electric, Press Release, GE to Create Simpler, More Valuable Industrial Company By Selling Most GE Capital Assets; Potential to Return More than $90 Billion to Investors through 2018 in Dividends, Buybacks &

role—albeit not the only role—in the decision to sell large pieces of GECC.[77] However, the decision came after the Federal Reserve publicly proposed its tailored regulatory plan for GECC, which included capital, liquidity, stress testing, risk management, and reporting requirements, and corporate governance changes.[78] The Federal Reserve noted in making those proposals that GECC's "activities and risk profile are similar to those of large bank holding companies, and that enhanced prudential standards similar to those that apply to large bank holding companies would be appropriate."[79] GECC responded with concern to the proposed regulatory plan and the process by which the Federal Reserve drew up the plan.[80] The Federal Reserve made some modifications to the proposed plan, but the final plan included "standards applicable to the largest bank holding companies."[81]

The company recently announced its substantial progress in executing its divestiture plan and its consequent intention to seek to have GECC de-designated by FSOC.[82] GECC's request for a reprieve from some of the proposed SIFI-related regulatory requirements gives us a glimpse of the arguments the company will use when it petitions for de-designation. The company informed the Federal Reserve that GE Capital "has embarked on a transformation that will reduce its overall size and systemic interconnectedness to levels well below those as of December 31, 2012 that formed the basis of [FSOC's] designation" and "will be smaller and less interconnected, with a substantially reduced systemic footprint through either the exposure or asset liquidation

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Synchrony Exchange (Apr. 10, 2015), *available at* http://www.genewsroom.com/press-releases/ge-create-simpler-more-valuable-industrial-company-selling-most-ge-capital-assets.

[77] *See, e.g.*, Joann S. Lubin, Dana Mattioli, and Ted Mann, *GE Seeks Exit from Banking Business*, WALL STREET JOURNAL, *available at* http://www.wsj.com/articles/ge-prepared-to-exit-the-bulk-of-ge-capital-1428662109 (noting that "the bulk of the $500 billion behemoth would be sold or spun off over the next two years, as the company concluded the benefits aren't worth bearing the regulatory burdens and investor discontent"); Comments of Michael Silva, Chief Regulatory Officer and Compliance Leader, GE Capital, at Mercatus Center at George Mason University Financing the Future Conference, *video available at* https://www.youtube.com/watch?v=sx4Vj_8QMaU (starting at approximately 6:54) (noting that "regulatory costs and pressures" were a "factor" in the decision, but not the driving factor, but also pointing to GE Capital as a "cautionary tale" that regulatory burdens "depress returns on capital" and thus affect investors' decisions about capital allocation).

[78] Board of Governors of the Federal Reserve System, Proposed Order: Application of Enhanced Prudential Standards and Reporting Requirements to General Electric Capital Corporation, 79 Fed. Reg. 71768 (Dec. 3, 2014).

[79] 79 Fed. Reg. at 71770. *See also* 79 Fed. Reg. at 71769 (noting that the Board is "also proposing to apply certain additional enhanced prudential standards to GECC in light of certain unique aspects related to GECC's activities, risk profile, and structure, including additional independence requirements for GECC's board of directors, restrictions on intercompany transactions between GECC and General Electric Company (GE), and leverage capital requirements that are comparable to the standards that apply to the largest, most systemic banking organizations").

[80] *See* Letter from Keith S. Sherin, Chairman & CEO, GE Capital, to Robert deV. Frierson, Secretary, Board of Governors of the Federal Reserve System (Feb. 2, 2015).

[81] Board of Governors of the Federal Reserve System, Final Order: Application of Enhanced Prudential Standards and Reporting Requirements to General Electric Capital Corporation, 80 Fed. Reg. 44111 (July 24, 2015) (explaining that "the final order applies capital standards applicable to bank holding companies, liquidity standards applicable to the largest bank holding companies, and certain reporting requirements," but modifying the proposed independence requirements).

[82] General Electric, Press Release: GE Capital Passes $100 Billion Threshold of Transactions Closed; Signings to Date Total $149 Billion (Dec. 9, 2015) ([GE] announced today that it has completed more than $100 billion in previously announced portfolio and business unit sales as part of its strategy to significantly reduce the size of GE Capital and apply for de-designation as a systemically important financial institution (SIFI)").

transmission channels under which any material financial distress could be transmitted to other financial institutions and markets."[83]

GECC's attempt to obtain de-designation will provide insight into FSOC's willingness to remove a designation. The magnitude of the proposed changes will force FSOC to give serious consideration to the company's de-designation request. However, removing any designation would expose FSOC to future criticism if the now undesignated company were later to run into trouble.[84]

C. Prudential

On September 19, 2013, FSOC designated a second insurance company—Prudential Financial, Inc. [85] FSOC, in support of its determination that material financial distress at Prudential could pose a threat to U.S. financial stability, cited the aggregate exposures of derivatives counterparties, creditors, debt and equity investors, securities lending counterparties, repurchase agreement counterparties, and institutional retirement and insurance product counterparties.[86] FSOC also pointed to Prudential's off-balance sheet exposures and use of captive reinsurance.[87] Although Prudential is not highly dependent on short-term funding, FSOC deemed many of the company's long-term insurance and annuity liabilities to be more like short-term liabilities because of the ease with which policyholders can withdraw or surrender them.[88] Another FSOC concern was the potential for Prudential to respond to surrenders and withdrawals with asset sales, which could "cause significant disruptions to key markets" and "could cause significant reductions in the asset valuations and losses" for large insurance companies with similar portfolios.[89] Although acknowledging Prudential's ability to defer payouts to policyholders, FSOC concluded that using such a power could make matters worse by undermining confidence in Prudential and the industry as a whole.[90] FSOC likewise put little stock in Prudential's existing state and international regulatory regime, which it deemed inferior to the Federal Reserve's powers under Dodd-Frank over designated companies.[91]

Three FSOC members—two voting and one non-voting and two of the Council's three insurance experts—objected to the designation. Edward DeMarco, acting Director of the Federal Housing Finance Agency, pointed to FSOC's inadequate analysis of Prudential's leverage, its derivatives, its susceptibility to runs, and the likelihood that runs could spread to other insurance

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[83] Letter from Keith S. Sherin, Chairman and CEO, GE Capital, to Robert deV. Frierson, Secretary, Board of Governors of the Federal Reserve System, pp. 1 and 13 (May 4, 2015), available at http://www.federalreserve.gov/SECRS/2015/May/20150506/R-1503/R-1503_050415_129930_568761743161_1.pdf.

[84] *See, e.g.*, White Testimony (explaining that "perpetual designation also avoids giving any designated SIFI a clean bill of health, for which regulators would be held accountable in the event of subsequent financial distress").

[85] Financial Stability Oversight Council, Basis for the Financial Stability Oversight Council's Final Determination Regarding Prudential Financial, Inc. (Sept. 19, 2013), *available at* https://www.treasury.gov/initiatives/fsoc/designations/Documents/Prudential%20Financial%20Inc.pdf [**hereinafter Prudential Public Basis**].

[86] Prudential Public Basis at 8.

[87] Prudential Public Basis at 8.

[88] Prudential Public Basis at 8.

[89] Prudential Public Basis at 9.

[90] Prudential Public Basis at 10.

[91] Prudential Public Basis at 10-11.

companies.[92] He also expressed concern about the potential distortive effects of the designation on "market equilibrium and competition," particularly in light of the lack of clarity with respect to the nature of the regulation and because Prudential would be "operating under a materially different capital and regulatory regime than all other participants in the market."[93]

Roy Woodall, FSOC's independent member with insurance expertise, has been an outspoken critic of FSOC's approach to analyzing insurance companies. Summarizing his dissent from the Prudential designation, he stated that the "underlying analysis utilizes scenarios that are antithetical to a fundamental and seasoned understanding of the business of insurance, the insurance regulatory environment, and the state insurance company resolution and guaranty fund systems."[94] Among other things, Woodall pointed to the implausibility of FSOC's run scenarios,[95] the unwarranted discounting of the effectiveness of tools available to the company and regulators to stop runs,[96] and the absence of evidence that Prudential's material financial distress would translate into broader "*significant* economic damage."[97] Non-voting state insurance commissioner representative John Huff—pointing to FSOC's underestimation of the power of state insurance regulation, overestimation of the likelihood of policyholder runs, and inadequate analysis—echoed Woodall's concerns.[98]

Prudential resisted its designation in a way that AIG and GECC had not. Prudential requested and received an oral hearing with FSOC to argue against the proposed designation.[99] After failing to persuade FSOC during the hearing, Prudential considered suing, but ultimately chose

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[92] Edward J. DeMarco, View of the Acting Director of the Federal Housing Finance Agency, at 1-2 (Sept. 19, 2013), *available at* https://www.treasury.gov/initiatives/fsoc/council-meetings/Documents/September%2019%202013%20Notational%20Vote.pdf [**hereinafter DeMarco Prudential View**].
[93] DeMarco Prudential View at 2.
[94] Roy Woodall, View of the Council's Independent Member Having Insurance Expertise, at 1 (Sept. 18, 2013), *available at* https://www.treasury.gov/initiatives/fsoc/council-meetings/Documents/September%2019%202013%20Notational%20Vote.pdf [**hereinafter Woodall Prudential View**].
[95] Woodall Prudential View at 3-4 (explaining that FSOC's analysis "is dependent upon its misplaced assumptions of the simultaneous failure of all of Prudential's insurance subsidiaries and a massive and unprecedented, lightning, bank-style run by a significant number of its cash value policyholders and separate account holders").
[96] Woodall Prudential View at 4-5.
[97] Woodall Prudential View at 5 (emphasis in original).
[98] View of Director John Huff, the State Insurance Commissioner Representative (Sept. 18, 2013), *available at* http://www.naic.org/documents/index_fsoc_130920_huff_dissent_prudential.pdf [**hereinafter Huff Prudential View**].
[99] *See, e.g.*, Arthur D. Postal, Prudential SIFI Challenge Hearing Held, LifeHealthPro (July 23, 2010), *available at* http://www.lifehealthpro.com/2013/07/23/prudential-sifi-challenge-hearing-held.

to work with the Federal Reserve on regulatory standards rather than challenging its designation in court.[100] The Federal Reserve has not disclosed the standards it plans to apply to Prudential.[101]

D. MetLife

FSOC designated MetLife, Inc. on December 18, 2014.[102] Of the designees to date, MetLife has mounted the most public and persistent resistance to designation. As Prudential had done, the company asked for and received an oral hearing in response to the preliminary determination.[103] MetLife went a step further than Prudential by appealing the final determination. In a parallel effort, MetLife announced a major proposed restructuring, which could serve as the basis for de-designation. MetLife's opposition to being a SIFI is not surprising in light of its earlier decision to cease being a bank holding company and thus exit Federal Reserve oversight.[104] MetLife characterized the designation fight as "probably the most important challenge to MetLife in its history."[105]

In concluding that material financial distress at MetLife could pose a threat to US financial stability, FSOC focused much of its attention on MetLife's non-insurance activities, such as its financial services and capital markets activities.[106] Looking at the exposure transmission channel, FSOC concluded that "[t]he direct and indirect exposures of MetLife's creditors, counterparties,

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[100] *See* Prudential Financial, Inc., Statement from Prudential Financial, Inc. Regarding Final Non-Bank SIFI Designation (Sept. 19, 2013), *available at* http://www.reuters.com/article/nj-prudential-financial-idUSnBw196467a+100+BSW20130919 ("Under the Dodd-Frank Wall Street Reform and Consumer Protection Act, Prudential has 30 days to consider its response to FSOC's determination. We are currently reviewing the rationale for the determination and our options."); Prudential Financial, Statement from Prudential Financial, Inc. Regarding Final Designation as a Non-Bank Systemically Important Financial Institution (Oct. 18, 2013), *available at* http://www.investor.prudential.com/phoenix.zhtml?c=129695&p=irol-newsArticle&ID=1866036 (pledging "not to seek to rescind" its SIFI designation and instead to "continue to work with the Board of Governors of the Federal Reserve System and other regulators to develop regulatory standards that take into account the differences between insurance companies and banks, particularly in the use of capital, and that benefit consumers and preserve competition within the insurance industry").

[101] *See, e.g.*, Prudential, Annual Report on Form 10-K for the Year Ended December 31, 2014, at 23 (Feb. 20, 2015) ("We cannot predict how the FRB will apply these prudential standards to us as a Designated Financial Company, or when the prudential standards ultimately adopted or ordered with respect to Prudential Financial will begin to be applied.").

[102] Financial Stability Oversight Council, Basis for the Financial Stability Oversight Council's Final Determination Regarding MetLife, Inc. (Dec. 18, 2014), *available at* https://www.treasury.gov/initiatives/fsoc/designations/Documents/MetLife%20Public%20Basis.pdf [**hereinafter Public MetLife Basis**].

[103] Transcript of Nonbank Financial Company Hearing Before the Financial Stability Oversight Council, at 22 (Nov. 3, 2014) (statement of Steven Kandarian, Chairman, President, and CEO, MetLife).

[104] *See, e.g.*, Erik Holm, *MetLife Exits Banking With Sale to GE*, WALL STREET JOURNAL (Jan. 15, 2013), *available at* http://www.wsj.com/articles/SB10001424127887323596204578241511522899992 ("MetLife had been eager to unload its banking business so it can shed its bank-holding company status—and Federal Reserve capital constraints that accompany it. The effort to sell the banking business gained urgency last March when the insurer failed the Fed's 'stress test,' forcing the insurer to backtrack on a plan to return capital to shareholders.").

[105] Transcript of Nonbank Financial Company Hearing Before the Financial Stability Oversight Council, at 60 (Nov. 3, 2014) (statement of Steven Kandarian, Chairman, President, and CEO, MetLife).

[106] Given FSOC's focus on activities, dissenting FSOC member Roy Woodall disagreed with FSOC's decision not to consider MetLife under the second determination standard, which centers on the potential threat posed by a company's activities rather than on the consequences of its material financial distress. Roy Woodall, Views of the Council's Independent Member Having Insurance Expertise, at 1 (Dec. 18, 2014), *available at* https://www.treasury.gov/initiatives/fsoc/designations/Documents/Dissenting%20and%20Minority%20Views.pdf [**hereinafter Woodall MetLife View**].

investors, policyholders and other market participants to MetLife are significant enough that MetLife's material financial distress could materially impair these entities or the financial markets in which they participate, and thereby could pose a threat to U.S. financial stability."[107] FSOC pointed, for example, to exposures other market participants have to MetLife through its variable insurance, annuity, and investment products; its outstanding debt and derivatives; and its securities lending program.[108] FSOC also cited the asset liquidation transmission channel, because, for example, investors might not roll over MetLife's funding agreements and funding agreement-backed securities, securities lending counterparties might demand the return of their cash, and retail customers might surrender their policies.[109] Given the competitive nature of the insurance markets, FSOC gave less weight to the third transmission channel—the consequences of a potential disruption of MetLife's provision of critical functions and services.[110] FSOC looked at, but dismissed, mitigating factors, such as MetLife's use of derivatives to hedge its risk,[111] its contractual right to defer payment of cash in response to policyholders' surrenders,[112] regulators' authority to stay policyholder withdrawals,[113] its state regulatory oversight,[114] and its resolvability through the system of state guaranty associations.[115] Without clearly explaining how this factor affected the analysis, FSOC also cited MetLife's use of a number of broad-based government programs established during the crisis to bolster financial stability.[116]

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[107] Public MetLife Basis at 17 (footnote omitted).
[108] Public MetLife Basis at 17-20.
[109] Public MetLife Basis at 21-2.
[110] Public MetLife Basis at 25-6.
[111] Public MetLife Basis at 9 ("Efforts to hedge such risks through derivatives and other financial activities are imperfect and further increase MetLife's complexity and interconnectedness with other financial market participants.").
[112] Public MetLife Basis at 23 (observing that MetLife might be disinclined to exercise its contractual delay provisions "because of the negative signal regarding the company's financial strength that could be sent to counterparties, policyholders, and investors as a result of these actions").
[113] Public MetLife Basis at 23 ("Surrenders and policy loan rates could increase if MetLife's policyholders feared that stays were likely to be imposed either by MetLife's insurance company subsidiaries or by their state insurance regulators.").
[114] *See, e.g.*, Public MetLife Basis at 27 ("While one or more of the state regulators' authorities may be effective in mitigating the risks arising from an insurance company, these authorities have never been tested by the material financial distress of an insurance company of the size, scope, and complexity of MetLife's insurance subsidiaries."). *See also* View of Adam Hamm, the State Insurance Commissioner Representative, at 7 (Dec. 18, 2014), *available at* https://www.treasury.gov/initiatives/fsoc/designations/Documents/Dissenting%20and%20Minority%20Views.pdf [**hereinafter Hamm MetLife View**] (objecting that FSOC's view of "the operation of the state regulatory system" was plagued by "basic factual errors," only some of which were corrected and that "it is unclear whether the Council ever fully considered the nature and scope of the state insurance regulatory system"); Brief of the National Association of Insurance Commissioners as Amici Curiae in Support of Plaintiff, MetLife, Inc., MetLife, Inc. v. Financial Stability Oversight Council , at 3 (No. 15-cv-45) (June 26, 2015) ("[I]t appears FSOC largely ignored or dismissed the state regulatory system and the views of state regulators and its own insurance expert in favor of speculation, assumptions about consumer and regulatory responses to distress that have no basis in fact or history, and a flawed analysis of the insurance business and its regulation.").
[115] Public MetLife Basis at 30 ("There is no global regulatory framework for the resolution of cross-border financial organizations, and applicable U.S. resolution regimes, including the separate state [guaranty associations], have never been tested by the resolution of an insurance organization of the size, scope and complexity of MetLife."); .
[116] Public MetLife Basis at 13-14. MetLife was eligible to participate in the Federal Reserve's Term Auction Facility and the FDIC's Temporary Liquidity Guarantee Program. Participants clearly benefited from participation, but the government invited participation and touted the stabilizing force of both programs. *See, e.g.*, Federal Reserve, Press Release (Dec. 12, 2007), *available at* http://www.federalreserve.gov/monetarypolicy/20071212a.htm ("By allowing the Federal Reserve to inject term funds through a broader range of counterparties and against a broader range of

As is typical in public FSOC justifications, material financial distress at MetLife is assumed without specificity about what it would entail. Also assumed is the likelihood that most material financial distress scenarios at MetLife would threaten financial stability.[117] FSOC's independent insurance expert, Roy Woodall, who was privy to the entire record of FSOC's deliberations, objected to FSOC's reliance on "implausible, contrived scenarios."[118] State insurance commissioner Adam Hamm pointed out that FSOC did not attempt to quantify the harmful effects it predicted would result from MetLife's material financial distress.[119] FSOC was unmoved by MetLife's own analysis that showed "that even a hypothetical run on MetLife, which [MetLife does not believe] is even possible, would have little impact upon the asset markets and the asset prices."[120]

MetLife, citing flaws in the process pursuant to which FSOC designated MetLife and flaws in FSOC's structure, sued for a rescission of the designation.[121] As a potentially determinative matter, MetLife contends that it is not eligible for designation because its non-U.S. insurance activities do not count as financial activities and therefore MetLife is not a U.S. nonbank financial company under Dodd-Frank.[122] MetLife also argues that FSOC acted prematurely by, for example, making designations before the Federal Reserve has promulgated the regulatory standards to which designated companies will be subject; absent an idea of the nature of these rules, FSOC cannot determine what the effects of a designation will be.[123] MetLife's next faults FSOC for failing to consider alternatives to designation, such as working with MetLife's existing regulators or taking an activities-based approach.[124] MetLife also takes issue with FSOC's practice of simply assuming—rather than assessing the likelihood of—material financial distress at MetLife.[125] MetLife also objects to FSOC's focus on factors it deems important, such as size and interconnectedness, rather than the statutory factors.[126] MetLife next challenges FSOC's

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collateral than open market operations, this facility could help promote the efficient dissemination of liquidity when the unsecured interbank markets are under stress."); FDIC, Press Release: The FDIC Extends the Debt Guarantee Component of Its Temporary Liquidity Guarantee Program (Mar. 17, 2009), *available at* https://www.fdic.gov/news/news/press/2009/pr09041.html ("The TLGP, which the FDIC created in October 2008, is part of a coordinated effort by the FDIC, the U.S. Department of the Treasury, and the Federal Reserve to remedy unprecedented disruptions in credit markets and the resultant inability of financial institutions to fund themselves and make loans to creditworthy borrowers."). *See also* Redacted Memorandum of Points and Authorities in Support of Plaintiff MetLife, Inc.'s Cross-Motion of Summary Judgment and in Opposition to Defendant's motion to Dismiss or, in the Alternative, for Summary Judgment, MetLife, Inc. v. Financial Stability Oversight Council, at 31 n. 12 (15-cv-45) (June 16, 2015) (arguing that MetLife participated in the TLGP "not out of need but because the federal government was offering funding at attractive interest rates and encouraged MetLife's participation") (citation omitted).

[117] FSOC maintains that "[t]here may be scenarios in which material financial distress at MetLife would not pose a threat to U.S. financial stability, but there is a range of possible alternatives in which it could do so." Public MetLife Basis at 5.

[118] Woodall MetLife View at 2.

[119] Hamm MetLife View at 10.

[120] Transcript of Nonbank Financial Company Hearing Before the Financial Stability Oversight Council, at 22 (Nov. 3, 2014) (statement of Steven Kandarian, Chairman, President, and CEO, MetLife).

[121] Complaint, MetLife, Inc. v. Financial Stability Oversight Council (Jan. 13, 2015) (No. 15-cv-00045) [**hereinafter MetLife Complaint**].

[122] MetLife Complaint at 40-41.

[123] MetLife Complaint at 41-42.

[124] MetLife Complaint at 43-47.

[125] MetLife Complaint at 47-8.

[126] MetLife Complaint at 49-51.

reliance—often contrary to evidence—"on assumptions that are unsubstantiated, far-fetched, and unmoored from the evidentiary record" in assessing how MetLife, regulators, and other market participants would respond to material financial distress at MetLife.[127] MetLife's alleges that FSOC illegally failed to take into account the adverse economic consequences of its designation.[128] Finally, MetLife contends that FSOC deprived MetLife of its due process rights by denying it access to the record and that FSOC unconstitutionally combines legislative, executive, and adjudicative functions in a single agency and in the same individuals within that agency.[129]

A successful judicial challenge would be extremely valuable to the company.[130] It would free MetLife from the regulatory costs and managerial diversion associated with being a SIFI. Moreover, the company's creditors, customers, and other counterparties likely would continue to believe that the company had the implicit backing of the government. Regardless of whether courts agree, if markets know that financial regulators collectively believe that a company is systemically important, they will assume those same regulators would not let the company fail.

Dodd-Frank and general judicial deference to agencies are obstacles to MetLife's challenge. Dodd-Frank's broad menu of considerations, including a directive that FSOC consider "any other risk-related factors that the Council considers appropriate,"[131] gives FSOC substantial leeway to designate companies for a wide variety of reasons. Dodd-Frank limits the court's review to "whether the final determination . . . was arbitrary and capricious."[132] This narrow review standard seems designed to limit the constitutional and statutory issues a court can consider.[133] Moreover, the standard of review focuses courts on the final determination, rather than the process for making it. In general, in reviewing agency actions, courts show great deference to agencies' reasonable statutory interpretations.[134] Here, where the statute is so open-ended, courts will find little in the statutory text to constrain FSOC's designations. FSOC argues that MetLife "cannot show that the Council's final determination was 'so implausible that it could not be ascribed to a difference in view.'"[135] Moreover, FSOC contends, particular deference is warranted because "the agency's decision involves highly technical analysis of complex financial information within its expertise, as well as predictive judgments about

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[127] MetLife Complaint at 51-71.
[128] MetLife Complaint at 71-2.
[129] MetLife Complaint at 73-6.
[130] On the other hand, a challenge is not without cost. Better Markets is seeking to allow the public access to the record in the case, which could be costly to MetLife. Memorandum of Points and Authorities in Support of Motion to Intervene and Contingent Application for an Order to Show Cause Why the Record Should Not Be Unsealed, Submitted by Better Markets, Inc., MetLife Inc. v. Financial Stability Oversight Council, at 32-3 (Nov. 19, 2015) (No. 15-cv-45) (contending that presumptive public access to records is a cost a company must bear if it chooses to go to court).
[131] Dodd-Frank § 113(a)(2)(K) [12 U.S.C. § 5323(a)(2)(K)].
[132] Dodd-Frank § 113(h) [12 U.S.C. § 5323(h)].
[133] See, e.g., C. Boyden Gray, The Nondelegation Canon's Neglected History and Underestimated Legacy, 22 Geo. Mason L. Rev. 619, n. 152 (2015) (discussing narrow review standard in Dodd-Frank § 113(h)
[134] *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n. 11 (1984) (case citations omitted) ("The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.").
[135] FSOC Brief at 23 (citing State Farm, 463 U.S. at 43).

financial markets."[136] This argument is weakened by the fact that two of FSOC's three insurance experts objected to the designation largely because FSOC exhibited an apparent lack of expertise in insurance.[137] A court might also be troubled that FSOC's justifications for designating MetLife and the other nonbank SIFIs do not contain any apparent limits; according to FSOC's reasoning, most other large financial companies would seem equally designation-worthy.

MetLife has not restricted itself to the courtroom to combat its systemic designation. In early 2016, the company announced a plan to exit much of its retail business by creating a new company that it plans to spin off or sell as a whole or through a public offering.[138] The announcement unequivocally linked the decision to MetLife's SIFI designation:

> We have concluded that an independent new company would be able to compete more effectively and generate stronger returns for shareholders. Currently, U.S. Retail is part of a Systemically Important Financial Institution (SIFI) and risks higher capital requirements that could put it at a significant competitive disadvantage. Even though we are appealing our SIFI designation in court and do not believe any part of MetLife is systemic, this risk of increased capital requirements contributed to our decision to pursue the separation of the business. An independent company would benefit from greater focus, more flexibility in products and operations, and a reduced capital and compliance burden.[139]

Fitch Ratings, in commenting on this proposed major business decision, noted that "the threat of higher regulatory capital requirements could lead to further restructuring initiatives by U.S. life insurers, as well as non-U.S. insurers designated as a global systemically important insurer (G-SII)."[140] The next section considers whether companies contemplating such reorganizations can learn anything from FSOC's designations to date.

V. Reading the SIFI Designation Tea Leaves

Now that FSOC has designated a number of nonbank SIFIs, what it means to be systemically important ought to be clearer than it is in the open-ended text of Dodd-Frank. Firms seeking to

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[136] FSOC Brief at 19 (citations omitted). *See also* Brief of Professors of Law and Finance as Amici Curiae Supporting Defendant, MetLife, Inc. v. Financial Stability Oversight Council , at 11 (No. 15-cv-45) (May 22, 2015). (arguing that "[f]ew agency decisions are more technical, or involve more complex economic judgments, than the FSOC's [designation] task").

[137] It is telling that, in citing an example of FSOC's insurance expertise, the brief points to "the Federal Reserve [which] is responsible for the consolidated supervision of financial holding companies with insurance affiliates," rather than to the independent insurance expert and state insurance commissioner representative, who voted against the MetLife designation. FSOC Brief at 12, n. 7.

[138] METLIFE, PRESS RELEASE: METLIFE ANNOUNCES PLAN TO PURSUE SEPARATION OF U.S. RETAIL BUSINESS (Jan. 12, 2016), *available at* https://www.metlife.com/about/press-room/index.html?compID=192215. The press release explained that the new company would absorb "[a]pproximately 60% of current U.S. variable annuity account values, . . . 75% of variable annuities with living benefit guarantees, [and] approximately 85% of the U.S. universal life with secondary guarantee business." In addition, a retail subsidiary that would not be included in the new company would stop offering new retail life and annuity products. *Id*.

[139] METLIFE, PRESS RELEASE: METLIFE ANNOUNCES PLAN TO PURSUE SEPARATION OF U.S. RETAIL BUSINESS (Jan. 12, 2016) (statement of Steven A. Kandarian, MetLife Chairman, President, and CEO).

[140] FITCH RATINGS, METLIFE MOVE HAS IMPLICATIONS FOR GLOBAL INSURERS (Jan. 13, 2016), *available at* https://www.fitchratings.com/site/fitch-home/pressrelease?id=997834. *See also* Catherine Chiglinsky and Ian Katz, *MetLife Plan Could Add Pressure on AIG to Split*, INSURANCE JOURNAL (Jan. 13, 2016), *available at* http://www.insurancejournal.com/news/national/2016/01/13/395018.htm (discussing implications of MetLife's announcement for AIG and Prudential).

avoid the systemic label should have a better sense of how to do so. Markets should be better able to predict which company might be designated next. Despite FSOC's designation track record, nonbank financial companies, other market participants, regulators, and the public still struggle to understand what features distinguish SIFIs from other large financial companies. A closer look at FSOC's reasoning suggests that the confusion is warranted. It also shows the futility and potential danger of the designation exercise.

In theory, a designation under Dodd-Frank is a way to ensure that the regulatory framework matches the risk-taking by a particular company. FSOC puts it this way:

> By requiring supervision before it is too late, Dodd-Frank promotes disciplined risk-taking; if a designated company seeks to benefit financially from its risks, the company must safeguard against the possibility that its risks could destabilize the U.S. economy in the event of the company's distress or failure. Congress thus sought to reduce the chance that the American taxpayer will be forced to bear the costs of a company's risk-taking.[141]

Yet, FSOC seems not to base its designations on the company's risk-taking, but on the company's size and external factors beyond the company's control.

With a few adjustments, FSOC's bases for designating GECC, AIG, MetLife, and Prudential would fit almost any other large financial company. The publicly released bases[142] include little company-specific information.[143] Instead, they are replete with generalities about the designee's size,[144] aggregate exposures to the company, and interactions with other large participants in the financial system. For example, FSOC concluded that GECC's material financial distress could threaten U.S. financial stability "[b]ecause GECC is a significant participant in the global economy and financial markets and is interconnected to financial intermediaries through its financing activities and its funding model, as well as other factors."[145] FSOC pointed to

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[141] Redacted Memorandum in Support of Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment, MetLife, Inc. v. Financial Stability Oversight Council, at 2 (No. 15-cv-45) (May 7, 2015) **[hereinafter FSOC Brief]**.

[142] This essay relies on the public bases, because that is the document FSOC uses to signal the factors it uses to identify SIFIs. *See* FSOC Supplemental Procedures at 4 (pledging to "to set forth sufficient information in its public bases to provide the public with an understanding of the Council's analysis while protecting sensitive, confidential information submitted by the company to the Council."). There is also a longer nonpublic basis. This basis does not appear to be available on Treasury's FSOC webpage, but FSOC made a redacted version of the nonpublic basis available to its amici in the MetLife challenge. *See, e.g.*, Amicus Brief of Better Markets, Inc., in Support of Defendant Financial Stability Oversight Council, at 14 (no. 15-cv-45) (May 22, 2015) ("This brief cites the previously non-public basis for FSOC's final determination regarding MetLife, which was provided to Better Markets by FSOC on May 13, 2015, with redactions that had been made by MetLife.").

[143] *See, e.g.*, Jacob Wimberly, *Note: SIFI Designation of Insurance Companies—How Game Theory Illustrates the FSOC's Faulty Conception of Systemic Risk*, 34 REV. BANKING & FIN. L. 337, 348 (2014). ("If one took out the names of the companies from these opinions, it is unlikely that even a sophisticated financial analyst could discern which decision belonged to which company.").

[144] See, e.g., Peter J. Wallison, *The Authority of the FSOC and the FSB to Designate SIFIs: Implications for the Regulation of Insurers in the United States after the Prudential Decision*, at 11 (Networks Financial Institute Policy Brief 2014-PB-02 2014) ("Assuming that what FSOC did in the Prudential matter was a real analysis—not just a perfunctory effort—Prudential apparently is to be regulated stringently by the Fed because it is large.") [**hereinafter Wallison (2014)**]. *See also* William M. Butler, *Note & Comment: Falling on Deaf Ears: The FSOC's Evidentiary Hearing Provides Little Opportunity to Challenge a Nonbank SIFI Designation*, 18 N.C. BANKING INST. 663, 685 (2014) ("The FSOC's designation focuses so sharply on size, in part, because the analytical framework applies the size of the company to nearly every statutory consideration.").

[145] Public GECC Basis at 1-2.

MetLife's important counterparties and many customers,[146] a feature it shares with most large companies.

If individual exposures are small, FSOC aggregates exposures.[147] Former FSOC member Edward DeMarco objected to FSOC's concern about the many small exposures to Prudential and noted that "the alternate view is that this exposure is small on an individual institution basis and broadly spread through the financial system, thus limiting the potential for systemic risk."[148] Roy Woodall predicted that the logical extension of FSOC's aggregating approach "would inevitably lead to a conclusion that any nonbank financial company above a certain size is a threat—contradicting pronouncements that 'size alone' is not the test for determination."[149] FSOC also looks through companies directly exposed to the designee to find indirect exposures.[150] FSOC considers *perceived* exposures along with actual exposures.[151] These exercises of looking at aggregate, indirect, and perceived exposures would draw in most large companies.

FSOC dismisses the contention that its designation criteria are broad enough to allow for the designation of any large company. Because fewer than fifty nonbank financial companies made it through FSOC's stage one filter and only four were designated, FSOC assures "[t]here is therefore no basis for MetLife's worry that the Council will (or could) designate for supervision

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[146] *See, e.g.*, Public MetLife Basis at 16 (observing that "[l]arge financial intermediaries have significant exposures to MetLife arising from the company's institutional products and capital markets activities" and noting that MetLife's "material financial distress could also expose certain of MetLife's approximately 100 million worldwide policyholders and contract holders to losses") (footnote omitted); Public MetLife Basis at 19 ("MetLife's derivatives counterparties, creditors, debt holders, and securities lending and repurchase agreement counterparties include other large financial intermediaries that are interconnected with one another and the rest of the financial sector.") Public MetLife Basis at 18 ("a large number of major financial institutions and corporations are significantly interconnected with and exposed to MetLife" and might be unable "to provide financial services" if MetLife were to become distressed, which could "result in a contraction in the supply of financial services that could negatively affect financial market functioning"); Public MetLife Basis at 21 ("In the event of MetLife's material financial distress, large and leveraged counterparties with direct or indirect exposures to MetLife could engage in behavior that results in a contraction in financial activity by those counterparties as well as others.").

[147] *See, e.g.,* Huff Prudential View at 2 ("In attempting to address the fact that individual exposures would not have a systemic impact, the Basis aggregates exposures and argues that together such exposures could pose a threat to the financial system of the United States. In so doing, the Basis merely demonstrates that Prudential is a large insurance company, yet it has been a long accepted principle of this process that size alone is not a sufficient basis for designation.").

[148] DeMarco Prudential View at 1. *See also* Hamm MetLife View at 12 (explaining that this "leav[es] large companies unable to determine the Council's specific concerns with their investment behavior given the illogic that both spreading and concentrating investments can be the basis for designation"); Woodall Prudential View at 2 ("Although aggregate exposures are large, individual losses may be able to be absorbed by counterparties or policyholders without materially impairing financial condition, financial services or economic activity.").

[149] Woodall Prudential View at 2.

[150] Public MetLife Basis at 17, n. 64 ("For example, a firm may be impaired through indirect exposures if its counterparties are unable to satisfy their obligations due to losses from direct exposures to MetLife.").

[151] MetLife Public Basis at 21 ("MetLife's material financial distress could indirectly affect other firms due to market uncertainty about their exposures to MetLife and the potential impact of such exposures on the financial health of those firms, their counterparties, or the financial markets in which they participate. This type of uncertainty can lead market participants to pull back from a range of firms and markets, in order to reduce exposures, thereby increasing the potential for destabilization."). *See also* Public GECC Basis at 7 (speculating that material financial distress at GECC could cause "investors [to] assume that other large financial institutions have exposure to GECC," which could "lead investors and counterparties to reduce their exposure to those institutions generally" and cause credit to be costly and scarce).

'every large financial institution.'"[152] FSOC could change its stage one thresholds and pick up the pace at which it designates companies, so neither of these facts materially alleviates concerns about the possible future expansion of the nonbank SIFI pool. Peter Wallison of the American Enterprise Institute predicts that "many more insurers—like bank holding companies—may be swept into the SIFI category simply" because of their size.[153] By contrast, Professor Robert Hockett argues that "large financial institutions that do not impose bank-like risks upon the broader financial system [do] not need to worry about SIFI designation."[154] FSOC, however, finds bank-like risks in traditional insurance activities.[155]

The imprecision of FSOC's reasoning impedes firms' efforts to trim their risks sufficiently to avoid becoming SIFIs or to achieve de-designation. The Government Accountability Office suggested that "[w]hile FSOC's determination evaluations may benefit from flexibility in applying criteria to different companies, the judgment and discretion involved in the process underscore the importance of disclosing how the criteria were applied and the basis for a determination decision."[156] FSOC promises that "[a]s a general matter, if the Council determines in an annual review that a company has addressed the key factors in the Council's basis for its designation, the Council would rescind the designation,"[157] but often the key factors underlying the designation are not clear. As MetLife's CEO explained to FSOC:

> If the concern is truly systemic risk, that we want to protect taxpayers by ending bailouts, then we would like to know what it is we are doing that makes us systemic. Perhaps we can stop doing it. We have had no communication to us as to what it is that people think makes MetLife systemic.[158]

The absence of such guidance is particularly problematic because the Federal Reserve has not followed the statutory prescription to provide safe harbors from designation by "setting forth criteria for exempting certain types or classes of [nonbank financial companies] from supervision by the Board of Governors."[159]

Companies' primary regulators also could benefit from greater clarity. State insurance commissioner Adam Hamm, in his objection to the MetLife designation, remarked that "[a]bsent

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[152] FSOC Brief at 35 (citing MetLife Complaint at ¶ 96).
[153] Wallison (2014) at 12.
[154] Oversight of the Financial Stability Oversight Council; Due Process and Transparency in Non-Bank SIFI Designations, Hearing before the Subcommittee on Oversight and Investigations of the Financial Services Committee of the House of Representatives, at 13 (Nov. 19, 2015) (written statement of Robert Hockett), *available at* http://financialservices.house.gov/UploadedFiles/HHRG-114-BA09-WState-RHockett-20151119.pdf.
[155] *See, e.g.*, Public MetLife Basis at 22-23 ("Upon requests for early withdrawal or surrender of some portion of these products, an insurer may find it necessary to liquidate securities in its investment portfolio to generate the cash required to meet those requests. Further, in lieu of surrenders, some policyholders may opt for partial surrenders or policy loans to reduce the impact of the contractual disincentives while still withdrawing available cash from their policies. The potential for withdrawals could increase in the event that MetLife experiences material financial distress, as concerns about the company's ability to meet future obligations could induce large numbers of policyholders and contract holders to use or accelerate contractual cash withdrawals or policy loans.").
[156] GAO Report 15-51 at 39.
[157] U.S. Treasury Department Office of Public Affairs, Financial Stability Oversight Council Meeting December 17, 2015, *available at* https://www.treasury.gov/initiatives/fsoc/council-meetings/Documents/December%2017,%202015.pdf.
[158] Transcript of Nonbank Financial Company Hearing Before the Financial Stability Oversight Council, at 59 (Nov. 3, 2014) (statement of Steven Kandarian, Chairman, President, and CEO, MetLife).
[159] Dodd-Frank § 170(a) [12 U.S.C. § 5370(a)].

a clear rationale from the Council and an 'exit ramp' from designation, neither the company nor its regulators can realistically determine how best to proceed in reducing the company's risk to the system and eliminating its 'Too Big to Fail' status."[160] Dissenting FSOC member Roy Woodall likewise urged FSOC to:

> be more transparent about which of MetLife's activities, together or separately, pose the greatest risk to U.S. financial stability in order to provide constructive guidance for the primary financial regulatory authorities, the Board of Governors, international supervisors, other insurance market participants and, of course, MetLife itself, to address any threats posed by the company.[161]

Part of the difficulty in identifying characteristics of a firm that qualify it for a SIFI designation stems from FSOC's consideration of factors external to the firm. For example, FSOC's analysis seems to rely in part on the material financial distress occurring against the backdrop of widespread financial system disruption, a factor outside of the potential designee's control.[162] In the exposure channel, FSOC considers other companies' exposure to the designated company, but the designee may not know—let alone be able to manage—the exposed firms' risks.[163] Because other companies' exposures are involved, the designee might not even legally be allowed to know why it is being designated.[164]

More generally, FSOC looks at factors that apply to the designee's industry or the economy as a whole. John Huff correctly worries "that broad industry or macroeconomic related issues, rather than firm-specific issues, could subject a company to designation."[165] One feature that invites designation is an industry-wide phenomenon in insurance—the absence of a permanent, federal consolidated regulator.[166] FSOC has questioned the ability of state insurance regulation to address systemic risk, in part because of states' purported inability to adequately oversee holding

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[160] Hamm MetLife View at 13.

[161] Woodall MetLife View at 2. *See also* Monica Lindeen, President-elect, National Association of Insurance Commissioners, NAIC Response to MetLife Designation by FSOC (Dec. 18, 2014), *available at* http://www.naic.org/newsroom_statement_141218_lindeen_fsoc_metlife.htm ("It is not clear to the regulators what specific activities triggered the designation, nor what steps must be taken by designated companies such as MetLife and Prudential to have the designation removed.").

[162] *See, e.g.*, Public MetLife Basis at 24 (speculating that suspensions by MetLife of insurance policy and annuity withdrawals and surrenders against the backdrop of "a weak macroeconomic environment" could spark increased surrenders industry-wide). *See also* Hamm MetLife View at 12 (observing that "the Council has created an impossible burden of proof for companies to meet as it effectively requires companies to prove that there are no circumstances under which the material financial distress of the company could pose a threat to the financial stability of the United States.").

[163] State insurance commissioner representative Hamm suggested that "[i]f Council members are concerned about their regulatory entities' exposures to MetLife, it is far more effective to limit those entities' exposures to MetLife than to designate MetLife." Hamm MetLife View at 9.

[164] In the MetLife case, for example, some state insurance regulators reportedly objected to granting MetLife access to portions of the designation record that dealt with companies other than MetLife. Plaintiff's Motion to Compel Disclosure of Withheld and Redacted Record Materials, MetLife v. Financial Stability Oversight Council (June 29, 2015), No. 15-cv-45 (citing declaration of Patrick Pinschmidt, Executive Director, Financial Stability Oversight Council).

[165] Huff Prudential View at 4.

[166] *See, e.g.*, FSOC Brief at 1 (noting that during the last crisis "[m]any of the nonbank financial companies were not subject to effective consolidated supervision, as no single regulator supervised he parent and all of its subsidiaries.").

companies and affiliates.[167] FSOC is also skeptical that state insurers and the state guaranty system could handle a major insurance company failure. Edward DeMarco objected that FSOC's concerns about the state guaranty system for insurance companies is not a legitimate basis for designating a particular company.[168] It is a general concern that applies to the whole industry. FSOC is not alone in questioning state regulation,[169] but in using these concerns as a basis for designation, FSOC appears to be second-guessing Congress. Dodd-Frank did not include an explicit system for federal insurance chartering, and the designation power should not be used as a substitute.[170] Moreover, Dodd-Frank directs FSOC to consider the existing regulatory framework of a company it is considering designating.[171]

Through its designation, FSOC also has in its sights savings-and-loan holding companies (SLHCs). Although SLHCs are subject to Federal Reserve supervision, they could lose that oversight by selling their savings-and-loan. Companies like GECC and AIG, for example, as SLHCs, were subject to Federal Reserve supervision before being designated. FSOC acknowledged that the Federal Reserve *could* apply the same Dodd-Frank standards in its capacity as a SLHC supervisor, but it would have to proactively do so and a company would always have the option to deregister as a SLHC.[172] Thus, FSOC prefers Dodd-Frank's SIFI framework. These concerns seem equally applicable to every SLHC.

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[167] Public MetLife Basis at 27 ("While one or more of the state regulators' authorities may be effective in mitigating the risks arising from an insurance company, these authorities have never been tested by the material financial distress of an insurance company of the size, scope, and complexity of MetLife's insurance subsidiaries. While the state insurance regulators have authority over MetLife's insurance subsidiaries domiciled in their respective states, state insurance regulators generally do not have direct authority to require a non-mutual holding company of a state-licensed insurer or any non-insurance company subsidiary to take or not take actions outside of the insurer for the purpose of safety and soundness of the insurer or for the avoidance of risks from activities that could result in adverse effects on U.S. financial stability. Also, state regulators do not have direct authority relative to MetLife's international insurance activities.").

[168] DeMarco Prudential View at 2.

[169] *See, e.g.*, Brief of Scholars of Insurance Regulation as Amici Curiae Supporting Defendant, MetLife, Inc. v. Financial Stability Oversight Council , at 1 (No. 15-cv-45) (May 22, 2015) ("In fact, many of the central features of U.S. state insurance regulation are inadequate in their capacity to prevent, anticipate, or respond to systemic risks. This problem is structural and cannot be remedied by state reforms."). *But see* Letter from Benjamin M. Lawsky, Superintendent of Financial Services, New York, to Jacob Lew, Secretary, Department of Treasury (July 30, 2014), *available at* http://www.dfs.ny.gov/about/letters/ltr140730_MetLife_FSOC.pdf (asking FSOC to take into account the financial-stability-enhancing role that state regulators—independently, in coordination with one another, and in coordination with international regulators—play); Huff Prudential View at 3 (pointing out FSOC's misunderstanding of the independently capitalized nature of insurance companies housed within a holding company structure and arguing that ring-fencing of insurance subsidiaries by state insurance regulators gives confidence to policyholders and enables regulators to work together to use assets to orderly resolve the firm).

[170] *See, e.g.*, 156 Cong. Rec. S5870, 5902 (statement of Senator Susan Collins) ("While I can envision circumstances when a company engaged in the business of insurance could be designated under section 113, I would not ordinarily expect insurance companies engaged in traditional insurance company activities to be designated by the council based on those activities alone."). Calls for federal chartering of insurance are not new in Washington, D.C. policy circles, so could have been included in Dodd-Frank. *See, e.g.*, Peter J. Wallison, ed.,OPTIONAL FEDERAL CHARTERING OF INSURANCE COMPANIES (AEI 2000).

[171] Dodd-Frank § 113(a)(2)(H) [12 U.S.C. § 5323(a)(2)(H)].

[172] *See, e.g.*, AIG Public Basis at 9 (noting that the standards in sections 165 and 166 of Dodd-Frank "do not apply to SLHCs unless the Board of Governors separately applies these requirements to SLHCs" and noting that "if AIG were to deregister as an SLHC . . . the Board of Governors would no longer act as its consolidated supervisor"). *See also* Public GE Capital Basis at 9.

One of the key critiques of FSOC's determinations is that they simply assume material financial distress at the company under consideration, rather than showing that such distress is likely to occur and how it will occur.[173] The statute does not explicitly require such a showing, and FSOC argues that this gives it "prophylactic authority to address risks of low-probability, but high-impact events."[174] However, if the likelihood of material financial distress is not part of FSOC's analysis, companies that take steps to protect themselves from material financial distress cannot avoid the SIFI label. This result is contrary to Dodd-Frank's goal of enhancing financial stability and its goal "to promote market discipline, by eliminating expectations on the part of shareholders, creditors, and counterparties of [large, interconnected bank holding companies or nonbank financial companies] that the Government will shield them from losses in the event of failure."[175]

The result is consistent with FSOC's use of SIFI designations as a way for regulators to manage risks in the financial system, rather than as a way to encourage financial firms to manage their own risks. This use of the SIFI designation reflects FSOC's macroprudential outlook.[176] Macroprudential regulators—based on considerations about how a particular firm's action might affect other market participants—can direct the firm to take steps that would not make sense for that particular firm or can rescue the firm to save its counterparties. In the designation context, therefore, FSOC might apply macroprudential logic to designate a firm—not because of something within the firm's own control—but because of other companies' risks or because designating a firm is an effective way to control risk somewhere else in the system.

FSOC's chairman has underscored the importance of the power to "designate large, complex firms that pose significant risks to the financial system [as] one of the most important tools we and future Councils should have to address threats to financial stability."[177] As that power is being implemented, it seems less about identifying firms that pose risks or singling out particular risks at the company and more about expanding federal regulatory control over large financial companies. Because FSOC cannot practically or immediately designate every large company, FSOC's designations run the risk of being haphazard and arbitrary. FSOC will simply pick some companies and pass over others, even though both sets would arguably fit the open-ended criteria

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[173] State insurance commissioner representative Hamm, for example, objected that "nowhere in the Basis does the Council a) delineate stressed run scenarios, including the impact of company and/or regulatory stay activities, b) identify asset liquidation scenarios and their impacts to specific and defined financial markets; and c) compare those impacts to normal and stressed ranges of variance in those specific and defined markets." Hamm MetLife View at 10. *See also* Hamm MetLife View at 7 ("Identifying the outer boundaries of exposures and claiming they could impact a nebulously defined market is not robust analysis; it simply means the Council has identified a very large company.").

[174] FSOC Brief at 33. *See also* Amicus Brief of Better Markets,, Inc., in Support of Defendant Financial Stability Oversight Council, at 12 (no. 15-cv-45) (May 22, 2015) ("Recognizing the inherent unpredictability of financial crises, Congress framed FSOC's designation authority in unmistakably discretionary terms that allow for designation based on possible, not only certain or likely, scenarios.").

[175] Dodd-Frank §112(a)(1) [12 U.S.C. § 5322(a)(1).

[176] *See, e.g.*, John Cochrane, "Macro-Prudential Policy," Blog, August 26, 2013, http://johnhcochrane.blogspot.com/2013/08/macro-prudential-policy.html ("This is not traditional regulation—stable, predictable rules that financial institutions live by to reduce the chance and severity of financial crises. It is active, discretionary micromanagement of the whole financial system. A firm's managers may follow all the rules but still be told how to conduct their business, whenever the Fed thinks the firm's customers are contributing to booms or busts the Fed disapproves of.").

[177] Letter from Jacob J. Lew, Secretary, Department of the Treasury, to Jeb Hensarling, Chairman, Committee on Financial Services of the U.S. House of Representatives, at 2 (Nov. 2, 2015).

FSOC is employing. Such an arbitrary approach makes it extremely difficult for companies to predict, plan for, and respond to designations. As the next section discusses, there are efforts underway to improve the designation process, but only more fundamental change will bring much-needed certainty and stability.

VI. Potential Changes: Marginal and Fundamental

SIFI designations and the process for assigning them have received substantial attention in American policy circles. FSOC has responded to concerns about its process and openness with some procedural and transparency enhancements,[178] but there is room for additional changes in these areas. More importantly, fundamental questions about the value of designations in strengthening financial stability persist.[179] Should a group of regulators with little direct accountability to Congress or the public be able to make decisions that can so fundamentally change the competitive and regulatory course of a company and an industry and the financial stability of the nation?[180] The door for procedural changes to the designation process is open, but more fundamental changes are necessary to address the concerns that have come to light through FSOC's designations.

One area of change is likely to relate to the interaction between US and international designations. The Financial Stability Board (FSB), of which the Federal Reserve, Treasury, and SEC, are members, designates global systemically important financial institutions. In signing onto designations of companies that have not yet been designated by FSOC, the FSB's American board members give the appearance of prejudging FSOC's systemic determination; if a regulator concludes a company is systemic to the world, it is likely also to find it is domestically systemic.[181] FSOC member Roy Woodall explained:

> It is clear to me that the consent and agreement by some of the Council's members at the FSB to identify MetLife a G-SIFI, along with their commitment to use their best efforts to regulate said companies accordingly, sent a strong signal early-on of a predisposition as to the status of MetLife in the U.S.—ahead of the Council's own decision by all of its members.[182]

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[178] FSOC Supplemental Procedures.

[179] *See, e.g.*, Written Testimony of Hal S. Scott, Oversight of the Financial Stability Oversight Council; Due Process and Transparency in Non-Bank SIFI Designations, Written Testimony before the Subcommittee on Oversight and Investigations of the Financial Services Committee of the House of Representatives (Nov. 19, 2015) ("Designating non-banks as systemically important and then subjecting these institutions to more stringent regulation simply does not reduce systemic risk.").

[180] FSOC lacks mechanisms typically employed by Congress to guide, restrain, and hold accountable regulators. For example, FSOC is funded through a levy on certain financial firms and sets its budget without congressional input. For an excellent overview of FSOC's design flaws and constitutional vulnerabilities, *see* White Testimony.

[181] In interviews with the Government Accountability Office, Treasury and Federal Reserve officials denied that FSB designations are determinative, although the Federal Reserve noted that an international designation would be a factor in considering whether a company should be designated domestically and Treasury officials noted that "an FSOC determination contradicting that of FSB might [result in] a negative peer evaluation of the United States by FSB." GAO Report 15-51 at 51-2.

[182] Woodall MetLife View at 4. *See also* Peter J. Wallison, *The Authority of the FSOC and the FSB to Designate SIFIs: Implications for the Regulation of Insurers in the United States after the Prudential Decision*, at 5 (Networks Financial Institute Policy Brief 2014-PB-02 2014) ("And this is how it can happen indefinitely; the FSB can make designations and the FSB will simply follow suit; the FSB's determination will be treated as sufficient evidence for the FSOC's purposes.").

Expressing congressional interest in the matter, Senate Banking Committee Chairman Richard Shelby asked regulators about the process by which international bodies make their designations and the role that U.S. regulators play in that process.[183]

Congress is also considering ways to facilitate de-designations. For example, a bill coming out of the Senate Committee on Banking, Housing, and Urban Affairs would prescribe a process for FSOC's annual designation reviews and would allow the designated company to challenge its designation annually.[184] A bill introduced in the House of Representatives would require annual evaluations of each designation by FSOC, allow designees to request a review in response to "a material change in the company's operations or activities or a material change in regulatory or market conditions," require FSOC to provide "a confidential written analysis of the specific elements of the company's exposures or activities that would be relevant to the Council's reevaluation" and to provide feedback about company's proposed plan for achieving de-designation, and require the FSOC to analyze the company's vulnerability to financial distress.[185] These legislative efforts seek to address the concern that FSOC is not telling companies why they are SIFIs or offering them a viable escape from SIFI status.

An effective de-designation process will not change companies' need to resist the initial designation because, once designated, a company is likely never to be the same. MetLife's CEO warned:

> FSOC should not assume that it can designate MetLife, see how it goes, come back to it two or three or four years later, and maybe we are not so systemic after all, and we can reverse things. The market won't allow us to operate that way, especially if the capital rules are really harsh. Activism investment alone will put tremendous pressure on the company to do a number of things, including restructuring the company."[186]

Not only is a SIFI designation costly in terms of added regulation and uncertainty about the form and stringency of that regulation, but it is likely to shift the focus of a company's managers as they respond to formal and informal regulatory direction in a wide range of matters.

Moreover, even as modified, neither the designation process nor the de-designation process would afford competitors, customers, and counterparties of the company under consideration or the general public a formal way to object to a designation. Only after FSOC has made its designation and if the designee sues for rescission is there a clear route for other interested parties to participate as amici, or "friends of the court." Even then, their ability to raise unintended consequences of a designation will be limited. As Professor Hal Scott points out, the nonpublic nature of the designation process also "unnecessarily limit[s] the opportunity to receive data and input from outside experts" not associated with the company in question.[187]

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[183] Letter from Richard C. Shelby to Jacob Lew, Janet Yellen, and Mary Jo White (Sept. 29, 2015), available at http://www.banking.senate.gov/public/index.cfm?FuseAction=Newsroom.PressReleases&ContentRecord_id=3e578bb0-5056-a063-c0e0-7e55d2bad9f1&Region_id=&Issue_id=.

[184] The Financial Regulatory Improvement Act of 2015, S. 1484 (2015).

[185] FSOC Designation Review Act, H.R. 4248, (2015).

[186] Transcript of Nonbank Financial Company Hearing Before the Financial Stability Oversight Council, at 59-60 (Nov. 3, 2014) (statement of Steven Kandarian, Chairman, President, and CEO, MetLife).

[187] Written Testimony of Hal S. Scott, Oversight of the Financial Stability Oversight Council; Due Process and Transparency in Non-Bank SIFI Designations, Written Testimony before the Subcommittee on Oversight and Investigations of the Financial Services Committee of the House of Representatives (Nov. 19, 2015).

The exclusion of third parties from the process is problematic because they may be harmed by the designation through resulting financial instability, cost increases, and competitive distortions.[188] Competing life insurance companies may want to argue against a designation that will make a competitor appear to have government backing. Customers of a potential designee may wish to intervene to raise concerns about increased costs, reduced access, or a change in ownership.[189] Taxpayers also may want to weigh in. Although proponents of designation argue that the public has an interest in protecting FSOC's ability to designate companies because the power is an integral tool in protecting taxpayers from bearing financial crisis costs,[190] another view is that labeling companies systemic lays the groundwork for more taxpayer bailouts during future crises. As additional companies are subjected to Federal Reserve supervision, crises may be more likely; a common supervisor may lead to increased homogenization across the financial system and thus greater susceptibility to common shocks.[191] As valid as the interests of these third parties are, it would be difficult to construct a SIFI designation process that afforded all interested parties an opportunity to raise concerns, yet also protected the confidential business information of the company under consideration.

In addition to the public interest in financial stability, there is a public interest in the integrity of the regulatory system. Uniform, predictable, consistently applied rules are hallmarks of such a system. A regulatory framework that is premised on handpicking companies for extra regulation and then crafting a regulatory framework for each selected company, by contrast, is fertile ground for arbitrary and inconsistent application of rules.

Although potential designees and other market participants may benefit from procedural refinements to the designation process, more fundamental change is needed. The overly broad discretion afforded FSOC by Dodd-Frank cannot be fixed with procedural changes. FSOC's designations have not been helpful to companies and regulators seeking to address risks to the financial system. Instead, they have been used as a way to secure for the Federal Reserve regulatory control over large financial companies. Removing FSOC's power to impose Federal Reserve regulation on companies will help to focus FSOC on the goal of mitigating and reducing systemic risk, rather than altering the regulatory structure of the financial system.

A better system would assist firms in identifying areas of risk within their control and encourage firms to manage them effectively. Thus, instead of identifying companies for Federal Reserve regulation and supervision, FSOC could be charged with identifying companies required to submit a resolution plan for FSOC review. The resolution planning process would be instructive to the companies seeking to improve risk management and to FSOC in its quest to better understand the financial system. Lowering the stakes of designation would make it easier for

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[188] FSOC's former state insurance commissioner representative John Huff suggested four potential consequences of designation that implicate the public interest: "1) the stability of the financial system, 2) policyholders that may be disadvantaged to the benefit of financial counterparties, 3) the cost and availability of insurance products, and 4) the competitiveness of the insurance sector." Huff Prudential View at 4.

[189] For example, as discussed above, MetLife plans to sell much of its retail business in response to its designation.

[190] Memorandum of Points and Authorities in Support of Motion to Intervene and Contingent Application for an Order to Show Cause Why the Record Should Not Be Unsealed, Submitted by Better Markets, Inc., MetLife Inc. v. Financial Stability Oversight Council, at 22-23 (Nov. 19, 2015) (No. 15-cv-45).

[191] For example, in designating MetLife, FSOC cited—among other things—the effect that a fire sale by MetLife could have on the values of the investment portfolios of other large insurance companies, many of which have similar portfolios. Public MetLife Basis at 25. If the Federal Reserve applies bank-like regulation to large insurance companies, asset portfolios at banks and insurance companies may start to look alike.

FSOC to establish and follow clear designation procedures without worrying about gaming by potential designees. Finally, a designation process with a more modest end goal would counter, rather than support, market expectations of government support.

VII. Conclusion

Dodd-Frank, in creating FSOC and entrusting it to identify systemically important companies for special regulation by the Federal Reserve, sought to enhance U.S. financial stability. Now that FSOC has made four nonbank designations and articulated its reasoning for doing so, it is time for a fresh assessment of the theory underlying SIFI designations—that identifying companies and placing them under special regulatory oversight enhances financial stability. As designations have unfolded, they have proved to be an ineffective and counterproductive financial stability tool. These initial designations lay the groundwork for arbitrary and inconsistent application of the designation power, which is particularly troubling because the consequences of designation are high for the designated companies, their competitors, their customers, and the broader economy. Companies look in vain to the designations for guidance as to what they can do to avoid being a threat to financial stability. Because FSOC's justifications are imprecise and broadly worded, they create uncertainty for the financial system.

Companies that are facing designation may be heartened by calls to modify the designation process. These procedural modifications are useful steps, but not a cure for a remarkably broad and ambitious statute. A more fundamental change would eliminate the SIFI label and its attendant Federal Reserve supervision and replace it with a one-time requirement that a designated company submit a resolution plan to FSOC. If FSOC's task were modified in this manner, regulators and market participants could shift their efforts from reading FSOC's tea leaves to upholding the stability of our financial system.

Addendum

As this chapter was making its way through the publication process, a district court rescinded MetLife's designation on the grounds that FSOC (i) departed from its own designation standards without explaining why and (ii) failed to take into account the costs that MetLife would incur as a result of the designation.[192] The former problem is easily addressed; FSOC can announce that it is changing the way it interprets the statute. The latter issue—FSOC's "refus[al] to consider cost as part of its calculus . . . a consideration that is essential to reasoned rulemaking"[193]—may be more difficult for FSOC to remedy. FSOC responded to the court's decision with defiant confidence in the designation and a promise to appeal.[194] Given the statute's breadth and the narrowness of the review standard, FSOC may ultimately prevail. In the meantime, the court's decision may spur other SIFIs to seek to shed their labels[195] and has intensified public attention on designations and the process for applying and removing them.

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[192] MetLife, Inc. v. Financial Stability Oversight Council, No. 15-00045 (D.D.C. Mar. 30, 2016).

[193] MetLife, Inc. v. Financial Stability Oversight Council, No. 15-00045, at pp.32-33 (D.D.C. Mar. 30, 2016) (citation omitted).

[194] Statement from Treasury Secretary Jacob J. Lew on MetLife v. Financial Stability Oversight Council (April 7, 2016), *available at* https://www.treasury.gov/press-center/press-releases/Pages/jl0410.aspx.

[195] It is too early to tell what, if any, effect the ruling will have on other SIFIs. Acting on its earlier announced intention to seek de-designation, GE Capital submitted its formal rescission request to FSOC the day after the court issued its MetLife decision. GE, GE Capital Files Request for Rescission of Status as a Systemically Important Financial Institution (Mar. 31, 2016), *available at* http://www.genewsroom.com/press-releases/ge-capital-files-request-rescission-status-systemically-important-financial. The MetLife decision could encourage AIG and

Prudential to follow suit. *See, e.g.*, Lauren Tara Lacapra, MetLife Ruling Bolsters Other Firms Arguing Systemic Unimportance, Reuters (Mar. 31, 2016), *available at* http://www.reuters.com/article/usa-banks-size-idUSL2N1730UZ.