[ORAL ARGUMENT SCHEDULED FOR OCTOBER 24, 2016]

No. 16-5086

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

METLIFE, INC.,

Plaintiff-Appellee,

v.

FINANCIAL STABILITY OVERSIGHT COUNCIL,

Defendant-Appellant.

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

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REPLY BRIEF FOR APPELLANT

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

CHANNING D. PHILLIPS
United States Attorney

BETH S. BRINKMANN
Deputy Assistant Attorney General

MARK B. STERN
DANIEL TENNY
NICOLAS Y. RILEY
Attorneys, Appellate Staff
Civil Division, Room 7215
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-1838

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GLOSSARY

AIG	American International Group
APA	Administrative Procedure Act
D.E.	Docket Entry
EPA	Environmental Protection Agency
SEC	Securities and Exchange Commission

SUMMARY OF ARGUMENT

The Nation's chief financial regulators collectively determined that material financial distress at MetLife could threaten the stability of the financial system, and that MetLife should therefore be subject to Federal Reserve Board supervision and enhanced prudential standards. Before issuing its 341-page determination, the Financial Stability Oversight Council provided MetLife with a proposed basis for designation and considered extensive oral and written submissions from the company.

The bulk of MetLife's brief argues that the Council acted arbitrarily and capriciously by departing from its interpretive guidance, failing to address material submitted by MetLife, and employing palpably false assumptions in its analysis. Even a cursory review of the record demonstrates that these claims are without basis.

The guidance identified three factors as relevant to assessing a company's vulnerability, and the Council examined those criteria closely in its MetLife determination. MetLife's response is to declare that the Council's "lengthy discussion" of the criteria is "entirely beside the point." MetLife Br. 27. But an agency does not act arbitrarily when it identifies criteria (taken directly from the statute) and then applies them. MetLife's contention that the Council should have used these factors to determine the likelihood that MetLife will experience material financial distress has no basis in the guidance or the statute.

As discussed below, the Council responded to all the relevant contentions and evidence submitted by MetLife, sometimes on the very pages the company cites in its brief. And the assumptions and methodologies that MetLife attributes to the Council bear no resemblance to its actual analysis. The Council did not, for example, "assum[e] the simultaneous failure of all of MetLife's insurance subsidiaries," MetLife Br. 32, in evaluating the impact of material financial distress at MetLife on the economy, and, instead, "assume[d] material financial distress at one or more of the company's significant subsidiaries as well as at the holding company." Final Determination 4 n.3 [JA 366 n.3].

In addition to its argument that the Council was arbitrary and capricious, MetLife asserts that the statute required the Council to consider whether the cost of regulation and Federal Reserve supervision would undermine the statute's purpose of reducing risk to the economy. The Council correctly concluded that designation is proper when a nonbank financial company meets the criteria established by the statute. Dodd-Frank does not invite the Council to second-guess the legislature's judgment and dispense with the regulatory protections that Congress believed crucial.

Finally, MetLife's due-process and separation-of-powers claims lack any doctrinal foundation.

ARGUMENT

I. The Council Properly Analyzed the Statutory Factors and the Categories Identified in the Interpretive Guidance as Relevant to a Company's Vulnerability to Material Financial Distress.

The Dodd-Frank Act provides for designation if "material financial distress at [a] U.S. nonbank financial company . . . could pose a threat to the financial stability of the United States," 12 U.S.C. § 5323(a)(1), and lists ten factors the Council must consider in its analysis. The Council's guidance grouped those factors into six categories and noted that three of these categories—those concerning leverage, liquidity risk and maturity mismatch, and existing regulatory scrutiny—seek to assess a company's vulnerability to material financial distress.

Although MetLife argues that the Council "refused to consider MetLife's vulnerability to material financial distress," MetLife Br. 24, it does not dispute that the Council considered the factors it identified as relevant to vulnerability; indeed, as demonstrated in our opening brief, the Council analyzed those factors in depth. *See* Gov't Br. 30-37, 39-50. MetLife instead insists that the Council's "lengthy discussion" of those factors is "entirely beside the point." MetLife Br. 27.

The fact that an agency has carefully considered the relevant factors under both its governing statute and its own guidance has never been thought irrelevant to whether agency action is arbitrary and capricious. MetLife seeks to deal with the paradox of its position by arguing that although the Council considered the relevant factors, it did not do so for the proper purpose. In MetLife's view, the Council was required to consider those factors in order to assess "the likelihood of a company's experiencing material financial distress." MetLife Br. 24.

MetLife identifies no basis for this purported mandate, which does not derive from the statutory directive that the Council determine whether the company's "material financial distress . . . could pose a threat to the financial stability of the

United States," 12 U.S.C. § 5323(a)(1), or from the list of statutory factors. The purported requirement is likewise at odds with the statute's directive that the Council assume a company's distress in conducting its analysis. *See id.* § 5322(a)(2)(H) (directing the Council to require Federal Reserve supervision "for nonbank companies that may pose risks to the financial stability of the United States *in the event of their material financial distress or failure*" (emphasis added)).

MetLife further errs in asserting that the Council's guidance "made an unambiguous commitment . . . to undertake a vulnerability assessment that examines the likelihood of a company's experiencing material financial distress." MetLife Br. 24. The guidance does not establish this new analytic requirement; instead, it simply "describes the manner in which the Council intends to apply the statutory standards and considerations." 12 C.F.R. pt. 1310, App. A, § I. At no point does the guidance suggest that the Council would assess the likelihood that a company would experience distress. It certainly does not do so by stating that three of the six guidance categories seek to assess vulnerability. Assessing vulnerability to distress is not equivalent to assessing likelihood of distress. An engineer may analyze a building's vulnerability to earthquakes by examining the building's foundation and its structural integrity. Such analysis would do nothing to predict the likelihood of an earthquake. Similarly, the Council analyzes companies' vulnerabilities "in the event of their material financial distress." 12 U.S.C. § 5322(a)(2)(H). The statute and guidance do not anticipate that the Council will undertake the very different task of predicting the likelihood that a company will experience such distress. In insisting that the Council fundamentally misunderstood its own guidance, MetLife ignores the established principle that a court "must defer to an agency's reading of its own regulations unless that reading is 'plainly erroneous or inconsistent with the regulation[s].'" *Global Crossing Telecomms., Inc. v. FCC*, 259 F.3d 740, 746 (D.C. Cir. 2001) (citations omitted).[1]

MetLife's argument also disregards the lessons of the 2008-2009 financial crisis, when the economy was shaken by the sudden and unexpected failure or near-failure of apparently healthy institutions. In mandating more effective regulatory safeguards, Congress did not direct the Council to predict the likelihood of a future crisis or the fortunes of individual companies in the indefinite future. It charged the Council, instead, with addressing the risks that a company's financial distress (should it occur) could pose to financial stability. Although MetLife declares that the Council "did not offer this reasoning in the Final Designation," MetLife Br. 31, the Council explained that "[h]istory has shown, as recently as 2008, that financial crises can be hard to predict and can have far-reaching and unanticipated consequences," and that MetLife's interpretation "would set an unduly high and falsely precise threshold" for

[1] Although MetLife repeatedly asserts that the Council informed the company's state insurance regulators that it would consider MetLife's vulnerability to distress, *see* MetLife Br. 11, 26, 27, 28, 60-61, the cited communication was sent by staff of the Council member who dissented from the MetLife designation; moreover, it merely repeats the language of the guidance. *See* Email from Diane Fraser, Office of the Independent Member, Financial Stability Oversight Council, to Kathy Belfi, with attached Fact Sheet (Mar. 19, 2014) [JA 206, 209].

designations. Final Determination 27, 29 [JA 389, 391]. The Council reasonably declined to create an atextual requirement directly at odds with the lessons learned from the financial crisis that spurred Congress to pass Dodd-Frank.

II. The Council Properly Determined That Material Financial Distress at MetLife Could Pose a Threat to U.S. Financial Stability.

A. MetLife Does Not Come to Grips with the Central Underpinnings of the Council's Analysis.

The Council exhaustively examined the risks that material financial distress at MetLife could pose to U.S. financial stability. MetLife accuses the Council of ignoring issues that the Council, in fact, analyzed in detail, and MetLife's scatter-shot arguments cast no doubt on the Council's analysis or conclusions.

Although MetLife describes itself as a "traditional" life insurance group, MetLife Br. 8, it engages extensively in complex financial transactions that boost its leverage, heighten its reliance on short-term funding, and increase the exposures of its counterparties. Final Determination 32-34 [JA 394-96]. MetLife's counterparties face significant risks if the company defaults on its obligations, including its $56 billion in outstanding debt, *id.* at 100-01 [JA 462-63]. In response to the company's distress, these counterparties could seek to reduce their exposures by refusing to renew short-term loans to MetLife, or by terminating existing arrangements and demanding the return of cash or other liquid assets. Gov't Br. 32-33. MetLife asks the Court to disregard these facts on the ground that they are "*post hoc* rationalizations." *See*

MetLife Br. 49 (citing Gov't Br. 32-33). But the Council extensively analyzed the nature and significance of all of these risks. *See* Final Determination 143-44, 148-50 [JA 505-06, 510-12].

Even MetLife's so-called "traditional" insurance business allows many of its 100 million policyholders to surrender their policies and demand cash from MetLife. MetLife does not dispute the Council's finding that "more than half of MetLife's $275 billion of liabilities in its general account can be surrendered by policyholders for cash, including $50 billion that can be withdrawn with little or no penalty." Gov't Br. 33 (citing Final Determination 143 [JA 505]).

The Council explained that MetLife's unusually high leverage and large holdings of illiquid assets could force the company to liquidate assets rapidly to satisfy its obligations in the event of withdrawals by counterparties or policyholders. *See, e.g.*, Final Determination 142, 198 [JA 504, 560]. These relatively illiquid assets include $108 billion of U.S. corporate securities and $70 billion of asset-backed and mortgage-backed securities. Public Statement of Basis 24 & n.97 [JA 727 & n.97]. Based on quantitative analyses, peer comparisons, and historical reviews, the Council concluded that a sale of MetLife's assets in a period of overall stress in the financial-services industry and a weak economic environment could threaten U.S. financial stability. Final Determination 187-92, 211-26, 329-40 [JA 549-54, 573-88, 691-702].

With the recent financial crisis firmly in mind, the Council also concluded that the negative effects resulting from the distress of MetLife, one of the largest U.S.

financial institutions, could lead market participants to pull back from a range of firms and markets. MetLife has over $900 billion in assets and 359 subsidiaries in 50 countries; there is no precedent for the resolution of an insurance organization even remotely close to this size, scope, and complexity. *See* Public Statement of Basis 7, 29 [JA 710, 732]. While regulation of MetLife's insurance subsidiaries by state insurance regulators may mitigate some risks, the Council explained at length that it leaves a variety of concerns unaddressed. *See, e.g.*, Final Determination 89-97 [JA 451-59].

MetLife responds primarily by mistakenly asserting that the Council ignored evidence that it in fact considered, and arguing that the Council relied on assumptions that in fact formed no part of its analysis. The Council fully addressed the evidence and arguments that MetLife claims were disregarded. *See infra* pt. II.C-D.

B. The Council's Analysis in No Respect Departed from the Interpretive Guidance.

MetLife argues that the Council departed from its guidance, contending, for example, that the Council's analysis assumed a level of financial distress different than that contemplated by the guidance. MetLife asserts that the Council should have presumed that MetLife would be in "'imminent danger of insolvency,'" but that the Council instead "assumed states of distress that were far more desperate." MetLife Br. 32 (quoting 12 C.F.R. pt. 1310, App. A, § II(b)). But the Council explicitly applied the "imminent danger of insolvency" standard. *See, e.g.,* Final Determination 9 [JA 371].

None of the three citations relied on by MetLife describes assumptions that formed part of the Council's analysis. First, MetLife quotes from the opinion of the lone dissenting voting member of the Council. *See* MetLife Br. 32. Apart from the dangers of relying on a dissent's characterization of the majority's decision, the dissent does not, in fact, discuss the "imminent danger of insolvency" standard. The dissent believed that the Council should have analyzed the threat posed by MetLife under the statute's second determination standard, which authorizes a designation if the Council determines that a company could pose a threat to U.S. financial stability, 12 U.S.C. § 5323(a)(1), "regardless of whether the company were experiencing material financial distress," Final Determination 299 [JA 661] (dissenting opinion of Roy Woodall). The dissenting member "share[d] concerns about some of MetLife's activities, particularly in the non-insurance and capital markets activities spheres." *Id.* In a paragraph quoted by MetLife, the dissent stated that "it is easier to simply presume a massive and total insolvency first, and then speculate about the resulting effects on activities, than it is to initially analyze and consider those activities." *Id.* at 300 [JA 662]. But the dissent did not discuss the "imminent danger of insolvency" standard, let alone purport to identify some departure from that standard.

Second, MetLife cites the Council's discussion of a "deep insolvency" scenario in which MetLife could face a massive liquidity shortfall. MetLife Br. 32 (citing Final Determination 92 [JA 454]). But the "deep insolvency" scenario was developed and submitted to the Council by MetLife itself: the Council's discussion simply describes

MetLife's submission. *See* Final Determination 92 [JA 454]. The Council did not use MetLife's scenarios as the basis for its analysis; to the contrary, the Council criticized MetLife's estimates. *Id.*

Third, MetLife asserts that the Council "assum[ed] the simultaneous failure of all of MetLife's insurance subsidiaries." MetLife Br. 32 (citing Final Determination 246 [JA 608]). Again, however, the cited passage does not describe the Council's own analysis. Instead, it refers to the submission of a state insurance regulator. *See* Final Determination 246 [JA 608]. The Council's analysis, in contrast, "assume[d] material financial distress at one or more of the company's significant subsidiaries as well as at the holding company." *Id.* at 4 n.3 [JA 366 n.3].

MetLife similarly errs in arguing (Br. 34) that the Council failed to analyze whether, in the event of material financial distress at a company, "there would be an impairment of financial intermediation or of financial market functioning that would be sufficiently severe to inflict significant damage on the broader economy," 12 C.F.R. pt. 1310, App. A, § II(a). The Council expressly applied that standard by evaluating, among other factors, the exposures of specific counterparties relative to their capital. *See, e.g.*, Final Determination 75-85 [JA 437-47]. It concluded that the "negative effects of MetLife's material financial distress could be transmitted to other financial firms and markets, and materially impair those entities, which could in turn cause an impairment of financial intermediation or financial market functioning that could be sufficiently severe to inflict significant damage on the broader economy." *Id.* at 85 [JA 447]; *see also, e.g., id.* at 148 [JA 510] (similar).[2]

C. The Council Carefully Examined the Potential Impact of MetLife's Material Financial Distress.

1. MetLife renews arguments, rejected by the Council, regarding the impact of its distress on its direct counterparties. The company claims "that actual counterparty losses would be largely offset by collateral," MetLife Br. 38, and asserts that individual "counterparties would not be materially impaired and the losses would not produce systemic effects," *id.* at 35. None of these arguments is availing.

As noted in our opening brief, the Council explained that its "analysis estimates the aggregate capital markets exposure to MetLife at $183 billion," whereas MetLife asserted that the relevant figure was $90 billion. Final Determination 82 [JA 444]. The Council also estimated that the capital markets exposures of the largest banks and insurance companies to MetLife at $52 billion, while MetLife contended that the relevant figure was $13 billion. *Id.* The Council explained that the differing estimates resulted from MetLife's view that the figures should, among other things, "be reduced to reflect securities collateral held by MetLife's counterparties to secure MetLife's

[2] Although MetLife describes the discussion of impairment in our opening brief as a *post hoc* rationalization, MetLife Br. 34, the discussion reflects the language and analysis employed by the Council throughout its decision. *See, e.g.*, Final Determination 4, 13, 86, 88, 110-11 [JA 366, 375, 448, 450, 472-73].

obligations," and "be reduced based on expected recovery rates in the event of MetLife's material financial distress." *Id.*; *see also id.* at 13 [JA 375].

The Council did not, as MetLife suggests, disregard the company's estimates of its counterparties' losses; it explicitly considered the differences between its own estimates and MetLife's. Final Determination 82-83, 132-135 [JA 444-45, 494-97]. The Council concluded that even the figures provided by MetLife are "substantial and could lead the company's material financial distress to pose a threat to U.S. financial stability." *Id.* at 82 [JA 444]. To put matters in perspective, a bank holding company is automatically subject to enhanced prudential standards under Dodd-Frank if it has $50 billion in *assets*. MetLife offers no reason to conclude that the Council abused its discretion in finding that an institution whose counterparties could lose $90 billion in the financial markets alone—as adjusted by MetLife to reflect collateral and estimated recovery rates—should be subject to the same oversight.[3]

MetLife's suggestion that the Council "simply tallied counterparties' 'exposure,'" MetLife Br. 34, disregards the Council's detailed analysis of the specific risks posed by each type of those exposures for particular counterparties in particular markets. *See, e.g.*, Final Determination 100-02 [JA 462-64] (MetLife's debt); *id.* at 115-

[3] These capital markets exposures are only one of the many types of exposures considered by the Council. *See, e.g.*, Final Determination 87-97 [JA 449-59] (analyzing liabilities for pension closeouts and exposures of state-based insurance guaranty associations).

19 [JA 477-81] (letters of credit); *id.* at 119-125 [JA 481-87] (derivatives). The Council examined, for example, MetLife's $30 billion securities-lending business, specifically analyzing the concentration of large banks as counterparties, MetLife's reinvestment of the cash collateral it receives, and the counterparties' rights to terminate the loans without MetLife's consent, as they did during the financial crisis. *See id.* at 126-30 [JA 488-92]. On the other hand, the Council recognized that certain exposures to MetLife were less likely to be a significant source of risk; for example, MetLife has $246 billion of liabilities to holders of the company's "separate account" products, *id.* at 179 [JA 541], but the Council's analysis of the exposures associated with these liabilities focused on cases where MetLife's insurers had guaranteed the obligations, *id.* at 86-87 [JA 448-49].[4]

2. MetLife's narrow focus on direct and predictable counterparty exposures (Br. 35-36) ignores critical lessons of the 2008-2009 financial crisis. AIG's direct counterparties, for example, might have been able to manage their direct losses because "some of the exposure was collateralized" and because exposure to AIG's

[4] MetLife also accuses the Council of "disregard[ing] new risk-reducing measures the SEC had adopted for money market mutual funds" before the designation. MetLife Br. 39-40 (citing Money Market Fund Reform (Final Rule), 79 Fed. Reg. 47,736, 47,747-79 (Aug. 14, 2014)). But the measures to which MetLife refers will not take effect until October 2016. *See* 79 Fed. Reg. at 47,932. The Council noted that the SEC had adopted these measures, stating "that it intends to monitor the effectiveness of the SEC's reforms in addressing risks to financial stability." Final Determination 79 n.397 [JA 441 n.397].

problematic portfolio "was relatively small and risk was spread across a number of firms." Hal S. Scott, *Interconnectedness and Contagion* 4 (2012) (cited at Final Determination 85 n.424 [JA 447 n.424]).[5] The problem with AIG was not that "its failure would have put AIG's counterparties at risk of insolvency," but, rather, that "a failure of AIG would have added to already significant market fragility," which was "more a product of market sentiment than actual direct losses." Scott, *Interconnectedness and Contagion*, at 4-5; *see also* Final Determination 85 [JA 447] ("Notably, the avoidance of contagion effects was an important concern before the intervention that helped to prevent the potentially disorderly failure of AIG in the fall of 2008."). The Council was on firm historical ground in noting that "the negative effects resulting from the material financial distress or failure of a large, interconnected financial firm such as MetLife are not limited to the amount of direct losses suffered by any one of the firm's counterparties, creditors, and customers," Final Determination 14 [JA 376], and that "MetLife's material financial distress could lead investors to withdraw from other insurers or other significant financial intermediaries, out of fear that those firms could

[5] http://capmktsreg.org/wp-content/uploads/2014/11/2012.11.20_ Interconnectedness_and_Contagion.pdf

also experience distress," *id.* at 85 & n.424 [JA 447 & n.424].[6] The Council reasonably considered the destabilizing impact of contagion in the event of MetLife's distress.[7]

3. MetLife similarly errs in attacking the Council's analysis of potential consequences of asset liquidation. The Council quantitatively analyzed the harm to financial markets that could be caused by MetLife's rapid liquidation of assets, which include hundreds of billions of dollars of government securities, corporate debt securities, mortgage-backed securities, equity securities, and real estate investments. *See* Final Determination 148-51, 184-92, 216-19, 329-40 [JA 510-13, 546-54, 578-81, 691-702]. Indeed, MetLife's own annual report, quoted in the Council's determination, acknowledged that "[i]f we . . . need significant amounts of cash on short notice and we are forced to sell securities, we may have difficulty selling such collateral that is invested in securities in a timely manner, be forced to sell securities in a volatile or illiquid market for less than we otherwise would have been able to realize under normal market conditions, or both." *Id.* at 158 [JA 520] (quoting MetLife Annual Report on Form 10-K for the year ended December 31, 2013, at 44). The Council reasonably agreed with MetLife's assessment in this regard.

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[6] The Council also considered a number of other academic papers regarding the potential for contagion. *See* Final Determination 136-39 & accompanying footnotes [JA 498-501].

[7] In addition to discussing similarities between AIG and MetLife, the Council also considered differences between the two companies. *See, e.g.*, Final Determination 158-59, 176 [JA 520-21, 538].

MetLife attacks a caricature of the Council's analysis when it asserts that the Council "assumed that MetLife would sell its assets in *random order*." MetLife Br. 49 (emphasis in original). The Council merely declined to accept MetLife's assumption that the company would sell its most liquid assets first. Final Determination 220-21 [JA 582-83]. That assumption cannot be reconciled with MetLife's own admission that "[i]n reality, MetLife would typically sell a mix of assets across a number of classes to comply with capital management guidelines and investment restrictions." *Id.* at 221 [JA 583] (quoting MetLife Voluntary Submission, Section IV, p. IV-20, District Court Joint Appendix 1004). As the Council noted, moreover, MetLife would have an incentive not to sell the most liquid assets first because doing so could, among other things, trigger intervention by state regulators. *Id.* at 220 [JA 582]. Further, "in the event of a significant market disruption, there could be a meaningful first-mover advantage to selling less-liquid assets first," because waiting until later to sell assets could diminish the return on those sales. *Id.*

The Council considered the two extremes of selling less liquid assets first (to maximize the first-mover advantage) and selling the most liquid assets first (as assumed by MetLife) and noted that there is a "range of potential orders in which MetLife could decide to sell its assets, based on various circumstances." Final Determination 221 [JA 583]. To model that range of possible orders of sales, the Council conducted a "Monte Carlo" simulation, performing 500 simulations using random orderings of asset sales in an effort to "determine average values for the spectrum by creating a large number of potential liquidation scenarios and then averaging the resultant price effects." *Id.* The simulation did not assume that MetLife would sell its assets in random order, but rather used a standard statistical technique to provide the best possible analysis in the face of significant uncertainty.[8]

D. The Council Fully Responded to MetLife's Contentions Regarding Policyholders' Behavior and Considered the Efficacy of Regulation by the States.

MetLife urges that the Council overestimated the potential impact of material financial distress on its insurance business and underestimated the efficacy of state insurance regulation. Although MetLife declares that the Council ignored its evidence and disregarded its arguments, the Council fully addressed the contentions that MetLife offers in its brief.

[8] MetLife also urges that the Council should have conducted stress tests like those used for bank holding companies. But stress tests are not intended, as MetLife urges, to determine if "a company's weaknesses . . . could have systemic effects." MetLife Br. 31. Rather, they evaluate whether a company has the capital necessary to absorb losses and continue operations throughout times of stress. Nor does passing the stress tests exempt bank holding companies from continuing Federal Reserve supervision. Moreover, although neither the statute nor the guidance compels the Council to conduct stress tests as part of its designation analysis, the Council did conduct some analyses akin to a stress test, including preparing a "life insurance liquidity stress test" that assesses the company's liquidity compared to its peers. Final Determination 166 [JA 528]; *see also id.* at 115 [JA 477] (examining MetLife's ability to access credit "during a period of overall stress in the financial services industry and in a weak macroeconomic environment").

1. *Policyholder Surrenders*

The error of MetLife's approach is epitomized by its treatment of the Council's conclusion that, in the event of MetLife's material financial distress, insurance policyholders could surrender their policies and demand cash. MetLife contends that the Council did not "offer any response to MetLife's showing that it would be irrational for the average policyholder to terminate early because doing so could trigger penalties and taxes, and because a terminating policyholder might not be able to obtain replacement coverage." MetLife Br. 45. But in an eight-page section of its analysis entitled "Disincentives to General Account Surrenders," the Council provided a point-by-point response to these arguments. Final Determination 167-75 [JA 529-37]; *see also id.* at 175-77 [JA 537-39] (analyzing historical evidence of policyholder surrenders).

The Council did not "assume[] that MetLife would not invoke its contractual deferral right to limit or postpone policyholder terminations in the event it experienced material financial distress." MetLife Br. 45. The Council considered the potential for MetLife to take the "significant and unprecedented action" of deferring payments to withdrawing policyholders, while also observing that MetLife "could have strong disincentives to invoke this option" because doing so "could exacerbate concern about MetLife's financial condition, potentially leading to a further increase in surrender activity for those contracts that have not been deferred." Final Determination 145, 165 [JA 507, 527]. The Council did not "flatly disregard[]"

MetLife's statements that it would nonetheless exercise the rights, MetLife Br. 45, but explained that if MetLife did choose to exercise its deferral rights, "there is still the potential for negative market impacts and contagion because of MetLife's actions." Final Determination 145 n.703 [JA 507 n.703].

2. *State Regulation*

MetLife does not dispute that state agencies regulate only MetLife's individual insurance subsidiaries, and not the parent company or the family of companies on a consolidated basis. MetLife instead argues that "Dodd-Frank does not identify the existence of consolidated supervision as a relevant consideration in evaluating a U.S. nonbank financial company for designation." MetLife Br. 49-50. But the statute expressly directs the Council to consider "*the degree to which* the company is already regulated by 1 or more primary financial regulatory agencies," 12 U.S.C. § 5323(a)(2)(H) (emphasis added)—not, as MetLife would have it, "*whether* a U.S. nonbank financial company is subject to regulation by '1 or more primary financial regulatory agencies,'" MetLife Br. 50 (quoting 12 U.S.C. § 5323(a)(2)(H)) (emphasis added). *See also* Final Determination 89-97, 112 [JA 451-59, 474] (considering benefits and limitations of state regulation of MetLife's insurance subsidiaries).

Although MetLife suggests that the Council overstated the risks created by the company's use of captive reinsurance, the company does not dispute that captive reinsurers allow MetLife to assume insurance risk while being permitted to hold lower-quality capital and lower reserves than MetLife's commercial insurance subsidiaries. The letter from a state insurance regulator on which MetLife relies, MetLife Br. 50, acknowledges that "reserves are lowered by captive reinsurance transactions." Letter from Karen Weldin Stewart, Del. Ins. Comm'r, to Jacob Lew, Sec'y, U.S. Dep't of Treasury 6 (Oct. 13, 2014) [JA 154].

MetLife asserts that state regulators would avert any crisis by issuing a stay of withdrawals by MetLife's insurance policyholders. MetLife Br. 46-47. But the Council explained that a stay imposed on such a major market participant as MetLife "could affect confidence in other life insurers that have similar product or balance sheet profiles and could prompt increased surrenders by retail and institutional policyholders at these other insurers," a phenomenon known as contagion. Final Determination 90-91, 138 [JA 452-53, 500].[9]

MetLife notes that it submitted a study purporting to demonstrate that contagion would not occur, and asserts that the Council "refused to address that evidence." MetLife Br. 47-48. But the Council extensively analyzed the flaws in the study, noting, among other things, that the combined assets of the three largest U.S.

[9] MetLife asserts that the Council's reasoning is inconsistent with a new SEC rule allowing limitations, known as "redemption gates," on withdrawals from money market funds in some circumstances. MetLife Br. 47. But the Council's conclusions about the effects of a stay on MetLife were based on analyses of the insurance industry, not the money market fund industry. *See* Final Determination 164-65, 214 [JA 526-27, 576]. Moreover, the SEC's final rulemaking "acknowledge[d] the possibility that, in market stress scenarios, shareholders might pre-emptively redeem shares if they fear the imminent imposition of fees or gates." 79 Fed. Reg. at 47,752.

insurers included in the study were less than ten percent of MetLife's assets, and that, unlike the firms discussed in the study, MetLife is "a truly national firm not focused on or centered in any one state or region," increasing the likelihood of a nationwide effect. Final Determination 140-41 [JA 502-03].

MetLife's assertion that the Council "ignored evidence regarding the funding capacity of the [state] Guaranty Associations and their success in resolving complex multi-state insurance companies," MetLife Br. 51, itself ignores the Council's four-page discussion entitled "Impact on [Guaranty Association] Capacity." Final Determination 93-97 [JA 455-59]. On the same page referenced in MetLife's brief, the Council quantified the assessment capacities of the state guaranty associations. *Id.* at 94 [JA 456]. The Council also noted that prior failures of insurance companies involved much smaller companies, *id.* at 94-96 [JA 456-58], and concluded that, even accounting for mitigating factors, insolvency at MetLife "could either exceed the [guaranty associations'] available capacity or constrain the [guaranty associations'] ability to respond to other insolvencies of other life insurance companies, particularly during a period of financial stress and in a weak macroeconomic environment," *id.* at 97 [JA 459].

III. The Council Was Not Required To Consider the Costs of Designation on MetLife.

Congress determined that a nonbank financial company should be supervised by the Federal Reserve and subject to enhanced prudential standards if the Council determines that the company's distress could pose a threat to the Nation's financial stability. The statute does not invite the Council to consider whether regulation and Federal Reserve supervision will be effective. Congress itself made that judgment.

The statutory factors that guide the Council's consideration underscore the statute's clear directive. The statute requires the Council to consider certain enumerated factors and "other risk-related factors" as the Council "deems appropriate." 12 U.S.C. § 5323(a)(2)(K). The Council may therefore, in its discretion, consider other risk-related factors similar to those specifically enumerated. None of the enumerated factors relates to the costs of the regulatory framework, and nothing in the statute suggests that the regulatory framework could itself be deemed a "risk-related factor." On the contrary, Congress directed that the regulations be crafted to reduce risks. *See* 12 U.S.C. § 5365(a)(1) (requiring the Federal Reserve to establish prudential standards "[i]n order to prevent or mitigate risks to the financial stability of the United States that could arise from the material financial distress or failure" of nonbank financial companies). Nothing in the statute suggests that the Council was required to second-guess Congress's determination regarding the importance of the Federal Reserve's supervision and prudential standards or to assume that the Federal Reserve will violate its statutory mandate by regulating MetLife in a way that actually increases risks to financial stability.

MetLife fundamentally misapprehends the statutory scheme when it declares that the Council was required "to evaluate whether designating the company would advance, or undermine, its statutory mandate." MetLife Br. 53; *see also id.* at 55 (arguing that the Council was required to determine whether the Federal Reserve's supervision and prudential standards would "weaken the company and make it more likely to transmit material financial distress to the rest of the economy"). The Council's statutory mandate is to designate a company when it determines that the standard under 12 U.S.C. § 5323(a)(1) is satisfied. *See also* 12 U.S.C. § 5322(a)(2)(H) ("The Council shall . . . require supervision by the Board of Governors for nonbank financial companies that may pose risks to the financial stability of the United States . . . .").

MetLife identifies no scenario, moreover, in which application of the regulatory framework will subvert the purpose of the statute. The company declares that designation could lead the company to "dismantl[e] itself," "withdraw[] from certain lines of business," or scale back its operations. *See* MetLife Br. 14, 20, 53. Even accepting MetLife's assertions at face value, such actions would not make material financial distress at MetLife more likely to threaten financial stability. Moreover, MetLife points to nothing in the Federal Reserve's proposed prudential standards that would require it to take such steps. *See* 81 Fed. Reg. 38,610 (June 14, 2016); 81 Fed. Reg. 38,631 (June 14, 2016). And, insofar as MetLife believes that aspects of the proposed regulations do not serve the statute's purpose, it was free to raise those concerns when the Federal Reserve solicited comments on its proposed rules.

MetLife makes no attempt to respond to the fundamental differences between the statutes at issue in this case and in *Michigan v. EPA*, 135 S. Ct. 2699 (2015). *See* Gov't Br. 52-54. In *Michigan*, the applicability of certain Clean Air Act provisions hinged on an EPA determination that regulation was "appropriate and necessary." 135 S. Ct. at 2704. In this case, the statutory standard is wholly different: designation hinges on the Council's conclusion that material distress at the nonbank financial company could pose a threat to the Nation's financial stability, and nothing in the statute requires the Council to determine that regulation and Federal Reserve supervision is "appropriate." Indeed, in further contrast to *Michigan,* Dodd-Frank lists the specific factors the Council must consider—none of which relates to cost—and authorizes the Council to consider additional risk-related factors in its discretion. MetLife provides no basis for sustaining the district court's reliance on that decision.

IV. The Council Was Not Required To Consider Alternatives to Designation.

Dodd-Frank provides for designation when the statutory criteria are met and does not contemplate that the Council will instead consider whether some other regulatory alternative might be preferable. The Council properly rejected MetLife's proposal to "adopt an 'activities-based approach' to regulating insurers" as a substitute for designation, MetLife Br. 57, explaining that "an industry-wide, activities-based analysis is not one of the statutory considerations" Congress directed it to examine. Final Determination 31 [JA 393].

Even assuming, *arguendo*, that the Council was obligated to consider and respond to MetLife's proposed alternative, the Council's explanation of its reasons for rejecting that proposal were sufficient. *See* Final Determination 31 [JA 393] ("[A]n industry-wide evaluation of activities is not necessary or appropriate in the case of MetLife, where a company-specific analysis . . . supports a determination that the company's material financial distress could pose a threat to U.S. financial stability"); *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 242 (D.C. Cir. 2008) (agency conducting rulemaking is "not required to do more" than offer "an explanation for rejecting the alternative").

The Council's ongoing review of asset-management products and activities is not designed to be an alternative to designation. Rather, it is meant to identify and provide a framework for assessing any risks that those products and activities may pose. And its decision to undertake such an analysis in no way precludes it from designating asset-management companies in the future.

V. The Council's Designation Comported with Due Process and Separation-of-Powers Principles.

MetLife's contention that the Council's procedures violated due process fails in every respect. MetLife identifies no deprivation of a cognizable liberty or property interest caused by the designation and cannot do so by assertions that designation could harm its reputation or market value. *See, e.g.*, *General Elec. Co. v. Jackson*, 610 F.3d 110, 119-24 (D.C. Cir. 2010) (no cognizable interest where company alleged that the government's action had "depresse[d] its stock price, harm[ed] its brand value, and increase[d] its cost of financing").

In any event, the Council's procedures easily satisfied due process. Even before MetLife's oral hearing before the Council, the Council's staff met with the company's representatives a dozen times, reviewed over 21,000 pages of materials submitted by the company, and provided the company with a 270-page proposed determination explaining in detail the facts and analysis on which the Council intended to rely. *See* Final Determination 3 [JA 365]; Proposed Determination 1-270 [JA 819-1088]. Although MetLife asserts that it never received "access to the record on which [the Council] based its designation inquiry," MetLife Br. 60, the Council's proposed determination was more than sufficient to apprise the company of the basis for the Council's decision. The final determination rests on the same evidence and reasoning as the proposed determination, and the only "new" analysis in the final decision was added to respond to specific arguments raised by MetLife in its hearing.[10]

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[10] For example, the Council included the Monte Carlo simulation in the final decision to respond to arguments MetLife raised regarding the Council's analysis of the company's potential asset liquidation, an issue MetLife had already addressed in written and oral submissions, both before and after the Council's proposed determination. *See* Final Determination 221-22 [JA 583-84]; *supra* pt. II.C.3 (discussing Monte Carlo simulation). MetLife was not entitled to another (post-hearing) opportunity to address the issue. *See Southwest Airlines Co. v. Transportation Sec. Admin.*, 650 F.3d 752, 757 (D.C. Cir. 2011).

The Council did not violate due process by declining to share with MetLife certain confidential information from other third parties, much of which is subject to Dodd-Frank's requirement that the Council "maintain the confidentiality of any data, information, and reports" it receives during the designation process. 12 U.S.C. § 5322(d)(5)(A).[11] Furthermore, while MetLife did not receive the confidential versions of other designation decisions, it had access to the public versions of those decisions and raised before the Council many of the same arguments it now cites in claiming it required access to confidential information. *See, e.g.*, Hearing Tr. 22-23 [JA 260-61] (arguing that "the record for MetLife is quite different than the record was for [previously designated companies] AIG and for Prudential" regarding counterparty exposures).

Nor do due-process or separation-of-powers principles prohibit, as MetLife contends, the "same agency staff and principals" who participated in the Council's evaluation of MetLife from also participating in the decision to designate the company. MetLife Br. 62. The Supreme Court recognized in *Withrow v. Larkin*, 421 U.S. 35 (1975), that "the combination of investigative and adjudicative functions does not, without more, constitute a due process violation." *Id.* at 58; *see also id.* at 56 (noting that it is "very typical for the members of administrative agencies to receive

[11] MetLife relied on this provision in opposing an amicus's request to unseal the administrative record—a request that the Council also opposed. *See* D.E. 95, at 14-15.

the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings," and that "[t]his mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law"). This Court has repeatedly relied on *Withrow* in rejecting due process challenges to similar combinations of functions, especially in the context of informal adjudications. *See, e.g., Southwest Airlines Co. v. Transportation Sec. Admin.*, 554 F.3d 1065, 1074 (D.C. Cir. 2009); *Chemical Waste Mgmt., Inc. v. EPA,* 873 F.2d 1477, 1484 (D.C. Cir. 1989); *see also City of Arlington v. FCC*, 133 S. Ct. 1863, 1873 n.4 (2013) (noting that agency activities that may "take 'legislative' and 'judicial forms'" still constitute "exercises of . . . the 'executive Power'").

CONCLUSION

For the foregoing reasons and those given in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

CHANNING D. PHILLIPS
United States Attorney

BETH S. BRINKMANN
Deputy Assistant Attorney General

MARK B. STERN

s/ Daniel Tenny
DANIEL TENNY
NICOLAS Y. RILEY
Attorneys, Appellate Staff
Civil Division, Room 7215
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530
(202) 514-1838
daniel.tenny@usdoj.gov

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a). This brief contains 6,859 words.

s/ Daniel Tenny
Daniel Tenny

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Daniel Tenny
Daniel Tenny